PROGRAM MATERIALS
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July 30, 2026

Trade Agreements Acts

- Wojciech Kornacki, Esq. - Watson and Associates LLC

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5301 North Federal Highway, Suite 150, Boca Raton, FL 33487
Phone 561-241-1919

Trade Agreements Acts

July 30, 2026

By Wojciech Z. Kornacki, Esq.

Lecturer

Not Legal Advice / For Educational Purposes Only

Agenda

How do I know if my products are TAA compliant?

How do I verify that I can sell my products to the US Government?

How to respond to enforcement actions based on the latest legal trends?

What are best TAA compliance policies to develop?

Sources

Trade Agreements Act, 19 U.S.C. § 2501

The Federal Acquisition Regulation, Subpart 25.4 / 52.225-5

Defense Federal Acquisition Regulation Supplement

GSA Trade Agreements Acts Guidance

Federal Caselaw

GAO Bid Protest Decisions

CBP E-Rulings

www.gsa.gov

The Federal Acquisition Regulation, Subpart 25.4

Buy American Act of 1933:

The Buy American Act requires Federal agencies to procure domestic materials and products. Two conditions must be present for the Buy American Act to apply:

(1) the procurement must be intended for public use within the United States; and

(2) the items to be procured or the materials from which they are manufactured must be present in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.

Trade Agreements Act waives the BAA for partner countries (not for China or India)

The Federal Acquisition Regulation, Subpart 25.4

Connecticut Company and Owner Settle Liability for False Claims Related to Violations of Buy American Act and Trade Agreements Act ($300,000)

LED Lighting Solutions also entered into eight contracts/delivery orders with the Air Force, Army, and FEMA, which required compliance with the BAA. The government contends that LED Lighting Solutions and DeSantos falsely certified that they were providing these procuring agencies with domestic end products when, in fact, some of the products were foreign end products.

In addition to making payment under the civil settlement agreement, LED Lighting also agreed to withdraw, with prejudice, two appeals pending before the Armed Services Board of Contract Appeals ("ASBCA") for termination of an Army contract for which LED Lighting Solutions supplied foreign end products in violation of the BAA and the False Claims Act.

The Federal Acquisition Regulation, Subpart 25.4

Multinational Industrial Engineering Company To Pay $22 Million To Settle False Claims Act Allegations Relating to Evaded Customs Duties

Linde GmbH and its U.S. subsidiary Linde Engineering North America LLC (LENA) (together, "Linde") have agreed to pay the United States more than $22.2 million to resolve allegations that Linde violated the False Claims Act by knowingly making false statements on customs declarations to avoid paying duties owed on the companies' imports, the Justice Department announced today.

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TAA Compliance Key Definitions

Country of Origin (under TAA) the test to determine country of origin is "substantial transformation" (i.e., transforming an article into a new and different article of commerce, with a name, character, or use distinct from the original article).

Sugar from Country A, flour from Country B, dairy products from Country C, and nuts from Country D are taken to Country E. In Country E, these products are further manufactured into cookies. (The separate ingredients were substantially transformed into a product of Country E, in that a new type of goods resulted from processing).

Fresh vegetables grown in various countries are taken to another country to be mixed together and frozen. (The vegetables were NOT substantially transformed into products of the country where mixing and freezing occurred, and the mixture must be labeled with the origin of each ingredient).

Repackaging, dilution with water, and similar minor processes usually do NOT cause a substantial transformation. Assembly or disassembly may result in a substantial transformation, depending on the nature of the products involved and the complexity of the operations.

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TAA Compliance Key Definitions

Designated Country: A World Trade Organization Government Procurement Agreement (WTO GPA) country (Armenia, Aruba, Australia, Austria,, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, New Zealand, North Macedonia, 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, or United Kingdom)…

TAA Compliance Key Definitions

Domestic offer means an offer of a domestic end product. When the solicitation specifies that award will be made on a group of line items, a domestic offer means an offer where the proposed price of the domestic end products exceeds 50 percent of the total proposed price of the group.

End product means those articles, materials, and supplies to be acquired for public use.

Foreign contractor means a contractor or subcontractor organized or existing under the laws of a country other than the United States.

Foreign end product means an end product other than a domestic end product.

TAA Compliance Key Definitions

Least developed country: Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Tanzania, Timor-Leste, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia.

Predominantly of iron or steel or a combination of both means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components excluding COTS fasteners.

TAA Compliance Key Definitions

Open Market also known as incidental items, noncontract items, non-Schedule items, and items not on [an FSS] contract. FAR 8.402(f)

(f) For administrative convenience, an ordering activity contracting officer may add items not on the Federal Supply Schedule (also referred to as open market items) to a Federal Supply Schedule blanket purchase agreement (BPA) or an individual task or delivery order only if-

(1) All applicable acquisition regulations pertaining to the purchase of the items not on the Federal Supply Schedule have been followed (e.g., publicizing (part 5), competition requirements (part 6), acquisition of commercial products or commercial services (part 12), contracting methods (parts 13, 14, and 15), and small business programs (part 19));

(2) The ordering activity contracting officer has determined the price for the items not on the Federal Supply Schedule is fair and reasonable;

(3) The items are clearly labeled on the order as items not on the Federal Supply Schedule and they conform to the rules for numbering line items at subpart 4.10; and

(4) All clauses applicable to items not on the Federal Supply Schedule are included in the order.

TAA Compliance Key Definitions

Rules Of Origin (ROO) are laws, regulations, and procedures used for ascertaining the country of origin of imported products.

ROO are important for assessing tariffs, enforcing U.S. trade laws, establishing eligibility for trade preference programs and free trade agreements (FTAs), and more.

ROO may be a policy tool to shape global supply chains, incentivize manufacturing in certain countries, and address issues such as tariff evasion.

The Federal Acquisition Regulation, Subpart 25.4

The TAA provides the authority for the President to waive the Buy American statute and other discriminatory provisions for 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.

Table 1 to Paragraph (b)

Trade Agreement	Supply Contract (equal to or exceeding)	Service Contract (equal to or exceeding)	Construction Contract (equal to or exceeding)
WTO GPA	$174,000	$174,000	$6,683,000
FTAs			
Australia FTA	105,767	105,767	6,683,000
Bahrain FTA	174,000	174,000	13,749,689
CAFTA-DR (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua)	105,767	105,767	6,683,000
Chile FTA	105,767	105,767	6,683,000
Colombia FTA	105,767	105,767	6,683,000

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The Federal Acquisition Regulation, Subpart 25.4

Purchase restriction. (1) Under the TAA(19 U.S.C. 2512), in acquisitions covered by the WTO GPA, 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. This purchase restriction does not apply below the WTO GPA threshold for supplies and services, even if the acquisition is covered by an FTA.
(2) This restriction does not apply to purchases of supplies by the Department of Defense from a country with which it has entered into a reciprocal agreement, as provided in departmental regulations.

The Federal Acquisition Regulation, Subpart 25.4

25.407 Agreement on Trade in Civil Aircraft.
Under the authority of Section 303 of the Trade Agreements Act, the U.S. Trade Representative has waived the Buy American statute for civil aircraft and related articles that meet the substantial transformation test of the Trade Agreements Act, from countries that are parties to the Agreement on Trade in Civil Aircraft. Those countries are Albania, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Macao China, Malta, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Taiwan (Chinese Taipei), and the United Kingdom.

The Federal Acquisition Regulation, Subpart 25.4

25.501 General. The contracting officer

(a) Must apply the evaluation procedures of this subpart to each line item of an offer unless either the offer or the solicitation specifies evaluation on a group basis (see 25.503);

(b) May rely on the offeror's certification of end product origin when evaluating a foreign offer;

(c) Must identify and reject offers of end products that are prohibited in accordance with subpart 25.7; and

(d) When trade agreements are involved, must not use the Buy American statute evaluation factors prescribed in this subpart to provide a preference for one foreign offer over another foreign offer.

How do I know if my products are TAA compliant?

100% domestically made

Domestic Substantial Transformation

United States ex rel. Folliard v. Comstor Corp., 308 F. Supp. 3d 56 (2018)

The relator's case was dismissed because, while the relator sufficiently alleged falsity as to end products sold by defendants through their GSA supply schedule contracts, he failed to show that any sales of non-Trade Agreements Act (TAA) compliant products by the defendants were material to the government's decision to pay; Relator also fell short in alleging existence of false claims as to TAA compliance with respect to configurable options or open market items.

How do I verify that I can sell my products to the US Government?

A country-of-origin advisory ruling or final determination may be requested by:

(a) A foreign manufacturer, producer, or exporter, or a United States importer of merchandise,

(b) A manufacturer, producer, or wholesaler in the United States of a like product,

(c) United States members of a labor organization or other association of workers whose members are employed in the manufacture, production, or wholesale in the United States of a like product, or

(d) A trade or business association a majority of whose members manufacture, produce, or wholesale a like product in the United States.

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(c) United States members of a labor organization or other association of workers whose members are employed in the manufacture, production, or wholesale in the United States of a like product, or

(d) A trade or business association a majority of whose members manufacture, produce, or wholesale a like product in the United States.

How do I verify that I can sell my products to the US Government?

In your letter dated January 22, 2026, on behalf of your client, Biom Innovations Inc., you requested a country of origin ruling on Disinfecting Wipes.

In your submission, the subject products are identified as P-60WIP-DSN-CIT, Disinfecting wipe roll, 60ct, Fresh Citrus and P-60WIP-DSN-ALP, Disinfecting wipe roll, 60ct, Alpine Mint. These wipes are intended as household disinfecting products for hard, non-porous surfaces, and consist of:

1. U.S.-origin, EPA-registered formulation disinfecting concentrate.
2. U.S.-origin fragrance.
3. A Chinese-origin nonwoven substrate
4. A pouch that serves as packaging.

You describe a scenario where disinfecting concentrate, which includes biodegradable detergents of U.S. origin and fragrance of U.S. origin will be shipped to a production facility in China. In China, the concentrate will be diluted with deionized water and mixed with the fragrance solution. This solution will be used to soak Chinese-origin nonwoven substrate sheets (wipes), which are cut to the required width and perforated (3.35" x 8.25"). The impregnated sheets will be inspected and packaged into retail pouches for export to the United States.

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How do I verify that I can sell my products to the US Government?

When determining the country of origin for purposes of applying current trade remedies under Section 301and additional duties, the substantial transformation analysis is applicable. See, e.g., Headquarters Ruling Letter H301619, dated November 6, 2018. The test for determining whether a substantial transformation will occur is whether an article emerges from a process with a new name, character, or use different from that possessed by the article prior to processing. See Texas Instruments Inc. v. United States, 681 F.2d 778 (C.C.P.A. 1982). This determination is based on the totality of the evidence. See National Hand Tool Corp. v. United States, 16 C.I.T. 308 (1992), aff'd, 989 F.2d 1201 (Fed. Cir. 1993).

How do I verify that I can sell my products to the US Government?

Regarding the country of origin of the Disinfecting Wipes, it is our view that the U.S. origin disinfecting concentrated solution imparts the finished Disinfecting Wipes' essential character. We do not believe that the diluting of the disinfecting concentrate, cutting and perforation of the nonwoven sheets, impregnation of the diluted disinfecting solution and fragrance, and packing processes in China result in a substantial transformation of the concentrated disinfecting solution of U.S. origin. Therefore, it is the opinion of this office that the country of origin for the finished Disinfecting Wipes is the United States.

The holding set forth above applies only to the specific factual situation and merchandise description as identified in the ruling request. This position is clearly set forth in Title 19, Code of Federal Regulations (CFR), Section 177.9(b)(1). This section states that a ruling letter is issued on the assumption that all of the information furnished in the ruling letter, whether directly, by reference, or by implication, is accurate and complete in every material respect. In the event that the facts are modified in any way, or if the goods do not conform to these facts at time of importation, you should bring this to the attention of U.S. Customs and Border Protection (CBP) and submit a request for a new ruling in accordance with 19 CFR 177.2. Additionally, we note that the material facts described in the foregoing ruling may be subject to periodic verification by CBP.

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Federal Courts and TAA

United States ex rel. Folliard v. Comstor Corp., 308 F. Supp. 3d 56 (2018)

The FAR imposes on vendors, such as the defendants, a general obligation to sell under the FSS contract "only U.S.-made or designated country end products," *id.* ¶ 72 (citing FAR 52.225-5(b)), and a continuing obligation to certify that each end product sold through a FSS contract is TAA compliant, *id.* ¶ 67 (citing FAR 52.225-6(a)

The defendants may also sell to the U.S. Government, without violating the TAA, "open market" items that are not included on the pricelists accompanying the FSS contracts, even when those items originate in non-designated countries

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Federal Courts and TAA

United States ex rel. Folliard v. Comstor Corp., 308 F. Supp. 3d 56 (2018)

The FCA provides for civil liability for anyone who:

(1) "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," 31 U.S.C. § 3729(a)(1)(A); or

(2) "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim," § 3729(a)(1)(B).

Federal Courts and TAA

United States ex rel. Folliard v. Comstor Corp., 308 F. Supp. 3d 56 (2018)

Consequently, the defendants' sale of open market items valued below the TAA-threshold from non-designated countries does not plausibly support the relator's alleged false claims.

"A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment" *Universal Health Servs. v. United States ex rel. Escobar*, 579 U.S. 176 (2016)

Federal Courts and TAA

United States ex rel. Folliard v. Comstor Corp., 308 F. Supp. 3d 56 (2018)

At the same time, however, the defendant was "receiving high marks" from GSA on its compliance operations.

Given these mixed signals, summary judgment was denied to both parties on the issue of scienter and "whether any reliance on supplier information was not just unreasonable but was 'gross negligence-plus.'"

Federal Courts and TAA

Klinge Corp. v. United States, 82 Fed. Cl. 127, 2008 (Fed. Cl. June 10, 2008)

U.S. Marine Corps was enjoined from accepting further performance by contractor that was awarded contract to deliver refrigeration systems because contractor had not complied with provision in request for proposals that each end product be U.S.-made, qualifying country, or designated country end product under Trade Agreements Act, 19 U.S.C. §§ 2501 et seq.; although contractor offered to have work that was going to be performed in China performed in U.S. so that it would be in compliance, court found that contractor's proposal was unfair to other companies that bid on contract, and appropriate remedy was to enjoin performance under contract.

Federal Courts and TAA

Acetris Health, LLC v. United States, 138 Fed. Cl. 579, 2018 U.S. Claims LEXIS 829 (Fed. Cl. July 10, 2018), aff'd in part, vacated, remanded, 949 F.3d 719, 2020 U.S. App. LEXIS 3892 (Fed. Cir. 2020).

In a preaward bid protest, a drug company was held to have standing to protest and was entitled to declaratory and injunctive relief because it established that it had a direct economic interest in the award of a contract flowing from the drug tablets solicitation and showed that the United States Veterans' Administration (VA) improperly construed and applied the solicitation's Trade Agreements Act, 19 U.S.C. § 2511(a), clause to preclude receipt of the tablets by the VA

The court agreed with the drug company that the VA directing offerors to affirmatively represent that their tablets were wholly manufactured or substantially transformed in the United States or a designated country in accordance with the Trade Agreements Act's rule of origin conflicted with the requirements and other provisions included in the solicitation.

Federal Courts and TAA

Securiforce Int'l Am., LLC v. United States, 125 Fed. Cl. 749, 2016 U.S. Claims LEXIS 214 (Fed. Cl. Mar. 21, 2016), aff'd in part, vacated in part, remanded, 879 F.3d 1354, 2018 U.S. App. LEXIS 1073 (Fed. Cir. 2018).

Although government argued that termination for convenience was proper because contracting officer (CO) acted without authority and in violation of Trade Agreements Act (TAA) when she awarded contract, record showed that agency could have pursued TAA waiver but chose not to do so; because CO abdicated her duty to exercise her own business judgment, termination was improper abuse of discretion.

Federal Courts and TAA

Securiforce Int'l Am., LLC v. United States, 125 Fed. Cl. 749, 2016 U.S. Claims LEXIS 214 (Fed. Cl. Mar. 21, 2016), aff'd in part, vacated in part, remanded, 879 F.3d 1354, 2018 U.S. App. LEXIS 1073 (Fed. Cir. 2018).

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GAO and TAA

Hudson Technologies Company, B-424395; B-424395.2; B-424395.3, July 7, 2026

Protest that the agency unreasonably relied on awardee's certification that it was offering domestic end products is denied where the record reflects the reasonableness of the agency's evaluation.

Generally, where a contracting officer has no information prior to award that would lead to the conclusion that the product to be furnished is not a domestic end product, the contracting officer may properly rely upon an offeror's self-certification without further investigation. However, if, prior to award, an agency has reason to believe that a firm will not provide domestic products, the agency should go beyond a firm's representation of compliance with the BAA. Unsupported allegations that a competitor's product is not in compliance with its BAA certification do not impose an obligation on the contracting officer to conduct a detailed investigation behind that certification.

GAO and TAA

HPI Federal, LLC, B-422583, August 9, 2024

1. Protest challenging agency's acceptance of representation of Trade Agreements Act (TAA) compliance for certain quoted items as unreasonable is sustained where the representation does not state that the end products to be delivered are U.S.-made, qualifying country, or designated country end products, but only states that the quoted items are assembled in a designated country.

2. Protest challenging agency's acceptance of representation of TAA compliance for another quoted item as unreasonable is denied where the quotation states the country of origin of the quoted item and the protester has not identified any information that reasonably should have caused the agency to believe that the firm will not provide compliant end products.

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GAO and TAA

Sea Box, Inc., B-409963.3, February 4, 2015

Protest that an agency's determination of noncompliance with the Trade Agreements Act was unreasonable is denied where the agency reasonably determined that the protester's foreign-sourced components would not be substantially transformed in the U.S. and thus the protester's item did not qualify as a U.S.-made end product.

Sea Box acknowledges that CBP is the agency responsible for making final determinations of country of origin and substantial transformation in response to written requests by non-government parties; there is no evidence in the record, however, showing that Sea Box requested a country of origin final determination from CBP.

The TAA Common Errors
How to respond to enforcement actions based on the latest legal trends?

Incorrectly Completed TAA Certificate

Purchase of Materials Without a TAA Certificate

Contractor Does Not Notify Suppliers That Products Must Be TAA Certified

No Records of TAA Compliance

Repackaging ‘Made In China’ Products and Putting ‘Made in U.S.’

High Risk Areas: IT Hardware, Medical Products, Software, Furniture

What are best TAA compliance policies to develop?

Carefully Scrutinize All Solicitations For TAA Issues

Ask Questions When Solicitations Are Not Clear

Address TAA Compliance In Your Proposal

Request an Advisory Opinion on TAA Country of Origin Compliance

Create a TAA Compliance Process

Obtain TAA Certifications and Indemnification

Maintain Records

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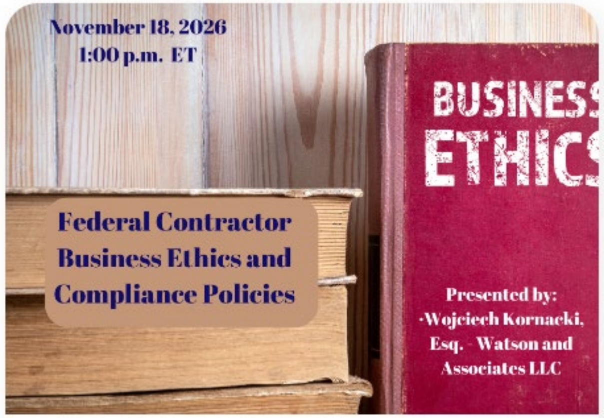
Additional Courses:

2026-08-27

2026-09-28

2026-10-29



2026-11-18

2026-12-10

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Thank you!

Wojciech Kornacki
Government Contract and Compliance Counsel,
Of Counsel
kornackiw@theodorewatson.com I 202.640-3023

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CRITICAL THINKING, CLEAR DIRECTION, DECISIVE RESULTS

Subpart 25.4 - Trade Agreements

25.400 Scope of subpart.

(a) This subpart provides policies and procedures applicable to acquisitions that are covered by-

(1) The World Trade Organization Government Procurement Agreement (WTO GPA), as approved by Congress in the Uruguay Round Agreements Act (Public Law 103-465);

(2) Free Trade Agreements (FTA), consisting of-

(i) USMCA (United States-Mexico-Canada Agreement, as approved by Congress in the United States-Mexico-Canada Agreement Implementation Act (Government Procurement Agreement applicable only to the United States and Mexico) (Pub. L. 116-113) (19 U.S.C. chapter 29 (sections 4501-4732));

(ii) Chile FTA (the United States-Chile Free Trade Agreement, as approved by Congress in the United States-Chile Free Trade Agreement Implementation Act of 1993 (Pub. L. 108-77) (19 U.S.C. 3805 note));

(iii) Singapore FTA (the United States-Singapore Free Trade Agreement, as approved by Congress in the United States-Singapore Free Trade Agreement Implementation Act (Pub. L. 108-78) (19 U.S.C. 3805 note));

(iv) Australia FTA (the United States-Australia Free Trade Agreement, as approved by Congress in the United States-Australia Free Trade Agreement Implementation Act (Pub. L. 108-286) (19 U.S.C. 3805 note));

(v) Morocco FTA (The United States-Morocco Free Trade Agreement, as approved by Congress in the United States-Morocco Free Trade Agreement Implementation Act (Pub. L. 108-302) (19 U.S.C. 3805 note));

(vi) CAFTA-DR (The Dominican Republic-Central America-United States Free Trade Agreement, as approved by Congress in the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (Pub. L. 109-53) (19 U.S.C. 4001 note));

(vii) Bahrain FTA (the United States-Bahrain Free Trade Agreement, as approved by Congress in the United States-Bahrain Free Trade Agreement Implementation Act (Pub. L. 109-169) (19 U.S.C. 3805 note));

(viii) Oman FTA (the United States-Oman Free Trade Agreement, as approved by Congress in the United States-Oman Free Trade Agreement Implementation Act (Pub. L. 109-283) (19 U.S.C. 3805 note));

(ix) Peru FTA (the United States-Peru Trade Promotion Agreement, as approved by Congress in the United States-Peru Trade Promotion Agreement Implementation Act (Pub. L. 110-138) (19 U.S.C. 3805 note));

(x) Korea FTA (the United States–Korea Free Trade Agreement Implementation Act (Pub. L. 112-41) (19 U.S.C. 3805));

(xi) Colombia FTA (the United States–Colombia Trade Promotion Agreement Implementation Act (Pub. L. 112-42) (19 U.S.C. 3805 note)); and

(xii) Panama FTA (the United States-Panama Trade Promotion Agreement Implementation Act (Pub. L. 112-43) (19 U.S.C. 3805 note));

(3) The least developed country designation made by the U.S. Trade Representative, pursuant to the Trade Agreements Act (19 U.S.C. 2511(b)(4)), in acquisitions covered by the WTO GPA;

(4) The Caribbean Basin Trade Initiative (CBTI) (determination of the U.S. Trade Representative that end products or construction material granted duty-free entry from countries designated as beneficiaries under the Caribbean Basin Economic Recovery Act (19 U.S.C. 2701, *et seq*.), with the exception of Panama, must be treated as eligible products in acquisitions covered by the WTO GPA);

(5) The Israeli Trade Act (the U.S.-Israel Free Trade Area Agreement, as approved by Congress in the United States-Israel Free Trade Area Implementation Act of 1985 (19 U.S.C. 2112 note)); or

(6) The Agreement on Trade in Civil Aircraft (U.S. Trade Representative waiver of the Buy American statute for signatories of the Agreement on Trade in Civil Aircraft, as implemented in the Trade Agreements Act of 1979 (19 U.S.C. 2513)).

(b) For application of the trade agreements that are unique to individual agencies, see agency regulations.

25.401 Exceptions.

(a) This subpart does not apply to-

(1) Acquisitions set aside for small businesses;

(2) Acquisitions of arms, ammunition, or war materials, or purchases indispensable for national security or for national defense purposes;

(3) Acquisitions of end products for resale;

(4) Acquisitions from Federal Prison Industries, Inc., under subpart 8.6, and acquisitions under subpart 8.7, Acquisition from Nonprofit Agencies Employing People Who Are Blind or Severely Disabled;

(5) Other acquisitions not using full and open competition, if authorized by subpart 6.2 or 6.3, when the limitation of competition would preclude use of the procedures of this subpart; or sole source acquisitions justified in accordance with 13.501(a); and

(6) Goods and services specifically excluded under individual trade agreements, such as exceptions negotiated by the U.S. Trade Representative for particular agencies. See the agency supplementary regulations.

(b) In the World Trade Organization Government Procurement Agreement (WTO GPA) and each FTA, there is a U.S. schedule that lists services that are excluded from that agreement in acquisitions by the United States. Acquisitions of the following services are excluded from coverage by the U.S. schedule of the WTO GPA or an FTA as indicated in this table:

	The Service (Federal Service Codes from the Federal Procurement Data System Product/Service Code Manual are indicated in paren-theses for some services.)	WTO GPA and KOREA FTA	Bahrain FTA, CAFTA-DR, Chile FTA, Columbia FTA, USMCA, Oman FTA, Panama FTA, and Peru FTA	Singapore FTA	Australia and Morocco FTA
(1)	All services purchased in support of military services overseas.	X	X	X	X

(2)	(i) Automatic data processing (ADP) telecommunications and transmission services (D304), except enhanced (*i.e.,* value-added) telecommunications services.	X	X		
	(ii) ADP teleprocessing and timesharing services (D305), telecommunications network management services (D316), automated news services, data services or other information services (D317), and other ADP and telecommunications services (D399).	X	X		
	(iii) Basic telecommunications network services (*i.e.,* voice telephone services, packet-switched data transmission services, circuit-switched data transmission services, telex services, facsimile services, and private leased circuit services, but not information services, as	*	*	X	X

	defined in 47 U.S.C.153(24)).				
(3)	Dredging.	X	X	X	X
(4)	(i) Operation and management contracts of certain Government or privately owned facilities used for Government purposes, including Federally Funded Research and Development Centers.	X		X	
	(ii) Operation of all Department of Defense, Department of Energy, or the National Aeronautics and Space Administration facilities; and all Government-owned research and development facilities or Government-owned environmental laboratories.	**	X	**	X
(5)	Research and development.	X	X	X	X

(6)	Transportation services (including launching services, but not including travel agent services).	X	X	X	X
(7)	Utility services.	X	X	X	X
(8)	Maintenance, repair, modification, rebuilding and installation of equipment related to ships (J019).		X		X
(9)	Nonnuclear ship repair (J998).		X		X

* Note1. Acquisitions of the services listed at (2)(iii) of this table are a subset of the excluded services at (2)(i) and (ii), and are therefore not covered under the WTO GPA.

** Note2. Acquisitions of the services listed at (4)(ii) of this table are a subset of the excluded services at (4)(i), and are therefore not covered under the WTO GPA.

25.402 General.

(a)

(1) The Trade Agreements Act (19 U.S.C.2501, *et seq*.) provides the authority for the President to waive the Buy American statute and other discriminatory provisions for 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. The President has delegated this waiver authority to the U.S. Trade Representative.
In acquisitions covered by the WTO GPA, Free Trade Agreements, or the Israeli Trade Act, the U.S. Trade Representative has waived the Buy American statute and other discriminatory provisions for eligible products. Offers of eligible products receive equal consideration with domestic offers.

(2) The contracting officer shall determine the origin of services by the country in which the firm providing the services is established. See subpart 25.5 for evaluation procedures for supply contracts covered by trade agreements.

(b) The value of the acquisition is a determining factor in the applicability of trade agreements. Most of these dollar thresholds are subject to revision by the U.S. Trade Representative approximately every 2 years. The various thresholds are summarized as follows:

Trade Agreement	Supply Contract (equal to or exceeding)	Service Con to or exceed
WTO GPA	$174,000	$174,000
FTAs		
Australia FTA	105,767	105,767
Bahrain FTA	174,000	174,000
CAFTA-DR (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua)	105,767	105,767
Chile FTA	105,767	105,767
Colombia FTA	105,767	105,767
Korea FTA	100,000	100,000

Morocco FTA	174,000	174,000
USMCA		
-Mexico	105,767	105,767
Oman FTA	174,000	174,000
Panama FTA	174,000	174,000
Peru FTA	174,000	174,000
Singapore FTA	105,767	105,767
Israeli Trade Act	50,000	-

Table 1 to Paragraph (b)

25.403 World Trade Organization Government Procurement Agreement and Free Trade Agreements.

(a) Eligible products from WTO GPA and FTA countries are entitled to the nondiscriminatory treatment specified in 25.402(a)(1). The WTO GPA and FTAs specify procurement procedures designed to ensure fairness (see 25.408).

(b) *Thresholds*.

(1) To determine whether the acquisition of products by lease, rental, or lease-purchase contract (including lease-to-ownership, or lease-with-option-to purchase) is covered by the WTO GPA or an FTA, calculate the estimated acquisition value as follows:

(i) If a fixed-term contract of 12 months or less is contemplated, use the total estimated value of the acquisition.

(ii) If a fixed-term contract of more than 12 months is contemplated, use the total estimated value of the acquisition plus the estimated residual value of the leased equipment at the conclusion of the contemplated term of the contract.

(iii) If an indefinite-term contract is contemplated, use the estimated monthly payment multiplied by the total number of months that ordering would be possible under the proposed contract, *i.e.,* the initial ordering period plus any optional ordering periods.

(iv) If there is any doubt as to the contemplated term of the contract, use the estimated monthly payment multiplied by 48.

(2) The estimated value includes the value of all options.

(3) If, in any 12-month period, recurring or multiple awards for the same type of product or products are anticipated, use the total estimated value of these projected awards to determine whether the WTO GPA or an FTA applies. Do not divide any acquisition with the intent of reducing the estimated value of the acquisition below the dollar threshold of the WTO GPA or an FTA.

(c) *Purchase restriction.*

(1) Under the Trade Agreements Act (19 U.S.C. 2512), in acquisitions covered by the WTO GPA, 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. This purchase restriction does not apply below the WTO GPA threshold for supplies and services, even if the acquisition is covered by an FTA.

(2) This restriction does not apply to purchases of supplies by the Department of Defense from a country with which it has entered into a reciprocal agreement, as provided in departmental regulations.

25.404 Least developed countries.

For acquisitions covered by the WTO GPA, least developed country end products, construction material, and services must be treated as eligible products.

25.405 Caribbean Basin Trade Initiative.

Under the Caribbean Basin Trade Initiative, the United States Trade Representative has determined that, for acquisitions covered by the WTO GPA, Caribbean Basin country end products, construction material, and services must be treated as eligible products. In accordance with Section 201 (a)(3) of the Dominican Republic-Central America-United States Free Trade Implementation Act (Pub. L. 109-53) (19 U.S.C. 4031), when the CAFTA-DR agreement enters into force with respect to a country, that country is no longer designated as a beneficiary country for purposes of the Caribbean Basin Economic Recovery Act, and is therefore no longer included in the definition of "Caribbean Basin country" for purposes of the Caribbean Basin Trade Initiative.

25.406 Israeli Trade Act.

Acquisitions of supplies by most agencies are covered by the Israeli Trade Act, if the estimated value of the acquisition is $50,000 or more but does not exceed the WTO GPA threshold for supplies (see 25.402(b)). Agencies other than the Department of Defense, the Department of Energy, the Department of Transportation, the Bureau of Reclamation of the Department of the Interior, the Federal Housing Finance Board, and the Office of Thrift Supervision must evaluate offers of Israeli end products without regard to the restrictions of the Buy American statute. The Israeli Trade Act does not prohibit the purchase of other foreign end products.

25.407 Agreement on Trade in Civil Aircraft.

Under the authority of Section 303 of the Trade Agreements Act, the U.S. Trade Representative has waived the Buy American statute for civil aircraft and related articles that meet the substantial transformation test of the Trade Agreements Act, from countries that are parties to the Agreement on Trade in Civil Aircraft. Those countries are Albania, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Macao China, Malta, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Taiwan (Chinese Taipei), and the United Kingdom.

25.408 Procedures.

(a) If the WTO GPA or an FTA applies (see 25.401), the contracting officer must-

(1) Comply with the requirements of 5.203, Publicizing and response time;

(2) Comply with the requirements of 5.207, Preparation and transmittal of synopses;

(3) Not include technical requirements in solicitations solely to preclude the acquisition of eligible products;

(4) Specify in solicitations that offerors must submit offers in the English language and in U.S. dollars (see 52.214-34, Submission of Offers in the English Language, and 52.214-35, Submission of Offers in U.S. Currency, or paragraph (c)(5) of 52.215-1, Instruction to Offerors-Competitive Acquisitions); and

(5) Provide unsuccessful offerors from WTO GPA or FTA countries notice in accordance with 14.409-1 or 15.503.

(b) See subpart 25.5 for evaluation procedures and examples.

52.225-5 Trade Agreements.

As prescribed in 25.1101(c)(1), insert the following clause:

Trade Agreements (Nov 2023)

(a) *Definitions*. As used in this clause-

Caribbean Basin country end product—

(1) Means an article that-

(i)

(A) Is wholly the growth, product, or manufacture of a Caribbean Basin country; or

(B) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a Caribbean Basin country 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; and

(ii) Is not excluded from duty-free treatment for Caribbean countries under 19 U.S.C.2703(b).

(A) For this reason, the following articles are not *Caribbean Basin country end products*:

(1) Tuna, prepared or preserved in any manner in airtight containers;

(2) Petroleum, or any product derived from petroleum;

(3) Watches and watch parts (including cases, bracelets, and straps) of whatever type including, but not limited to, mechanical, quartz digital, or quartz analog, if such watches or watch parts contain any material that is the product of any country to which the Harmonized Tariff Schedule of the *United States* (HTSUS) column2 rates of duty apply (*i.e.,* Afghanistan, Cuba, Laos, North Korea, and Vietnam); and

(4) Certain of the following: textiles and apparel articles; footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel; or handloomed, handmade, and folklore articles;

(B) Access to the HTSUS to determine duty-free status of articles of these types is available at https://usitc.gov/tata/hts/index.htm. In particular, see the following:

(1) General Note3(c), *Products* Eligible for Special Tariff treatment.

(2) General Note17, *Products* of Countries Designated as Beneficiary Countries under the *United States*-Caribbean Basin Trade Partnership Act of 2000.

(3) Section XXII, Chapter 98, Subchapter II, Articles Exported and Returned, Advanced or Improved Abroad, U.S. Note7(b).

(4) Section XXII, Chapter 98, Subchapter XX, Goods Eligible for Special Tariff Benefits under the *United States*-Caribbean Basin Trade Partnership Act; and

(2) Refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the *acquisition*, includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

Designated country means any of the following countries:

(1) A World Trade Organization Government *Procurement* Agreement (WTO GPA) country (Armenia, Aruba, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, New Zealand, North Macedonia, 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, or United Kingdom);

(2) A Free Trade Agreement (FTA) country (Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Oman, Panama, Peru, or Singapore);

(3) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Tanzania, Timor-Leste, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

(4) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sint Eustatius, Sint Maarten, or Trinidad and Tobago).

Designated country end product means a *WTO GPA country end product*, an FTA country *end product*, a *least developed country end product*, or a *Caribbean Basin country end product*.

End product means those articles, materials, and *supplies* to be acquired under the contract for public use.

Free Trade Agreement country end product means an article that-

(1) Is wholly the growth, product, or manufacture of a Free Trade Agreement (FTA) country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in an FTA country 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. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the *end product* includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

Least developed country end product means an article that-

(1) Is wholly the growth, product, or manufacture of a least developed country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a least developed country 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. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the *end product*, includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

United States means the 50 States, the District of Columbia, and *outlying areas*.

U.S.-made end product means 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.

WTO GPA country end product means an article that-

(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country 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. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the *end product* includes services, (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

(b) *Delivery of end products*. The *Contracting Officer* has determined that the WTO GPA and FTAs apply to this *acquisition*. Unless otherwise specified, these trade agreements apply to all items in the Schedule. The Contractor *shall* deliver under this contract only U.S.-made or *designated country end products* except to the extent that, in its *offer*, it specified delivery of other *end products* in the provision entitled "Trade Agreements Certificate."

(End of clause)

Parent topic: 52.225 [Reserved]

Department of Veterans Affairs

Memorandum

Date: November 19, 2025

From: Acting Executive Director, Office of Acquisition and Logistics (003A), and Acting Senior Procurement Executive

Subj: Class Deviation for FAR Part 25 in Support of Executive Order on Restoring Common Sense to Federal Procurement

To: Heads of the Contracting Activities

1. Purpose. Deviate from Federal Acquisition Regulation (FAR) part 25 for purposes of implementing the Federal Regulatory Council's (the Council's) model deviation text to FAR part 25.

2. Background. Executive Order (E.O.) 14275, Restoring Common Sense to Federal Procurement, signed April 15, 2025, mandates a comprehensive review and simplification of the FAR.

The FAR is being updated to:

- Eliminate non-statutory language
- Remove redundant or obsolete language
- Enhance clarity through plain language
- Align with the new FAR framework
- Preserve essential Governmentwide acquisition standards

This project is referred to as the Revolutionary FAR Overhaul (RFO) initiative. This initiative will make the FAR more concise, understandable, and focused on core procurement requirements.

3. Summary of Changes. FAR part 25, Foreign Acquisition, has been updated and reorganized to improve clarity, remove obsolete material, and logically group related content for enhanced usability by acquisition professionals.

Key highlights include:

- Adopting the centralized waiver process for nonavailability determinations including submission to the Made In America Office (MIAO), posting the waiver to the public-facing website, MadeinAmerica.gov, and using a digital waiver portal managed by the MIAO.
- Moving evaluation examples for foreign offers from the FAR. They are expected to be moved to the FAR Companion.

Subj.: Class Deviation for FAR Part 25 in Support of Executive Order on Restoring Common Sense to Federal Procurement

Statutory requirements retained in the RFO FAR part 25 model deviation include, but are not limited to:

- 19 U.S.C. §§ 2501 et seq., Trade Agreements Act of 1979
- 22 U.S.C. § 3305, The American Institute in Taiwan
- 41 U.S.C. §§ 8301 et seq., Buy American
- E.O. 10582, Prescribing Uniform Procedures for Certain Determinations Under the Buy-American Act
- E.O. 13881, Maximizing Use of American-Made Goods, Products, and Materials
- E.O. 14005, Ensuring the Future Is Made in All of America by All of America's Workers
- P.L. 103-465, World Trade Organization Government Procurement Agreement (WTO GPA), as approved in the Uruguay Round Agreements Act
- Free Trade Agreements (FTA) and Other International Agreements
    - P.L. 98-67, Caribbean Basin Economic Recovery Act
    - P.L. 99-47, United States-Israel Free Trade Area Implementation Act of 1985
    - P.L. 108-77, United States-Chile Free Trade Agreement Implementation Act
    - P.L. 108-78, United States-Singapore Free Trade Agreement Implementation Act
    - P.L. 108-286, United States-Australia Free Trade Agreement Implementation Act
    - P.L. 108-302, Morocco Free Trade Agreement Implementation Act
    - P.L. 109-53, Dominican Republic-Central America-United States Free Trade Agreement Implementation Act
    - P.L. 109-169, United States-Bahrain Free Trade Agreement Implementation Act
    - P.L. 109-283, United States-Oman Free Trade Agreement Implementation Act
    - P.L. 110-138, United States-Peru Trade Promotion Agreement Implementation Act
    - P.L. 112-41, United States-Korea Free Trade Agreement Implementation Act
    - P.L. 112-42, United States-Columbia Trade Promotion Agreement Implementation Act
    - P.L. 112-43, United States-Panama Trade Promotion Agreement Implementation Act
    - P.L. 116-113, United States-Mexico-Canada Agreement (USMCA) Implementation Act

Subj.: Class Deviation for FAR Part 25 in Support of Executive Order on Restoring Common Sense to Federal Procurement

Change	Description

Retained	• Section 25.001, "**General**," is retained with minor updates to remove reference to the American Recovery and Reinvestment Act (ARRA) of 2009 (P.L. 111-5), which is no longer active.
	• Section 25.003, "**Definitions,**" is retained with minor edits throughout.
	• Subpart 25.8, "**Other International Agreements and Coordination**," is retained because it is anchored in international treaties and agreements that are part of international law.
	• Subpart 25.9, "**Customs and Duties**," is retained in full because it implements statutory customs requirements and duty requirements.
	• Subpart 25.10, "**Additional Foreign Acquisition Regulations**," is mostly retained as statutorily required.
	  ○ Section 25.1003, "**Tax on Certain Foreign Procurements**," is deleted as this content is implemented in part 29. The **FAR Companion** is expected to include best practice information on tax on foreign procurements.
	• The **following provisions and clauses are retained** (or remain reserved) with no changes:
	  ○ 52.225-2 (Provision), Buy American Certificate
	  ○ 52.225-5 (Clause), Trade Agreements
	  ○ 52.225-6 (Provision), Trade Agreements Certificate
	  ○ 52.225-7 (Provision), Waiver of Buy American Statute for Civil Aircraft and Related Articles
	  ○ 52.225-8 (Clause), Duty-Free Entry
	  ○ 52.225-10 (Provision), Notice of Buy American Requirement—Construction Materials
	  ○ 52.225-12 (Provision), Notice of Buy American Requirement—Construction Materials Under Trade Agreements
	  ○ 52.225-14 (Clause), Inconsistency between English Version and Translation of Contract
	  ○ 52.225-15 and 52.225-16 remain reserved
	  ○ 52.225-17 (Provision), Evaluation of Foreign Currency Offers
	  ○ 52.225-18 (Provision), Place of Manufacture
	  ○ 52.225-19 (Clause), Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States

	○ 52.225-26 (Clause), Contractors Performing Private Security Functions Outside the United States.
Moved / Updated	• Section 25.002, "**Applicability of Subparts**," has been updated to align with the part 25 organizational structure and is expected to be moved to the **FAR Companion**. • Subpart 25.1, "**Buy American— Supplies**," is retained and updated. ○ Section 25.103 adopts the **centralized waiver process** for individual nonavailability determinations. ▪ **Submission to MIAO**: The new 25.103(b)(2)(iii) requires contracting officers to submit a proposed individual nonavailability waiver for review and posting to the public-facing website, MadeinAmerica.gov, using a digital waiver portal managed by the MIAO. ▪ **Prohibition on Award**: The contracting officer may not make an award until: (1) the MIAO has completed its review of the proposed waiver; (2) the MIAO has waived the review requirement; or (3) a specific exception to the posting requirement applies. ▪ **Procedural Details**: Subparagraphs (b)(2)(iii)(A) through (D) require the use of a standardized digital form, specify that certain information will be made public, establish MIAO review times, and outline exceptions for urgent requirements. In cases of urgency, a report must be filed within 30 days of award. • Subpart 25.2, "**Buy American—Construction Materials**," is retained and revised to align with the changes in subpart 25.1 and to streamline its content. ○ Section 25.203, "**Preaward Determinations**" ▪ Section 25.203(a) has been streamlined. The instructions for offerors are more appropriately located within the solicitation provisions (e.g., 52.225-10 and 52.225-12). ○ Section 25.204, "**Evaluating Offers of Foreign Construction Material**," has been revised for clarity and restructured. • Subpart 25.4, "**Trade Agreements**," is updated to remove the specific requirement for post-award notices previously at 25.408(a)(5), as it is redundant of content in other FAR parts. • Subpart 25.5, "**Evaluating Foreign Offers—Supply Contracts**" ○ The examples and tables formerly at section 25.504, "**Evaluation Examples**," are removed and expected to be

	included in the **FAR Companion**.
	• Subpart 25.6, “**Solicitation Provisions and Contract Clauses**,” is a relocation of the former Subpart 25.11. The content and structure are largely identical. Subpart 25.11 is now reserved.
	• Subpart 25.7, “**Contracts Performed Outside the United States**,” is a relocation of the former Subpart 25.3. The content and structure are largely identical. Subpart 25.3 is now reserved.
	• The **following provision and clauses have been updated** to reflect plain language, update cross-references, or make corresponding updates within the part:
	  o 52.225-1 (Clause), Buy American—Supplies
	  o 52.225-3 (Clause), Buy American—Free Trade Agreements—Israeli Trade Act
	  o 52.225-4 (Provision), Buy American—Free Trade Agreements—Israeli Trade Act Certificate
	  o 52.225-9 (Clause), Buy American—Construction Materials
	  o 52.225-11 (Clause), Buy American—Construction Materials Under Trade Agreement

Removed	• Subpart 25.6, “**American Recovery and Reinvestment Act-Buy American statute-Construction Materials**,” is deleted as obsolete because the content was specific to construction projects funded by the ARRA of 2009 which is no longer active.
	• Subpart 25.7, “**Prohibited Sources**,**”** is deleted, along with the following provisions and clauses, because this content has been moved to **RFO FAR part 40:**
	  o 52.225-13 (Clause), Restrictions on Certain Foreign Purchases
	  o 52.225-20 (Provision), Prohibition on Conducting Restricted Business Operations in Sudan—Certification.
	  o 52.225-25 (Provision), Prohibition on Contracting with Entities Engaging in Certain Activities or Transactions Relating to Iran—Representation and Certifications.
	• The **following provisions and clauses were deleted** as obsolete because the content was specific to construction projects funded by the ARRA of 2009 which is no longer active:
	  o 52.225-21 (Clause), Required Use of American Iron, Steel, and Manufactured Goods—Buy American Statute—Construction Materials.

	○ 52.225-22 (Provision), Notice of Required Use of American Iron, Steel, and Manufactured Goods—Buy American Statute—Construction Materials ○ 52.225-23 (Clause), Required Use of American Iron, Steel, and Manufactured Goods—Buy American Statute—Construction Materials Under Trade Agreements. ○ 52.225-24 (Provision), Notice of Required Use of American Iron, Steel, and Manufactured Goods—Buy American Statute—Construction Materials Under Trade Agreements.

This table is not an exhaustive list.

4. Instructions.

- The VA acquisition workforce must follow the RFO part 25 model deviation text instead of FAR part 25 as codified at 48 C.F.R. Chapter 1. The Council's RFO part 25 model deviation text is available at www.Acquisition.gov/far-overhaul and is incorporated into this class deviation.
- For new solicitations or contracts, when using any provisions or clauses that have been revised, utilize the RFO model deviation language at RFO FAR part 52.
- For open solicitations or awarded contracts, the contracting officer has discretion regarding the need to enforce or amend the provisions or clauses. Note that without some of the removed provisions or clauses, the contracting officer may be required to separately address certain aspects in the contract.

5. Applicability. All VA procurements.

6. Authority. E.O. 14275, OMB Memorandum M-25-26, 48 C.F.R. Subpart 1.4, and RFO FAR 1.304.

7. Effective Date. This class deviation is effective immediately, and remains in effect until rescinded or incorporated into the FAR.

8. Point of Contact. Questions related to this deviation may be directed to va.procurement.policy@va.gov.

JOSEPH MALETTA

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Date: 2025.11.19 13:21:47 -05'00'

Joseph P. Maletta

Cosette Pharms., Inc. v. United States

United States Court of Federal Claims

October 31, 2025, Decided; October 31, 2025, Filed under seal

No. 25-cv-279

Reporter

179 Fed. Cl. 740 *; 2025 U.S. Claims LEXIS 3341 **; 2025 LX 575746

COSETTE PHARMACEUTICALS, INC., Plaintiff, v. THE UNITED STATES, Defendant.

Subsequent History: Publication: November 17, 2025 [**1] [1]

Judges: ELENI M. ROUMEL, Judge.

Opinion by: ELENI M. ROUMEL

Opinion

[*746] **MEMORANDUM AND ORDER**

This action is a bid protest concerning the Department of Veterans Affairs' (VA's or Government's) efforts to procure prasugrel, a blood thinner used to reduce the risk of heart attacks and strokes. In this case, the VA seeks to obtain a lower-cost, generic version of the drug because the brand-name version of prasugrel—manufactured by Plaintiff Cosette Pharmaceuticals, Inc. (Cosette or Plaintiff)—is significantly more expensive. In procuring the drug, however, the VA must comply with federal law which mandates, with discrete exceptions, [**2] that the drug be manufactured in the United States or certain approved

[1] This Memorandum and Order was filed under seal on October 31, 2025, in accordance with the Protective Order entered in this case. ECF No. 43. On November 14, 2025, the parties filed a Notice proposing redactions to the Memorandum and Order. ECF No. 45. The sealed and public versions of this Memorandum and Order are identical, except for some redactions, this footnote, and the addition of the publication date.

countries. In particular, the *Trade Agreements Act of 1979, 19 U.S.C. §§ 2501 et seq.*, (TAA) constrains the agency's choices. The statute prohibits federal agencies from purchasing products manufactured in certain countries, unless, as relevant to this action (i) no statutorily-compliant alternative is offered, or (ii) the compliant alternatives are "insufficient" to fulfill the Government's requirements. *19 U.S.C. § 2512(a)(2)*. Despite receiving a TAA-compliant offer from Cosette, which manufactures its prasugrel in Germany,[2] a compliant country under the TAA, the VA nevertheless awarded the contract to Golden State Medical Supplies, Inc. (Golden State), which manufactures its generic version of prasugrel in India, a non-compliant country under the TAA. Cosette challenges that award here, contending that since it submitted the only TAA-compliant offer, the VA was bound by law to (i) award Cosette the contract for the supply of prasugrel, (ii) procure the drug via the current Federal Supply Schedule contract with Cosette, or (iii) cancel the Solicitation and procure a generic form of prasugrel on the open market. In contrast, despite the TAA's prohibition on purchasing products manufactured [**3] in India, the VA contends that the award to Golden State is nevertheless permissible under one of the TAA's above-referenced statutory exceptions because Cosette's significantly higher price rendered its offer "insufficient to fulfill the requirements of the United States Government." *See* ECF No. 29 at 29 (Def. MJAR); *19 U.S.C. § 2512(a)(2)(B)*.

Resolution of this dispute turns on whether an offer is "insufficient" under the TAA if it would impose significantly greater expenses on the agency (i.e., Cosette's offer) than would an otherwise non-TAA-compliant alternative (i.e., Golden State's offer). In urging the Court to rule in its favor, the VA advances many policy rationales, many of them seemingly well-founded; however, it is evident that Congress opted not to write such a "high price" exception into the plain text of the TAA. However much the VA may prefer a lower price—and however laudable

[2] Cosette performs its final manufacturing in Germany, while its active pharmaceutical ingredient (API) comes from Japan. ECF No. 27 at 12 (Plaintiff's Motion for Judgment on the Administrative Record). Under the TAA's definition, a product comes from the last country where "it has been substantially transformed." *19 U.S.C. § 2518(4)(B)*. Cosette acknowledges that the manufacture of the API (rather than the final manufacture) has historically been the country of the last substantial transformation but argues that the place of final manufacture "may also be relevant." ECF No. 27 at 12 n.1. As both Germany and Japan are TAA-compliant countries, the parties do not dispute that Cosette's prasugrel is TAA-compliant. *See* ECF No. 29 at 15 (Defendant's Cross-Motion for Judgment on the Administrative Record).

the VA's policy reasons to protect the public fisc may be—the agency is bound to the framework Congress enacted. The VA must comply with the TAA when making its award decision, and this Court is similarly bound to interpret laws as enacted by Congress, regardless of any compelling policy rationales the VA advances [**4] to the contrary.

Accordingly, for the reasons described below, Cosette's Motion for Judgment on the Administrative Record (ECF No. 27) is **GRANTED IN PART** and the VA's Cross-Motion for Judgment on the Administrative Record (ECF No. 29) is **DENIED IN PART**.

BACKGROUND

I. Statutory and Regulatory Context

Two relevant statutes limit the Government's ability to purchase goods originating [*747] abroad. *Acetris Health, LLC v. United States, 949 F.3d 719, 722-23 (Fed. Cir. 2020)*. The first, the *Buy American Act of 1933 (BAA), 41 U.S.C. §§ 8301-8305*, was enacted during the Great Depression "to create jobs for American workers and protect American industry." *United States v. Rule Indus., Inc., 878 F.2d 535, 538 (1st Cir. 1989)*. The BAA requires federal agencies to acquire "only manufactured articles, materials, and supplies that have been manufactured in the United States," unless the head of the procuring agency determines that doing so would be inconsistent with the public interest, would result in unreasonable cost,[3] or that suitable domestic products are not available in sufficient quantity or quality. *41 U.S.C. § 8302(a)(1)*.

As noted, this bid protest turns in large part on the construction and application of the second statute, the *Trade Agreements Act of 1979, 19 U.S.C. §§ 2501 et seq.*, and its implementing regulations. The Trade Agreements Act of 1979 was enacted in part to implement the United

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[3] *FAR 25.106* sets forth mechanical rules to define an "unreasonable cost" for domestic end products under the BAA. Under *FAR 25.106(b)(1)*, when the restrictions of the BAA apply, and the domestic offer is not the low offer, then the contracting officer adds either 20% or 30% to the price of the non-domestic low offer. If the price of the domestic offer remains higher than the adjusted low offer, then the domestic offer is deemed unreasonable. *Id.*

States' commitments under international trade agreements, including the World Trade Organization Government [**5] Procurement Agreement (WTO GPA)—a multilateral trade agreement that requires signatory countries to open government procurement markets to one another on equal and nondiscriminatory terms. *19 U.S.C. § 2502*. The WTO GPA prohibits its signatories from discriminating against goods and suppliers from other signatory countries, meaning that foreign-country signatories may not discriminate against American-made products, and the United States may not discriminate against products originating in those countries. The text of the TAA describes two purposes: first, "to provide appropriate reciprocal government procurement opportunities to United States products and suppliers,"; and second, to "encourage additional countries to become parties to" the agreement. *19 U.S.C. § 2512(a)(1)*. To achieve the first aim, the TAA authorizes the President to waive the BAA's domestic preference requirements for procurements covered by the WTO GPA, thereby allowing agencies to consider offers from designated countries[4] on equal terms with U.S.-made products. *Id.* To accomplish the second objective, the TAA imposes a strict limitation: for procurements covered by the WTO GPA, agencies may only acquire products from the United States or a designated [**6] country. *19 U.S.C. § 2512(a)(1)(A)*. In other words, Congress barred agencies from purchasing goods from non-designated countries to incentivize other countries to join the WTO GPA or to otherwise open their procurement markets to U.S. suppliers. This prohibition applies unless one of two statutory exceptions is satisfied: (i) there are no offers of a U.S.-made or designated country product; or (ii) such offers are "insufficient to fulfill the requirements of the United States Government."[5] *19 U.S.C. § 2512(a)(2)*. Significantly, unlike the BAA, the TAA

[4] While signatories to the WTO GPA form the core of designated countries, the set of TAA-compliant countries also includes: parties to the United States-Mexico-Canada Agreement, non-major-industrial countries that do not discriminate against American-made products in government procurement, and least developed countries. *19 U.S.C. § 2511(b)*; *FAR 25.400(a)*. There are currently over 120 designated countries under the TAA. *See FAR 25.003*. For purposes of this Memorandum and Order, the Court references offers of products from designated countries as "TAA-compliant" offers and offers of products from non-designated countries as "non-TAA-compliant" offers.

[5] In addition, the TAA permits agency heads, subject to interagency review, to waive the prohibition on a case-by-case basis when doing so is in the national interest. *19 U.S.C. § 2512(b)(2)*. No waiver has occurred related to the present action. *See, e.g.*, AR 892 (citing exception to TAA, rather than waiver, as authority).

contains no explicit exception based on price. *Compare* 41 U.S.C. § 8302(a)(1) (BAA), *with* 19 U.S.C. § 2512(a)(2) (TAA).

The Federal Acquisition Regulations (FAR) subpart 25.4 implements the TAA. For acquisitions covered by the WTO GPA, FAR 25.403(c)(1) directs contracting officers [*748] to "acquire only U.S.-made or designated country end products," unless offers for such products are "either *not received* or are *insufficient* to fulfill the requirements." FAR 25.403(c)(1) (emphasis added). Thus, if a government procurement is covered by the WTO GPA, an agency may award the contract to an otherwise non-TAA-compliant offeror only if one of those two exceptions applies.

II. The VA's Need for Prasugrel

Prasugrel is a medication used as a blood thinner to lower the risk [**7] of heart attacks and strokes. The drug comes in both a branded form under the name Effient, and a generic form. Administrative Record (AR) 299, 302. Currently, the brand name drug is available to the VA under a Federal Supply Schedule (FSS) contract with Cosette, and generic versions are available on an open market basis. AR 20. However, the VA contends that supply through those mechanisms is not guaranteed, and prices may vary over time. *Id.* Accordingly, the VA seeks to procure prasugrel via a national standardization contract to ensure the consistent availability of the medicine for nationwide usage and to obtain volume-based, committed-use pricing. AR 20, 41. Such a contract would establish the price for prasugrel products, which the VA anticipates will be ordered and distributed to the VA, the Department of Defense, the Indian Health Service, the Bureau of Prisons, and other federal agencies. AR 41.

III. The VA's Solicitation

The VA issued the Solicitation for the procurement of prasugrel in 10-mg and 5-mg forms on September 17, 2024, with offers due on October 8, 2024. AR 35, 117. The Solicitation called for a firm fixed price, indefinite-delivery requirements contract requiring [**8] prasugrel tablets to be delivered across one base year and four option years. AR 43, 97. The Solicitation estimated annual quantities of 80,262 bottles of 10-mg tablets and 4,724 bottles of 5-mg tablets. AR 36-37. The VA would evaluate proposals under FAR Parts 12, 15, and 25, with the award going to the offeror that submitted the lowest evaluated price meeting the Solicitation's requirements.[6] AR 40, 98, 99.

Under the Solicitation, offers of U.S.-made or designated-country end products would be evaluated "without regard to the restrictions of the Buy American statute." AR 97. Next, the Solicitation incorporated the TAA's restrictions, stating that the "Government will consider for award only offers of U.S.-made or designated country end products unless the Contracting Officer (CO) determines that there are no offers for such products or that the offers for those products are insufficient to fulfill the requirements of this solicitation." AR 97. To implement these provisions, the Solicitation required offerors to submit a Trade Agreements Certificate, certifying that each end product was U.S.-made, manufactured in a TAA-designated country, or otherwise identifying each end product and [**9] its country of origin. AR 108, 153.

IV. The Award Process

A. The Offers

The VA received six proposals in response to the Solicitation, and the contracting officer (CO) determined it necessary to enter into discussions with all six offerors.[7] AR 895, 901, 1028. During its discussion with Cosette on October 29, 2024, the VA "reminded Cosette that the Government can only award contracts with prices that have been determined to be fair and

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[6] Specifically, the Solicitation established five criteria offers must meet to be considered technically acceptable: (i) the offered items must fully meet the product description, (ii) the National Drug Code number of each product must be unique to the offeror, (iii) the offered drugs must be FDA-approved, (iv) the places of performance must be FDA cGMP acceptable for the product type offered, and (v) the manufacturing facility must have clearance by the FDA to manufacture under the specific NDA/ANDA/BLA cited/used in the offer. AR 99.

[7] The six companies include: Golden State, [TEXT REDACTED BY THE COURT] Cosette, [TEXT REDACTED BY THE COURT]. *See generally* AR 118-738

reasonable" per *FAR 15.404-1(b)* and suggested that Cosette's current pricing may not be considered fair and reasonable. AR 746, 895, 910. The Government concluded all discussions on October 29, 2024, and requested that the offerors submit their best and final pricing in their final proposal revisions by November 4, 2024. AR 895. Cosette [*749] submitted a final proposal revision but did not alter its proposed pricing. *Id.* Five offerors remained after submission of the final proposal revisions.[8]

Of the five remaining offerors, Cosette alone offered to supply a TAA-compliant product. AR 890. Cosette's prasugrel is manufactured in Germany and has an active pharmaceutical ingredient from Japan, both designated countries under the TAA. AR 301; *FAR 25.003*. Notably for the present [**10] protest, the other four offerors offered to supply prasugrel from India, which is not a TAA-compliant country. *See* *FAR 25.003*.

Also important to the present protest, Cosette's prices were dramatically higher than the other offers, as demonstrated in the following table:

[8] The VA rejected Shams Al-Warith's submission as untimely. AR 911.

Offeror	**Unit Price for 10MG**	**Unit Price for 5MG**	**Annual Price**	**Total Price (base year plus four option years)**
Golden State	[TEXT REDACTED BY THE COURT]	[TEXT REDACTED BY THE COURT]	[TEXT REDACTED BY THE COURT]	[TEXT REDACTED BY THE COURT]
[TEXT REDACTED BY THE COURT]	[TEXT REDACTED BY THE COURT]	[TEXT REDACTED BY THE COURT]	[TEXT REDACTED BY THE COURT]	[TEXT REDACTED BY THE COURT]
[TEXT REDACTED BY THE COURT]	[TEXT REDACTED BY THE COURT]	[TEXT REDACTED BY THE COURT]	[TEXT REDACTED BY THE COURT]	[TEXT REDACTED BY THE COURT]
[TEXT REDACTED BY THE COURT]	[TEXT REDACTED BY THE COURT]	[TEXT REDACTED BY THE COURT]	[TEXT REDACTED BY THE COURT]	[TEXT REDACTED BY THE COURT]
Cosette	[TEXT REDACTED BY THE COURT]	[TEXT REDACTED BY THE COURT]	[TEXT REDACTED BY THE COURT]	[TEXT REDACTED BY THE COURT]
Independent Government Cost Estimate (IGCE)	$7.49	$6.49	$631,821.14	$3,159,105.70
Procurement on the Open Market[9]	$21.26	$21.50	$1,807,936.12	$9,039,680.60

9 As noted, the Government may procure prasugrel via several methods. First, it can order the drug via an FSS contract, which in this case would mean the VA would order the drug from Cosette at a price similar to Cosette's offer. AR 5 (stating FSS prices of $336.33 and $336.51 for 10mg and 5mg packages from Cosette, respectively). Second, it can award a national contract to procure the drug, as it seeks to do via the present Solicitation. Third, it can procure prasugrel via the open market through the McKesson Connect database, which is the VA's vendor for open market purchases. AR 20. The VA used the prices listed in the McKesson Connect to arrive at an open market pricing figure. AR 913.

AR 875, 877, 880, 894.

Not only was Cosette's [**11] price markedly higher than the other offers, but it was also orders of magnitude higher than both the IGCE price and the price of procurement on the open market. Cosette contends there is such a significant price discrepancy because Cosette offered a branded version of prasugrel while the others offered a generic version.[10] AR 893, 889.

B. The Competitive Range Determination

On November 12, 2024, the contracting officer (CO) made a competitive range determination after evaluating the final revised proposals for the five remaining offerors. AR 911. The Determination states that a competitive range was necessary "[d]ue to the urgent need to award a contract" for prasugrel. AR 1030. The CO determined that the four offers besides Cosette represented the "lowest priced proposals . . . in a similar range," and excluded Cosette from the competitive range. AR 1029-30. Specifically, the CO found that the difference between the lowest price and the fourth lowest price offer was [TEXT REDACTED BY THE COURT], while the difference between the fourth lowest price and the fifth lowest price offer (Cosette) was [TEXT REDACTED BY THE COURT]. AR 1029. According to the VA, such an extraordinary pricing [**12] gap was "too significant to warrant keeping" Cosette's offer in the competitive range. *Id.* With Cosette excluded, only four proposals remained, none of which offered TAA-compliant products. On November 26, 2024, Cosette received a letter notifying it of its exclusion. AR 868-90.

[*750] C. The Non-Availability Determination

On December 20, 2024, prior to awarding the contract, the VA issued a "Determination of Non-Availability." AR 887. The Determination acknowledges that if a TAA-compliant, technically

10 The Government determined that the therapeutic factor between a branded version of prasugrel and the different versions of the generics is the same. AR 13. Accordingly, apart from price, it is of no relevance to the present dispute that Cosette offered the branded version of prasugrel. Id.

acceptable offer is received, the agency must award to that offeror. AR 890. However, the Determination stated that the VA did not include Cosette's offer—the only TAA-compliant offer—in the competitive range because its pricing was significantly higher than the other offers. *Id.* Therefore, according to the VA, the agency did not receive a "competitively priced" TAA-compliant offer in response to the Solicitation, thus permitting the VA to make the award to a non-TAA-compliant offeror. AR 891. Despite referencing the concept of a fair and reasonable price, the Non-Availability Determination did not expressly state that Cosette's prices were unfair or unreasonable. *See* AR 887-891.

D. The Source [**13] **Selection Determination**

The VA evaluated the remaining four proposals. AR 912. First, it assessed the proposals' technical acceptability, rejecting one offeror, Success Storage, for not meeting the Solicitation requirements. *Id.* Three offerors remained. Of those three offerors, Golden State offered the lowest price at $2,445,241.70. *See* AR 913. As the lowest priced technically acceptable offer, Golden State was the presumptive awardee. Before making the award, the VA analyzed whether Golden State's offer was a fair and reasonable price. *See* AR 914. The VA compared Golden State's price to (i) the other offers, (ii) the prices for procuring prasugrel on FSS and open market, and (iii) the IGCE, which tracked the prices historically paid for the drug. AR 914. As Golden State's prices were significantly lower than its comparators, the VA found that Golden State's prices were fair and reasonable. *Id.* Accordingly, on January 27, 2025, the VA made its award to Golden State.[11] AR 919.

V. Procedural History

11 Cosette wrote the VA on January 24, 2025, after the Source Selection Determination, raising concerns that the VA had disregarded evidence that the other offerors were providing non-TAA-compliant products. AR 1014, 1017-18. The VA responded to Cosette that the VA had addressed and considered all of Cosette's concerns during source selection. AR 1024.

Two weeks later, on February 14, 2025, Cosette filed its Complaint challenging the VA's award to Golden State.[12] ECF No.1 (Complaint or Compl.). On March 10, 2025, pursuant to this Court's Scheduling [**14] Order, the VA made the AR available for review.[13] ECF No. 19 (Scheduling Order, dated Nov. 22, 2024); ECF No. 20 (Notice). The VA subsequently amended the AR on May 1, 2025 to add two additional documents. *See* ECF No. 32. On March 28, 2025, Plaintiff filed its Motion for Judgment on the Administrative Record (MJAR)[14] and Defendant filed its MJAR and Response to Plaintiff's MJAR on April 22, 2025.[15] On May 13, 2025, Plaintiff filed its Response and Reply[16] and Defendant filed its Reply on May 27, 2025.[17] On June 25, 2025, the Court conducted oral argument. *See* Transcript, dated June 25, 2025 (ECF No. 41) (OA Tr.). Accordingly, the parties' Cross-MJARs are fully briefed and ripe for review.[18]

[*751] **APPLICABLE LEGAL STANDARDS**

The *Tucker Act, 28 U.S.C. § 1491(b)(1)*, as amended by the Administrative Dispute Resolution Act of 1996, provides this Court with jurisdiction over bid protests. *See* *Eco Tour Adventures, Inc. v. United States, 114 Fed. Cl. 6, 41 (2013)* ("In [enacting the ADRA], Congress . . . provided this court with a new, and independent, basis for bid protest jurisdiction[.]"). This Court reviews post-award bid protests in two steps. *First*, the Court analyzes the procurement under the Administrative Procedure Act (APA) standard to determine whether the Agency "acted without rational basis or contrary to law when evaluating the bids and awarding [**15] the contract." *Bannum, Inc. v. United States, 404 F.3d 1346, 1351 (Fed. Cir. 2005)*; *28 U.S.C. § 1491(b)(4)*; *see* *Oak Grove Techs., LLC v. United States, 116 F.4th 1364, 1374 (Fed. Cir. 2024)*. *Second*, the Court considers whether the alleged errors prejudiced the protestor. *DynCorp Int'l, LLC v. United States, 10 F.4th 1300, 1308 (Fed. Cir. 2021)* (citing *Bannum, 404 F.3d at 1351*).

12 Golden State did not move to intervene in this action.
13 The Government agreed to voluntarily stay performance until November 2, 2025. ECF No. 39.
14 Plaintiff's Motion for Judgment on the Administrative Record (ECF No. 27) (Pl. MJAR).
15 Defendant's Cross-Motion for Judgment on the Administrative Record and Response in Opposition to Plaintiff's Motion for Judgment on the Administrative Record (ECF No. 29) (Def. MJAR).
16 Plaintiff's Response in Opposition to Defendant's Cross-motion For Judgment on the Administrative Record and Reply in Support of Plaintiff's Motion for Judgment on the Administrative Record (ECF No. 33) (Pl. Resp.).
17 Reply to Plaintiff's Response in Opposition to Defendant's Cross-Motion for Judgment on the Administrative Record (ECF No. 34) (Def. Reply).
18 On August 22, 2025, Cosette filed an unopposed motion for the Court to take judicial notice of a recent Court of Federal Claims decision, Davinci Co., LLC v. United States, 178 Fed. Cl. 63, 2025 WL 2254550, at *1 (Fed. Cl. 2025). ECF No. 42. The Court grants this motion.

At the first step, the APA requires a reviewing court to determine whether an agency's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *5 U.S.C. § 706(2)(A)*; *see* *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 284, 95 S. Ct. 438, 42 L. Ed. 2d 447 (1974)*. Thus, to prevail in a post-award bid protest, a plaintiff must demonstrate that "(1) 'the procurement official's decision lacked a rational basis' or (2) 'the procurement procedure involved a violation of regulation or procedure.'" *DynCorp, 10 F.4th at 1308* (quoting *WellPoint Mil. Care Corp. v. United States, 953 F.3d 1373, 1377 (Fed. Cir. 2020)*). When a disappointed bidder alleges a violation of regulation or procedure, the Court reviews whether there was "a clear and prejudicial violation of applicable statutes or regulations." *Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1333 (Fed. Cir. 2001)* (quoting *Kentron Hawaii, Ltd v. Warner, 480 F.2d 1166, 1169, 156 U.S. App. D.C. 274 (D.C. Cir. 1973)*). When a bidder alleges that the procurement official's decision lacked a rational basis, the Court reviews "whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion." *Dell Fed. Sys., L.P. v. United States, 906 F.3d 982, 992 (Fed. Cir. 2018)* (quoting *Banknote Corp. of Am., Inc. v. United States, 365 F.3d 1345, 1351 (Fed. Cir. 2004)*).

At step two, this Court evaluates the factual question of prejudice. *Sys. Stud. & Simulation, Inc. v. United States, 22 F.4th 994, 998 (Fed. Cir. 2021)* (citing *WellPoint Mil., 953 F.3d at 1377*). A protestor establishes prejudice by showing "that there was a 'substantial chance' it would have received the contract award but for [**16] that error." *Sys. Stud. & Simulation, 22 F.4th at 998* (quoting *Bannum, 404 F.3d at 1353*). In other words, the disappointed bidder must have been "within the zone of active consideration." *Colonial Press Int'l, Inc. v. United States, 788 F.3d 1350, 1355 (Fed. Cir. 2015)* (quoting *Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996)*); *see* *C.A.C.I., Inc.-Fed. v. United States, 719 F.2d 1567, 1574-75 (Fed. Cir. 1983)*.

In the Court of Federal Claims, bid protests are adjudicated under *Rule 52.1(c)*, which provides an expedited trial on a "paper record, allowing fact-finding by the trial court." *Rule 52.1(c) of the Rules of the United States Court of Federal Claims* (Rule(s)); *Bannum, 404 F.3d at 1356* (referencing *Rule 56.1*, which was replaced by *Rule 52.1(c)*). Unlike at summary judgment, genuine disputes of material fact do not preclude the Court from granting a motion for judgment on the administrative record. *Bannum, 404 F.3d at 1357*. This Court is empowered to provide any relief, including declaratory or injunctive relief, that it deems proper. *28 U.S.C. § 1491(b)(2)*; *Oak Grove, 116 F.4th at 1375*.

DISCUSSION

Both parties agree that the TAA, its implementing regulations, and the Solicitation generally bar the VA from awarding a contract to a non-TAA-compliant source. Pl. MJAR at 15-16; Def. MJAR at 19-20. Despite receiving a TAA-compliant offer from Cosette, however, the VA awarded the contract to Golden State, which did not submit a TAA-compliant [*752] offer. Cosette contends such an award was unlawful, because applicable law required the VA to award to a TAA-compliant source, leaving only Cosette eligible. Compl. ¶¶ 54-58; Pl. MJAR at 17. Cosette notes that apart [**17] from the Solicitation, the Government can also lawfully obtain the drug via the FSS contract or on the open market. Pl. MJAR at 36. Defendant contends that the award was permissible because the VA deemed Cosette's price not fair and reasonable, as it was substantially higher than the non-TAA-compliant offers. Def. MJAR at 19-21. Cosette counters that such a price comparison was legally improper and, in any event, that its price was fair and reasonable as a matter of law. Pl. Resp. at 18-22.

As detailed below, the Court begins its analysis with the text and structure of the TAA and concludes that the TAA does not permit Cosette's exclusion for price unreasonableness based on comparisons to non-TAA-compliant offerors, even within a competitive range determination. Next, the Court examines *FAR 25.502* and concludes that it does not disturb the Court's interpretation of the statute. The Court further finds that the establishment of a competitive range was arbitrary and capricious. Finally, the Court rejects Cosette's argument that, as the remaining TAA-compliant offer, the VA must deem Cosette's exorbitant offer price fair and reasonable as a matter of law.

I. The VA's Determination Was Contrary to [**18] the TAA

The Supreme Court has made clear that courts must "exercise their independent judgment in deciding whether an agency has acted within its statutory authority" and "may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412-13, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024)*. To be sure, in some cases "the statute's meaning may well be that the agency is authorized to exercise a degree of discretion," when, for instance, the statute leaves the agency "with flexibility." *Id. at 394-95* (quoting *Michigan v. EPA, 576 U.S. 743, 752, 135 S. Ct. 2699, 192 L. Ed. 2d 674 (2015)*). However, even in those cases, "the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." *Id.* "The court fulfills that role by recognizing constitutional delegations, 'fixing the boundaries of the delegated authority,' . . . and ensuring the agency has engaged in 'reasoned decisionmaking' within those boundaries." *Id.* (citation modified). Thus, while the phrase "insufficient to fulfill the requirements of the United States Government" leaves the VA flexibility to define its operational needs, whether the TAA prohibits the VA from defining "insufficient" via a comparison to non-TAA-compliant offers is a legal [**19] question for the Court to resolve.

A. The VA's Price Reasonableness Determination Does Not Fall Under the TAA's Exception for Insufficiency

The parties agree that the TAA governs this procurement and generally prohibits the Government from awarding contracts to non-TAA-compliant sources. *See* Def. MJAR at 20; Pl. MJAR at 7. Despite receiving a TAA-compliant offer from Cosette, however, the VA awarded the contract to Golden State, which provided a non-TAA-compliant offer. Defendant contends that this award was nonetheless permissible under the TAA's second exception,[19] which permits an

19 In its briefing, Defendant states that the TAA is not a categorical bar to awarding a contract to a non-TAA-compliant offeror because the TAA contains two exceptions. Def. MJAR at 20; Def. Reply at 11. Defendant did not point to which exception it believed the procurement fell into.

award to a non-compliant offeror when a TAA-compliant offer is "insufficient to fulfill the requirements of the United States Government." 19 U.S.C. § 2512(a)(2). According to Defendant, [*753] Cosette's offer was insufficient because its price was not "fair and reasonable," and it is a requirement of the Government to only award a contract to an offeror whose price is fair and reasonable.[20] *See* Def. MJAR at 21, 25 (citing FAR 15.402). However, the VA's determination[21] that Cosette's price was not fair and reasonable rested on a comparison between Cosette's TAA-compliant offer and non-TAA-compliant sources.[22] *See* AR 890, 1029. Cosette argues that, under [**20] the TAA, an offeror's price cannot be deemed unreasonable—and therefore insufficient—based on such a comparison to non-TAA-compliant offers, characterizing it as an "apples-to-oranges" analysis. *See* Pl. MJAR at 18-19; OA Tr. 10:14-18. Defendant does not directly engage with this point and instead side-steps the issue by insisting that the CO properly applied the FAR in finding Cosette's price unreasonable. *See* Def. MJAR at 25-26.

The Court agrees with Cosette. As explained further below, the TAA does not permit an agency to declare a TAA-compliant offer "insufficient to fulfill the requirements of the United States" simply because its price compares unfavorably to non-TAA-compliant alternatives.[23] Absent some other independent basis for insufficiency, the statute's prohibition on awarding to a non-TAA-compliant offer remained in force, and the VA's award here contravened that bar.

In determining this question, the Court must begin with the text of the statute. *See* Jimenez v. Quarterman, 555 U.S. 113, 118, 129 S. Ct. 681, 172 L. Ed. 2d 475 (2009); Lamie v. United States Tr., 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004); Strategic Hous. Fin.

When asked at oral argument, Defendant conceded that the first exception was inapplicable because Cosette's offer was received by the VA and FAR 25.403(c)—the applicable implementing rule—describes the first exception as applying when no TAA-compliant offers are "received," and thus the second exception was the relevant one. See OA Tr. 43:15-44:7. The AR further confirms that Cosette's TAA-compliant offer was received. See e.g., AR at 889 ("Six offers were received; one of which (from [Cosette]) contained U.S.-made products."); AR 896 (listing Cosette's final proposal revision as having been "received").

20 Cosette does not dispute that the VA may evaluate its price for reasonableness; it argues instead that the VA erred by performing that analysis before excluding non-TAA-compliant offers. See Pl. MJAR at 18-19.

21 It is unclear from the record if such a determination was in fact made. See infra, n.27.

22 In the Administrative Record, the CO compares Cosette's price to the prices of the other, non-TAA compliant offerors. AR 1029. He also compares Cosette's price to the ICGE. Id. The VA based its IGCE, however, on Golden State's incumbent contract price and as such both comparisons rely on the price of non-TAA-compliant products. AR 888.

23 To be clear, the Court does not hold that agencies are barred from conducting price reasonableness analyses of TAA-compliant offers. It holds only that if a TAA-compliant offer's price is deemed unreasonable by comparison to non-TAA prices, that determination alone cannot render the offer "insufficient" under the TAA.

Corp. of Travis Cty. v. United States, 608 F.3d 1317, 1323 (Fed. Cir. 2010). "If the statutory language is plain, [the Court] must enforce it according to its terms." King v. Burwell, 576 U.S. 473, 474, 135 S. Ct. 2480, 192 L. Ed. 2d 483 (2015). When considering whether the language is plain, "[the Court] must read the words in their context and [**21] with a view to their place in the overall statutory scheme." *Id.* (quotations omitted); *see also* West Virginia v. Env't Prot. Agency, 597 U.S. 697, 721, 142 S. Ct. 2587, 213 L. Ed. 2d 896 (2022).

Text and structure point to a clear answer. "The meaning of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."). Syngenta Crop Prot., LLC v. Willowood, LLC, 944 F.3d 1344, 1359 (Fed. Cir. 2019) (internal quotations omitted). That context "always includes evident purpose," which "always includes effectiveness." Transpacific Steel LLC v. United States, 4 F.4th 1306, 1323 (Fed. Cir. 2021) (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* § 4, at 63 (2012)). The TAA's express aim is to "encourage additional countries to become parties to" the WTO GPA; Congress pursued that aim by imposing a categorical bar on the procurement of non-TAA-compliant products. 19 U.S.C. § 2512(a)(1). That prohibition has bite precisely when non-compliant offers appear cheaper or more attractive than compliant ones, because those are the circumstances in which the temptation to procure non-compliant offers would otherwise arise. Necessarily, such a prohibition will sometimes require the Government to accept a worse financial deal than would be available if the TAA did not exist. However, Congress accepted that tradeoff in service of broader [**22] market-access objectives, and it is not for the Court to [*754] revisit that policy choice. *See* Rodriguez v. United States, 480 U.S. 522, 526, 107 S. Ct. 1391, 94 L. Ed. 2d 533 (1987) (per curiam) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice.").

Congress paired the bar with two exceptions, one of which arises when TAA-compliant offers "are insufficient to fulfill the requirements of the United States Government." 19 U.S.C. § 2512(a)(2)(B). By its terms, Section 2512(a)(2)(B) does not apply if a TAA-compliant offer fulfills the requirements. The plain language does not invite a comparison against non-TAA-compliant proposals, which would allow a buyer to avoid *Section 2512(a)(1)*'s prohibition whenever non-compliant products cost less. If Congress had meant to permit that kind of analysis, it knew how to say so: in fact, Congress created just that structure in the BAA's express cost exception, allowing agencies to bypass the BAA's preference when domestic products are too expensive. *See* *41 U.S.C. § 8302(a)(1)*; *supra* n.3. By contrast, the TAA, which directly relates to the BAA, contains no such carveout. *See* *FAR 25.402(a)(1)* (indicating that "[t]he Trade Agreements Act . . . provides the authority for the President to waive the Buy American statute). Instead, in designing the [**23] TAA, Congress paired its categorical prohibition with a narrower, requirement-focused exception. *See* *Caddell v. Dep't of Just., 96 F.3d 1367, 1371 (Fed. Cir. 1996)* ("Congress easily could have" drafted the statute to include certain language, and the court would not read into the statute what Congress chose to omit); *see also* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* § 8 at 93 (2012) (courts should not "elaborate unprovided-for exceptions to a text . . . 'If the Congress had intended to provide additional exceptions, it would have done so in clear language'") (citing *Petteys v. Butler, 367 F.2d 528, 538 (8th Cir. 1966)* (Blackmun, J., dissenting)). Thus, a TAA-compliant offer is not rendered insufficient under the statute merely because it carries a higher price than non-TAA-compliant offers.

Defendant nonetheless argues that it properly determined that Cosette's price was insufficient by recasting its actions as a price reasonableness determination. Def. MJAR at 20-21. Defendant asserts that, as *FAR 15.402(a)* directs agencies not to pay more than a fair and reasonable price, the VA's comparison of Cosette's price to non-TAA prices simply applied the TAA's "insufficient" exception, rather than creating a new one. Def. MJAR at 25; OA Tr. 43:24-44:6. The problem is not that the agency followed the direction to determine price reasonableness, but that the determination [**24] compared TAA-compliant against non-TAA-compliant offers. By Defendant's standard, any time a TAA-compliant offer is less attractive than a non-TAA-compliant one, the agency could simply relabel that disadvantage as a "failure to fulfill the requirements," and thereby circumvent the statutory prohibition. This recasting of the statute would allow the "sufficiency" of a TAA-compliant offer to hinge on the relative attractiveness of non-TAA-compliant offers and reintroduce competition from which Congress had deliberately shielded TAA-compliant offers.

At bottom, using FAR 15.402 to expand the term "insufficiency" in the TAA would result in the exception consuming the rule. The prohibition against procuring non-TAA-compliant products matters most when non-TAA-compliant offers look better in terms of price or features than TAA-compliant ones; those are the very moments when the bar is meant to apply. To allow agencies to reintroduce those disfavored offers as the benchmark of sufficiency would mean the statute's prohibition collapses precisely when it is intended to be strongest, contrary to the "plain logic" of the statute.[24] *See* *Env't Prot. [*755] Agency v. EME Homer City Generation, L.P., 572 U.S. 489, 525, 134 S. Ct. 1584, 188 L. Ed. 2d 775 (2014)* (Scalia, J., dissenting). That is the definition of an exception swallowing [**25] the rule, a result Congress "is unlikely to intend." *Env't Prot. Agency v. Calumet Shreveport Ref., 605 U.S. 627, 145 S. Ct. 1735, 1751, 222 L. Ed. 2d 230 (2025)*; *Smith & Wesson Brands v. Estados Unidos Mexicanos, 605 U.S. 280, 299, 145 S. Ct. 1556, 221 L. Ed. 2d 910 (2025)* (holding that giving an exception "such a capacious" reading, would swallow most of the rule, which is not what Congress intended). Instead, the Court takes a similar view to the court in *Davinci Co., LLC v. United States*: the FAR cannot "enlarge th[e TAA's] statutory command," *178 Fed. Cl. 63, 70-71 (2025)*.

Recognizing the breadth of its proposed exception, Defendant suggested at oral argument that the statute may permit an "insufficiency" finding only when a TAA-compliant offer is "exorbitantly" higher than non-TAA-compliant prices. *See* OA Tr. 42:10-24. That proposed standard does not exist in the statute. Indeed, the plain text of *Section 2512(a)(2)(B)* contains no such qualifier, and the Court cannot red pen exceptions into the statute that Congress declined

24 While not precedential, the Court notes that multiple GAO decisions reinforce the same rule against distorted benchmarks. For example, the GAO has repeatedly held that when conducting price-reasonableness analyses, agencies may not rely on prices skewed by unacceptable or ineligible offers. See Lifecycle Constr. Servs., LLC, B-406907, 2012 U.S. Comp. Gen. LEXIS 271, 2012 WL 5194140, at *6 (Comp. Gen. Sept. 27, 2012); Kilda Grp., LLC, B-409144, 2014 U.S. Comp. Gen. LEXIS 87, 2014 WL 1338281, at *4 (Comp. Gen. Jan. 29, 2014); Root9B, LLC, B-417801, 2019 U.S. Comp. Gen. LEXIS 431, 2019 WL 7759700, at *7 n.6 (Comp. Gen. Nov. 4, 2019). Most relevant here, the GAO rejected the use of such "invalid benchmarks" in a TAA procurement where the Government declined the only technically acceptable, TAA-compliant offer as unreasonable based on (1) a price estimate derived from open-market prices that included non-TAA-compliant products and (2) a comparison to a technically unacceptable offer. AvKARE, Inc., B-417250, 2019 U.S. Comp. Gen. LEXIS 214, 2019 WL 3202586, at *3 (Comp. Gen. Apr. 18, 2019).

to enact. *See* *Freytag v. Comm'r, 501 U.S. 868, 874, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991)* (quoting *Hallstrom v. Tillamook County, 493 U.S. 20, 27, 110 S. Ct. 304, 107 L. Ed. 2d 237 (1989)*). As noted above, Congress could have written a comparative-price provision into the TAA, but it did not, and accordingly the term "insufficient to fulfill the requirements" cannot be repurposed, even where Defendant acts to preserve the public fisc. *See* *Maracich v. Spears, 570 U.S. 48, 60, 133 S. Ct. 2191, 186 L. Ed. 2d 275 (2013)* ("Unless commanded by the text, however, [] exceptions ought not operate to the farthest reach of their linguistic possibilities."). Congress [**26] did not intend to permit price disparities—whether large or small—to justify procurement of non-compliant products.[25] *See* *Turtle Island Restoration Network v. Evans, 284 F.3d 1282, 1296 (Fed. Cir. 2002)* ("When Congress omits from a statute a provision found in similar statutes, the omission is typically thought deliberate.").

This understanding underscores why Defendant's construction cannot be sustained. As discussed, the TAA's prohibition matters precisely when a non-TAA-compliant offer appears cheaper or more attractive than a compliant one, and Congress accepted that tradeoff as part of the statute's design. Permitting agencies to treat that comparative judgment as a basis for "insufficiency"—whether through a straightforward comparison or an "exorbitant" gap—would amount to judicial engraftment of the statute and reintroduce non-TAA-compliant offers into the very analysis from which Congress deliberately excluded them. That outcome is inconsistent with the statutory scheme and, as noted, with the settled principle that exceptions must not be read to swallow the rule.

Such a construction does not leave the Government helpless in the face of extraordinarily expensive TAA-compliant offers. First, the TAA itself authorizes agency heads to waive, subject [**27] to interagency review, the [*756] TAA's prohibition "on a case-by-case basis

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25 Defendant contends that the BAA's unreasonable-price exception should not inform the interpretation of the TAA. Def. Reply at 7. Its only justification for this position is that the two statutes pursue different policy goals: the BAA balances support for domestic industry with cost control, while the TAA, in Defendant's view, seeks only the latter—reducing costs regardless of whether goods are domestic or from designated partners. Id. Accordingly, Defendant claims that it was unnecessary to include an explicit price exception in the TAA. Id. That position, however, is contradicted by the statute itself. The TAA makes clear that its central purpose is "to encourage additional countries to become parties to the Agreement and to provide appropriate reciprocal competitive government procurement opportunities to United States products." 19 U.S.C. § 2512. Like the BAA, which deliberately privileged domestic suppliers over lower prices, the TAA prioritizes reciprocity even at higher cost. See id. Because Defendant identifies no other distinction between the statutes, and its sole rationale rests on a mischaracterization of the TAA's aim, Defendant's effort to discount the express unreasonable-price exception in the BAA fails.

when in the national interest." *19 U.S.C. § 2512(b)(2)*. The VA has not done so here. Thus, faced with the prospect of being forced to procure a much more expensive TAA-compliant product, the VA could attempt to waive the TAA's prohibition if that is "in the national interest." *Id.* Second, as Cosette acknowledges, the VA could evaluate the reasonableness of Cosette's offer "in a competitive range of one," without comparing it to the non-TAA-compliant offers. OA Tr. 13:8-12. Such an evaluation may include factors listed in FAR 15.404(1)(b)(2), so long as non-TAA-compliant offers are not relied upon for comparison. Pl. MJAR at 18-19. Only then could the Government decide whether to accept Cosette's offer. OA Tr. 13:15-16. Finally, as Cosette acknowledges, the Government can opt to cancel the Solicitation, and "can always go on to the open market" to procure prasugrel.[26] OA Tr. 13:15-16; 14:5-6; *see* Def. Reply at 19-20 (acknowledging agency could cancel solicitation and purchase drug elsewhere).

B. The VA's Use of a Competitive Range Determination to Exclude Cosette Runs Contrary to the TAA

Throughout its briefing, Defendant continually seeks to justify its decision [**28] to exclude Cosette by asserting that Cosette's price was rejected from the competitive range as not fair and reasonable. Def. MJAR at 21, 22-23; Def. Reply at 15-18.[27] It argues that the competitive range is a price evaluation tactic within the CO's discretion, and that nothing bars Cosette's elimination from the competitive range prior to an evaluation of TAA compliance. Def. Reply at 15. The Court holds that the use of a competitive range does not allow the VA to ignore the TAA's threshold bar here.

26 Additionally, it is undisputed that the VA may also procure prasugrel on the FSS. OA Tr. 16:1-3 (Plaintiff: "there is already availability on the FSS"); Def. MJAR at 9 ("prasugrel tablets are available in the branded form under a [FSS] contract").

27 It is not clear from the record that the Defendant ever made such a determination outright. In its Non-Availability Determination, the VA determined that "for the purpose of this procurement, no competitively priced offers of [TAA-compliant] end-products were received in response to the subject Solicitation for Prasugrel Tablets in sufficient quantity, of satisfactory quality or in the required form, to meet Agency requirements." AR 891 (emphasis added). Labelling Cosette's offer as not "competitively priced" is not a clear determination that the offer was not "fair and reasonable." Id. Further, while the record alludes to the idea that Cosette's price was unreasonable, it never states so explicitly. See AR 890 (discussing price reasonableness factors but not officially making a price reasonableness determination); AR 1028 (describing discussions with Cosette where Defendant warned it that its price "may not be" fair and reasonable). Finally, Defendant stated throughout its briefing that a price reasonableness determination was made, see e.g., Def. MJAR at 28, but at oral argument, counsel for Defendant disavowed that position and agreed that the VA did not conduct a price reasonableness determination for Cosette's offer. OA Tr. 41:1-13.

A competitive range determination serves to narrow the field of offers and to facilitate meaningful discussions aimed at refining proposals and improving value. *See Birch & Davis Int'l, 4 F.3d at 973-74*; *Scott Techs., Inc. v. United States, 168 Fed. Cl. 705, 719 (2023)*. This process supports efficiency by focusing agency resources on viable proposals. *See Quantico Tactical Inc. v. United States, 150 Fed. Cl. 566, 573 (2020)*, *aff'd*, *835 F. App'x 598 (Fed. Cir. 2021)*. "A contracting officer has broad discretion in determining [the] competitive range, and such decisions are not disturbed unless clearly unreasonable." *Birch & Davis Int'l, Inc. v. Christopher, 4 F.3d 970, 973 (Fed. Cir. 1993)*. However, that discretion does not allow the CO to suspend the TAA's applicability to a procurement: excluding an offer from the competitive range is not the same as finding it "insufficient to fulfill the requirements of the United States Government" [**29] so as to permit awarding of a contract to a non-TAA-compliant offeror. *19 U.S.C. § 2512(a)(2)(B)*. The record reveals that the CO did not exclude Cosette from the competitive range because its offer was insufficient to fulfill the Solicitation's requirements, but rather because of the "significant gap in pricing" between Cosette and non-TAA-compliant offers. *See* AR 890, 895; *see also* Def. Reply at 17 ("In the [CO]'s judgment, the price difference between Cosette's price and the other prices was too significant to warrant including [*757] Cosette's offer in the competitive range.").

To treat exclusion from a competitive range as automatically meeting the "insufficiency" exception would impermissibly expand the scope of the exception, permitting agencies to use a competitive range determination to evade the prohibitions of the TAA whenever a TAA-compliant offer was less attractive relative to its non-TAA-compliant rivals. Again, such judicial engraftment to the plain text is impermissible. *King v. Burwell, 576 U.S. 473, 486, 135 S. Ct. 2480, 192 L. Ed. 2d 483 (2015)* ("If the statutory language is plain, [the Court] must enforce it according to its terms."). Furthermore, unlike its price reasonableness argument, reflected above, Defendant does not directly argue that a failure to be included in [**30] the competitive range is equivalent to a failure to meet a requirement of the Solicitation. *Contrast* Def. MJAR 22-26, *with supra* I.A *and* OA Tr. 43:24-44:6. Accordingly, this premature Competitive Range Determination cannot be the basis for awarding the contract to a non-TAA-compliant offeror.

II. *FAR 25.502* Does Not Resolve This Dispute

Both parties devote briefing to provisions of *FAR 25.502*, each contending that the regulation mandates a result in their favor. *See* Pl. Resp. at 7-9; Def. Reply at 12-14. This section of the FAR guides contracting officers through the process of evaluating domestic and foreign offers under several regulatory schemes that could apply, such as the TAA and the BAA rules. *See* *FAR 25.502*. Cosette maintains that *FAR 25.502* required the VA to eliminate non-TAA-compliant offers entirely before any assessment of Cosette's price reasonableness, and then to make an award to Cosette. Pl. Resp. at 7. The Government responds that the contracting officer followed the FAR's procedures by evaluating Cosette's price in comparison to non-TAA-compliant offers. Def. Reply at 14-15. Neither argument is persuasive. *FAR 25.502* does not mandate upfront elimination of non-TAA-compliant offers or an automatic award to Cosette, [**31] nor does it allow the VA to evade the requirements of the TAA.

FAR 25.502 establishes the evaluation framework for foreign acquisitions. *Subsection (a)* prescribes a sequence: first, eliminate offers that are "unacceptable for reasons other than price," such as nonresponsive proposals, suspended or debarred offerors, or prohibited sources, *FAR 25.502(a)(1)*; next, rank the remaining offers by price, *FAR 25.502(a)(2)*; and finally, if award is based on factors beyond price, apply those factors and use the "evaluated price" in the best-value determination, *FAR 25.502(a)(3)*. For procurements covered by the WTO GPA, *FAR 25.502(b)* adds further steps: contracting officers must "consider only" compliant offers unless none are received, *FAR 25.502(b)(1)*, and, if the agency gives the same consideration given eligible offers to offers of U.S.-made end products that are not domestic end products, award on the low offer; otherwise, evaluate according to agency procedures. *FAR 25.502(b)(2)*. If no compliant offers exist, the agency must issue a nonavailability determination before awarding to a noncompliant source, *FAR 25.502(b)(3)*.

Cosette's first argument rests on *FAR 25.502(a)(1)*. It contends that non-TAA-compliant offers must be deemed "nonresponsive" and eliminated immediately. Pl. Resp. at 7. As Defendant correctly notes, however, "nonresponsive" [**32] is a term of art referencing proposals that fail to meet material solicitation requirements. Def. Reply at 12; *see* *Excel Mfg., Ltd. v. United States, 111 Fed. Cl. 800, 806 n.3 (2013)*; *see also* *Asset Prot. & Sec. Servs., L.P. v. United States, 5 F.4th 1361, 1365 (Fed. Cir. 2021)* (holding a proposal nonresponsive because it "included information that expressly contradicted the solicitation's material terms"). The offer of a TAA-complaint product was not a mandatory or material requirement here because the TAA, the FAR, and the Solicitation itself all contemplate the possibility of award to non-TAA-compliant sources under specified statutory exceptions and conditions. *See* *19 U.S.C. § 2512(a)(2)*; *FAR 25.403(c)*; AR 108. Further, reading "nonresponsive" to encompass non-compliance with the TAA would also render *Subsection (b) of FAR 25.502* superfluous, which runs contrary to the rule against surplusage. *See* *Nat'l Ass'n of Home Builders [*758] v. Defs. of Wildlife, 551 U.S. 644, 669, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007)* (cautioning against reading regulations in a manner that makes certain provisions superfluous). Indeed, *Section (b)(3)* presumes that non-TAA-compliant offers remain available. *See* *FAR 25.502(b)(3)*. Yet, if non-TAA-compliant offers were categorically "nonresponsive" at the outset under *FAR 25.502(a)(1)*, then no non-compliant offers would reach the steps in *FAR 25.502(b)*. Therefore, *FAR 25.502(a)(1)* does not dictate that the agency must immediately eliminate non-TAA-compliant offers as "unresponsive."

Cosette next asserts that *FAR 25.502(b) (1)* bars consideration of non-TAA-compliant offers [**33] when a TAA-compliant one has been received, and (2) mandates that the VA must award the contract to Cosette as the lowest-price offer still within consideration. Pl. MJAR at 16-19; Pl. Resp. at 7, 11-13. The FAR directs the agency to "[c]onsider only" TAA-compliant offers at *(b)(1)*; then "award on the low offer" according to the circumstances outlined in *(b)(2)* and *(b)(3)*. *See* *FAR 25.502(b)(1)-(b)(3)*. *Subsection (b)* does not eliminate the government's ability to conduct an evaluation of a TAA-compliant offer for reasonableness or sufficiency before awarding. It merely ensures that the agency must first evaluate TAA-compliant offers without reference to non-TAA-compliant offers before the agency awards the contract.

Defendant's proposed application of the FAR fares no better. Defendant contends that the contracting officer complied with *FAR 25.502(a)* by first eliminating one nonresponsive offer (Cosette's), then ranking proposals by price, and finally applying *FAR 25.502(a)(3)*. Def. Reply at 14-15 (citing AR 895, 896). According to Defendant, the instruction in *FAR 25.502(a)(3)* to "use the evaluated price" to determine the best value to the Government meant that the contracting officer was required to conduct a general price evaluation considering both TAA-compliant and non-compliant [**34] offers, which the VA did here. *Id.* at 15. That reasoning suffers from two flaws. First, "evaluated price" in *FAR 25.502(a)(3)* does not, as Defendant suggests, direct a price reasonableness analysis before evaluating offeror's TAA compliance. Rather, "evaluated price" is a term of art, referencing a domestic offer's price as adjusted under the BAA—for example, by adding the 20-30% evaluation factor. *See* *FAR 25.106(b)* ("The price of the domestic offer is reasonable if it does not exceed the evaluated price of the low offer after addition of the appropriate evaluation factor."); *see also* *FAR 25.504-1* (explaining that the evaluated price of offers is the price of the offer plus a 20 or 30% evaluation factor when the BAA applies). Defendant therefore cannot rely on the term "evaluated price" to support its contention that the FAR required the kind of price reasonableness analysis undertaken here. Second, *FAR 25.502(a)(3)* only applies "[if] the solicitation specifies award on the basis of factors in addition to cost or price." This Solicitation, however, was a lowest-price, technically acceptable procurement. AR 99. Accordingly, sub-*subsection (a)(3)* is inapplicable.

In sum, neither party's *FAR 25.502*-based arguments resolve this case. The regulation neither compels the [**35] categorical exclusion of non-TAA-compliant offers as a first step, as Cosette urges, nor authorizes the type of price reasonableness comparison between TAA-compliant and non-compliant offers that Defendant favors. Only the text of the TAA answers the pertinent question here: an agency may award to a non-TAA-compliant offeror when the TAA-compliant offers are "insufficient"—a standard not satisfied by mere price comparison to non-TAA-compliant offers. *See supra* Section I.

III. The VA's Actions Were Arbitrary and Capricious

An agency's decision to award a contract must provide a "coherent and reasonable explanation of its exercise of discretion" and should be set aside only if "the award decision had no rational basis." *Banknote Corp. of Am. v. United States, 365 F.3d 1345, 1351 (Fed. Cir. 2004)* (quotation omitted); *Tolliver Grp., Inc. v. United States, 151 Fed. Cl. 70, 109 (2020)* (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)*). An agency's price reasonableness decision is arbitrary and capricious [*759] when the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or . . . is so implausible that it could not be ascribed to a difference in view of the product of agency expertise." *Ala. Aircraft Indus., Inc.-Birmingham v. United States, 586 F.3d 1372, 1375 (Fed. Cir. 2009)* (quoting *Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43*). In addition to violating the TAA and thus being contrary to law, [**36] the CO's decision to establish a competitive range among TAA-compliant and non-compliant offers lacked a rational basis.

Cosette asserts that the VA provides no adequate justification for establishing a competitive range determination, and therefore, the competitive range was a pretext to exclude Cosette from the competition. Pl. MJAR at 26-31. "A contracting officer has broad discretion in determining competitive range, and such decisions are not disturbed unless clearly unreasonable." *Birch & Davis Int'l, Inc. v. Christopher, 4 F.3d 970, 973 (Fed. Cir. 1993)*. When assessing whether a competitive range determination was arbitrary, capricious, or an abuse of discretion, the Court may look to the entire administrative record. *KSC Boss All., LLC v. United States, 142 Fed. Cl. 368, 387 (2019)*.

The Administrative Record here establishes that the contracting officer's decision to establish a competitive range was "clearly unreasonable." *Birch & Davis, 4 F.3d at 973*. The VA offered three different justifications for its determination, each contradicted by the record or rendered illogical by the procurement's circumstances.

First, the VA's reasoning was internally inconsistent. The Competitive Range Determination cited an "urgent need" for a contract. AR 1030. Yet the VA's subsequent Non-Availability Determination explicitly stated that the acquisition was [**37] not urgent. AR 889. Additionally, in its acquisition plan, the VA stated that the schedule risk for this procurement was "low" because the drug was available via the FSS and open market, further contradicting any urgent need justification. AR 23. Such contradictory justifications indicate arbitrary and capricious action. *See IBG LLC v. Trading Techs. Int'l, Inc., 757 F. App'x 1004, 1008 (Fed. Cir. 2019)*; *see also CAN Softtech, Inc. v. United States, No. 24-670, 2024 U.S. Claims LEXIS 2568, 2024 WL 4434253, at *6 (Fed. Cl. Oct. 4, 2024)* ("'[I]t is not arbitrary for an agency to not provide detailed explanations of the reasons an approach is adequate, unless this subjective judgment can be shown to be inconsistently reached.'") (alteration in original) (quoting *Inspace 21 LLC v. United States, 128 Fed. Cl. 69, 89 (2016)*).

Second, the Non-Availability Determination, which Defendant issued more than a month after the Competitive Range Determination was made, claimed the competitive range was needed for "further discussions and final evaluation." AR 890. Yet, the VA's claimed need for further discussions in the procurement appears nowhere in the Competitive Range Determination itself. *See* AR 893-97 (referencing in the Competitive Range Determination "any further discussions" as a possibility, rather than an anticipated or present need). Further, the status of the procurement suggests that the CO never had any intention of engaging in further discussions—by [**38] the time the range was established, the deadline for Final Proposal Revisions including each offeror's "best and final pricing" had already passed. AR 744. In requesting those revisions, the CO expressly stated that he was "concluding discussions" on each proposal, strongly indicating there was no intent to conduct additional discussions following the Competitive Range Decision. AR 744, 746, 748, 750, 752, 754. Ultimately, no discussions, in fact, occurred after the range was set. *See* AR 912-17 (no discussions between Competitive Range Determination and Golden State's Source Selection as lowest-priced, technically acceptable proposal).

Third, the Source Selection Decision stated that "it was determined that a competitive range determination would be made . . . for the purposes of efficiency in reviewing proposals." AR 911. Efficiency can provide a legitimate basis for limiting the number of proposals in active consideration. For example, where an agency faces a large volume of offers requiring complex technical evaluations, [*760] narrowing the pool may allow evaluators to focus on the most promising proposals and avoid expending resources on offers with little chance of award. *See Quantico Tactical, 150 Fed. Cl. at 573*. The circumstances [**39] here bore none of those hallmarks. At the time the CO decided to establish a competitive range, the VA had received only five timely Final Proposal Revisions. AR 875. Each proposal already included final pricing, and the Solicitation's evaluation scheme was a straightforward Lowest Price Technically Acceptable award methodology. AR 11-14; 895-96. Moreover, the record reflects that Cosette's offer had already been found to meet all the technical evaluation criteria and the terms and conditions listed in the Solicitation prior to the competitive range decision. AR 903. Any time savings from omitting Cosette's price from review would have been negligible. Given the minimal number of proposals, the mechanical nature of the remaining evaluation, and the prior confirmation of Cosette's technical acceptability, it is evident that "efficiency" was not a genuine operational consideration but an after-the-fact rationalization unsupported by any demonstrable benefit to the procurement.

Defendant offers little rebuttal to these points, noting only that agencies are afforded substantial deference in establishing a competitive range and that "[u]nder the FAR, if discussions are to be conducted, a [**40] contracting officer has the discretion to establish a competitive range." Def. MJAR at 23. While *FAR 15.306(c)(1)* provides for the creation of a competitive range when discussions are to occur after its establishment, here, all discussions occurred beforehand. *See supra* at 29. And while the Court acknowledges the well-established, broad discretion afforded contracting officers in this area, that discretion is not boundless; even under this deferential standard, the VA's decision to and method of establishing a competitive range here was unreasonable. *WellPoint Mil. Care Corp. v. United States, 953 F.3d 1373, 1377 (Fed. Cir. 2020)*;

Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1333 (Fed. Cir. 2001); *Frawner Corp. v. United States, 161 Fed. Cl. 420, 441 (2022)*.

IV. Cosette Was Prejudiced by the VA's Actions

Defendant argues that, even if it had committed an error in eliminating Cosette from the procurement process, Cosette cannot prevail here because it has not suffered prejudice. Def. Reply at 19-20. A protestor establishes prejudice by showing "that there was a 'substantial chance' it would have received the contract award but for" that error. *Sys. Stud. & Simulation, 22 F.4th at 998* (quoting *Bannum, 404 F.3d at 1353*). In other words, the disappointed bidder must have been "within the zone of active consideration." *Colonial Press Int'l, Inc. v. United States, 788 F.3d 1350, 1355 (Fed. Cir. 2015)* (quoting *Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996)*). Cosette satisfies this standard. Its proposal was the only TAA-compliant offer; and without a determination that its offer was insufficient [**41] to fulfill the requirements of the Solicitation, it was the sole eligible offeror. While Defendant asserts that Cosette's price was too high to be considered for award, the record reflects only that the agency deemed Cosette's price too high in comparison to non-TAA-compliant prices—comparisons that cannot lawfully serve as the basis for exclusion. *Supra* Section I.A. And while both parties agree that the VA "could have cancelled" the Solicitation rather than award to Cosette, nothing in the Administrative Record indicates that the VA will necessarily adopt that course. *See* Def. Reply at 19-20; OA Tr. 13:15-16. It would be improper for the Court to supplement the Administrative Record with either its own suppositions or with attorney argument, however compelling. Indeed, it is well-established that *post hoc* assertions in litigation cannot substitute for contemporaneous agency reasoning. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 22, 140 S. Ct. 1891, 207 L. Ed. 2d 353 (2020)*. Accordingly, Defendant's counsel's speculation about what the VA might do cannot defeat Cosette's showing of prejudice at this stage. *See* *IAP Worldwide Servs., Inc. v. United States, 160 Fed. Cl. 57, 89-90 (2022)* (rejecting government's attempt to show lack of prejudice by relying "upon something that never happened, upon an administrative determination [*761] that was never made") [**42] (quoting *Bell v. United States, 366 U.S. 393, 413, 81 S. Ct. 1230, 6 L. Ed. 2d 365 (1961)*).

V. The Court Declines Cosette's Request to Declare its Offer Price Fair and Reasonable.

Having determined that Cosette's offer was impermissibly excluded, Cosette asks this Court to go further and declare that its price is fair and reasonable as a matter of law. OA Tr. 91:22-93:1; Pl. MJAR at 19-25. The Court declines Cosette's entreaty.

In support of its position, Cosette contends that its offered price is *per se* fair and reasonable because it complies with the Veterans Health Care Act's (VHCA's) pricing framework. Pl. MJAR at 20-22. Under the VHCA, drug manufacturers must enter into pharmaceutical pricing agreements with the VA and list covered drugs on the FSS at prices not exceeding 76% of the non-Federal average manufacturer price. *38 U.S.C. § 8126(a)(2)*. Cosette represents that its branded prasugrel tablets qualify as "covered drugs," and it offers them to the VA on its FSS contract at statutorily-capped prices. Pl. MJAR. at 20; *see also* *38 U.S.C. § 8126(h)(2)*. Cosette states that the prices listed in its final offer were lower than the statutory cap, lower than its 2024 FSS prices, and at least 24% lower than the open-market price for prasugrel. Pl. MJAR at 24.

From this premise Cosette advances two legal theories, neither of which are compelling [**43] here. First, it contends that an offer price at or below a legally mandated cap is, by definition, fair and reasonable under *FAR 15.403-1(c)(2)*, which provides that "[p]rices set by law or regulation" are "sufficient to set a price." Pl. MJAR at 21. However, Plaintiff's reliance on *FAR 15.403-1(c)(2)* is misplaced, as that provision merely exempts agencies from obtaining certified cost or pricing data when prices are set by law or regulation. It does not declare such prices *per se* fair and reasonable. In fact, *FAR 15.404-1(a)(2)* instructs agencies to assess price reasonableness even when certified data is not required, showcasing the difference between certified pricing data and a price reasonableness analysis. As Cosette cites no authority establishing that a price at or below a statutory cap is *per se* fair and reasonable, the Court declines to adopt that view.

Second, Cosette asserts that it is "bedrock procurement law" that FSS prices are presumed fair and reasonable, citing *FAR 8.404*, which states: "GSA has already determined the prices of supplies and fixed-price services . . . under schedule contracts to be fair and reasonable" and "[t]herefore, ordering activities are not required to make a separate determination of fair and reasonable pricing." [**44] Pl. MJAR at 21 (quoting *FAR 8.404*). This argument has multiple flaws. First, this procurement is not an FSS order, so *FAR Subpart 8.4* does not control. *FAR 8.403(a)* ("Procedures in this subpart apply to—(1) Individual orders for supplies or services placed against [FSS] contracts; and (2) [blanket purchase agreements] established against [FSS] contracts."); *see also* *Distributed Sols., Inc. v. United States, 106 Fed. Cl. 1, 15 (2012)*, *aff'd*, *500 Fed. Appx. 955 (Fed. Cir. 2013)* (noting that *FAR 8.403(a)* is applicable to solicitations under the FSS). Second, even within the FSS framework, *FAR 8.404* merely dispenses with a duplicative determination; it does not bind future procurements to such a determination. Third, Cosette's argument was squarely rejected by the Federal Circuit in *Land Shark Shredding, LLC v. United States, 842 F. App'x 594, 598 (Fed. Cir. 2021)*. There, the Federal Circuit explained that "nothing requires the contracting officer to defer to the FSS in making the determination that an award could be made at fair and reasonable prices that offer the best value to the United States." *Id.* Accordingly, as Cosette has failed to provide support for its contention that its offer price was fair and reasonable as a matter of law, the Court declines to make such a pronouncement here.

VI. Injunctive Relief

The Court considers four factors when deciding whether to grant injunctive relief: (1) whether the [**45] plaintiff has succeeded on the merits, (2) whether the plaintiff will suffer irreparable harm if the court withholds injunctive relief, (3) whether the balance of hardships to the respective parties [*762] favors granting an injunction, and (4) whether the public interest is served by granting an injunction. *Centech Grp., Inc. v. United States, 554 F.3d 1029, 1037 (Fed. Cir. 2009)*; *see also* *Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1312 (Fed. Cir.*

2007) (noting that success on the merits is "the most important factor required to enjoin the award of [a] contract"). As discussed above, Cosette's protest succeeds on the merits. Thus, this Court reviews the other three factors to determine whether injunctive relief is appropriate.

A. Cosette Will Suffer Irreparable Harm

Cosette will suffer irreparable harm if injunctive relief is withheld. "'A party suffers irreparable harm when there is no adequate remedy' in the absence of an injunction." *Frawner Corp. v. United States, 161 Fed. Cl. 420, 462 (2022)* (quoting *CW Gov't Travel, Inc. v. United States, 61 Fed. Cl. 559, 575 (2004)*, *aff'd*, *163 F. App'x 853 (Fed. Cir. 2005)*). Courts have recognized that a party suffers irreparable harm when it loses the "opportunity to compete for a contract and secure any resulting profit." *Id.* Since an award was improperly made to Golden State, Cosette is unable to compete for the award and will potentially lose profits as a result. Thus, Cosette will suffer irreparable harm.

B. The Balance of Hardships Weighs [**46] **in Favor of an Injunction**

The balance of hardships inquiry requires a "consideration of the harm to the [G]overnment." *Frawner Corp., 161 Fed. Cl. at 462* (quoting *Overstreet Elec. Co. v. United States, 47 Fed. Cl. 728, 744 (2000)*) (alteration in original). Here, injunctive relief does not present hardship to the VA. The VA has entered into a bridge contract with Golden State for the awarded contract price, and thus the drug is fully available to the VA in the interim as it reevaluates how to proceed. Def. MJAR at 32. As Defendant's counsel acknowledged during oral argument, "the sky [will not] fall." OA Tr. 85:2-4. In contrast, without an injunction, Cosette would still be deprived of the ability to compete for the award. Accordingly, the balance of hardships weighs in favor of granting an injunction.

C. An Injunction Is in the Public Interest

It is axiomatic that "the public interest in honest, open, and fair competition in the procurement process is compromised whenever an agency abuses its discretion in evaluating a contractor's bid." *Overstreet Elec., 47 Fed. Cl. at 744*. An injunction preventing performance under an improperly awarded contract will serve the public interest by preserving that honest, open, and fair process. *Frawner Corp. v. United States, 161 Fed. Cl. 420 (2022)* (citing *PGBA, LLC v. United States, 57 Fed. Cl. 655, 663 (2003)*). Defendant contends that an injunction would force the Government to unnecessarily [**47] spend an additional $[TEXT REDACTED BY THE COURT] to procure a TAA-compliant version of the drug, which is not in the public interest. However, any award must comply with the law; as discussed above, the current award fails in that regard. Further, as noted, in passing the TAA, Congress contemplated the tradeoffs in increasing procurement price and determined the tradeoff to be worthwhile.

Importantly, as Defendant stated in its brief and as Cosette's counsel agreed, an injunction would not force the VA to award the contract to Cosette at such a high price; all agree that the VA may cancel the Solicitation and procure the drug on the open market at a lower price rather than award the contract to Cosette at its offer price. *See* Reply at 19-20; OA Tr. 13:15-17, 14:5-6. All agree such an action would be proper and would comport with the public interest. Accordingly, the public interest factor weighs in favor of an injunction.

D. Scope of Injunction

As all four factors weigh in Plaintiff's favor, this Court finds entry of an injunction appropriate. "[T]he Court of Federal Claims has broad equitable powers to fashion an appropriate remedy." *Turner Constr. Co., Inc. v. United States, 645 F.3d 1377, 1388 (Fed. Cir. 2011)*. Indeed, the Tucker Act empowers this Court to "award [**48] any relief that [it] considers proper." *28 U.S.C. § 1491(b)(2)*. Concerning the scope of injunctive relief, the Court enjoins Defendant from [*763] awarding or proceeding with any award under the Solicitation to a non-TAA-compliant offeror unless the Defendant (i) invokes the TAA's waiver provision, or (ii) determines, consistent with this Memorandum and Order and with sufficient explanation, that Cosette's offer is otherwise insufficient to meet the requirements of the VA under the terms of the Solicitation and applicable law. In determining the sufficiency of Cosette's TAA-compliant offer, the VA is prohibited from basing such a determination on a comparison between Cosette's price and the price of non-TAA-compliant products; similarly, the VA cannot exclude Cosette from a competitive range based on such an improper comparison to non-TAA-compliant offers.

To be clear, as reflected above, the Court is not ordering the VA to procure prasugrel from Cosette at its offer price; as noted, and as all partes agree, the VA may opt to cancel the Solicitation and, for example, procure the drug at a lower price via the open market instead. AR 15; OA Tr. 13:15-17 (Plaintiff agreeing VA may turn to open market); OA 38:11-14 [**49] (Defendant agreeing).

CONCLUSION

For the reasons set forth above, Plaintiff's Motion for Judgment on the Administrative Record (ECF No. 27) is **GRANTED IN PART** and Defendant's Cross-Motion for Judgment on the Administrative Record (ECF No. 29) is **DENIED IN PART**. As noted, the Court also **GRANTS** Plaintiff's unopposed Motion for Judicial Notice (ECF No. 42), for good cause shown.

The VA is **ENJOINED** from proceeding with any award under the current Solicitation to a non-TAA-compliant offeror. Should the VA opt to proceed under the current Solicitation (as opposed to purchasing the drug on the open market), then consistent with this Court's Memorandum and Order, it may not deem Cosette's offer insufficient on the basis that (i) its price is unreasonable based on a comparison to non-TAA-compliant offerors' prices, or (ii) it is excluded from the competitive range based on a price comparison to non-TAA-compliant offers. The Court **DENIES** Cosette's request to declare its high offer price fair and reasonable as a matter of law.

The Clerk of Court is **DIRECTED** to enter Judgment accordingly and mark this case closed.

The parties are directed to **CONFER** and **FILE** a Notice by November 14, 2025, attaching [**50] a proposed, public version of this sealed Memorandum and Order, with any competition-sensitive or otherwise protected information redacted.

IT IS SO ORDERED.

/s/ Eleni M. Roumel

ELENI M. ROUMEL

Judge

October 31, 2025

Washington, D.C.

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U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: W&K Container, Inc.

File: B-422234.2

Date: March 12, 2024

Dennis J. Callahan, Esq., Rogers Joseph O'Donnell, PC, for the protester.
Ron D. Seignious, for Intrepid Eagle Logistics, Inc., the intervenor.
Samantha L. Meyer, Esq., John P. Patkus, Esq., and Andrew T. McGuire, Esq., Defense Logistics Agency, for the agency.
Paula A. Williams, Esq., and Evan D. Wesser, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's decision to rely on the awardee's certification in its proposal that the end products offered in its proposal are compliant with the Trade Agreements Act, 19 U.S.C. §§ 2501-2582, is denied where the agency had no reasonable basis prior to award to question the awardee's certification; whether the awardee will actually supply compliant end products is a matter of contract administration not subject to review by our Office.

DECISION

W&K Container, Inc. (W&K), a small business located in Mill Valley, California, protests the award of a contract to Intrepid Eagle Logistics, Inc. (Intrepid), of Bethesda, Maryland, under request for proposals (RFP) No. SPE8ED-23-R-0016, issued by the Defense Logistics Agency (DLA), DLA Troop Support, for a quantity of 20-foot transoceanic shipping containers. The protester contends that DLA should have rejected Intrepid's proposal as technically unacceptable for not complying with the requirements of the Trade Agreements Act of 1979, 19 U.S.C. §§ 2501-2582 (TAA).

We deny the protest.

BACKGROUND

DLA issued the solicitation on August 28, 2023, under the procedures of Federal Acquisition Regulation (FAR) parts 12 and 15. The solicitation sought delivery of 20-foot transoceanic shipping containers, National Stock Number 8150-01-463-8553, to various military depots in the United States. RFP at 3.[1] The solicitation provided for award of three fixed-price, definite-delivery contracts, each for a distinct lot identified by contract line item numbers. *Id.* at 7. This protest concerns the award of Lot No. 1 for the delivery of 1,200 shipping containers to three domestic military depots. *Id.* at 7-8.

The solicitation incorporated Defense Federal Acquisition Regulation Supplement (DFARS) clause 252.225-7021, Trade Agreements – Basic (Jan. 2023), which implements the TAA. *Id.* at 53. Relevant here, the TAA generally requires that end products be produced in the United States (U.S.), qualifying countries, or designated countries. DFARS clause 252.225-7021; FAR § 25.001(c)(2). The DFARS clause defines a designated country end product as "a [World Trade Organization Government Procurement Agreement (WTO GPA)] country end product, a Free Trade Agreement [FTA] country end product, a least developed country end product, or a Caribbean Basin country end product." DFARS clause 252.225-7021(a). An end product means those articles, materials, and supplies to be acquired under this contract for public use. *Id.*

The DFARS clause defined a WTO GPA country end product as an article that:

> (1) [i]s wholly the growth, product, or manufacture of a [WTO GPA] country; or
>
> (2) [i]n the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a [WTO GPA] country 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. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

DFARS clause 252.225-7021(a).

The solicitation provided that offerors must deliver only U.S.-made, qualifying country, or designated country end products under this contract unless --

> (1) In its offer, the Contractor specified delivery of other nondesignated country end products in the Trade Agreements Certificate provision of the solicitation; and
>
> (2) (i) Offers of U.S.-made, qualifying country, or designated country end products from responsive, responsible offerors are either not received or are insufficient to fill the Government's requirements; or

[1] Citations to the RFP are to the copy provided in the agency report as Exhibit 1.

(ii) A national interest waiver has been granted.

DFARS clause 252.225-7021(c).

Also of relevance here, the RFP included DFARS clause 252.225-7020, Trade Agreements Certificate – Basic (Nov. 2014), which requires offerors to certify that their end products comply with the TAA and will deliver only U.S.-made, qualifying country, or designated country end products. RFP at 69. The RFP further required offerors to identify the country of origin, the location of the manufacturer of the final end products (*i.e.*, the shipping containers), the manufacturer's name, address, and point of contact, and stated that failure to provide this information could result in rejection of the proposal. *Id.* at 7. The RFP also cautioned that proposals offering end products that were not compliant with the requirements of the TAA might be rejected as technically unacceptable. *Id.*

For Lot No. 1, DLA received seven proposals by the submission due date, including those from Intrepid and W&K. Agency Report (AR) Exh. 4, W&K Unsuccessful Offeror Letter at 1. In its proposal, Intrepid represented that the final end products it would supply would be manufactured in the Republic of Korea (Korea)[2] and identified its Korean manufacturer. AR Exh. 2, Intrepid's Proposal at 8.[3] In addition, Intrepid listed none of its end items as "other nondesignated country end products" in the Trade Agreements Certificate included in its proposal. Contracting Officer's Statement (COS) at 3. Intrepid offered a total price of $8,602,000 for Lot No. 1.

In its proposal, W&K certified that it would provide shipping containers manufactured and assembled by a Korean company, in full compliance with the TAA. W&K offered a total price of $9,530,400 for Lot No. 1. Protest attach A, Decl. of W&K's Principal ¶¶ 9, 10.

On November 20, DLA issued the contract for Lot No. 1 to Intrepid at a total price of $8,602,000. COS at 3. On November 23, the agency emailed notice of the award to W&K. AR Exh. 4, W&K Unsuccessful Offeror Letter. On December 6, the agency concluded W&K's post-award debriefing after responding to its debriefing questions. AR Exh. 8, Agency Debriefing Addendum at 6.

Separately on December 6, DLA sent a letter to Intrepid regarding the firm's offer for Lot No. 2. AR Exh. 10, DLA Letter to Intrepid at 3. As to Lot No. 2, the agency asked Intrepid to provide: "a list of all the components of the containers, including the country of origin of each component. Please also provide a brief description of the manufacturing process for the containers, identifying the location of each step in the

[2] The FAR designates Korea as a WTO GPA country. FAR clause 52.225-5(a).

[3] Unless otherwise noted, citations to documents provided by the agency are to the Adobe PDF pagination numbers.

manufacturing process." *Id.* In its December 11 response, Intrepid provided, among other things, its bill of materials documentation that identified the [DELETED] as the country of origin for nearly every individual component, but these components would be assembled in [DELETED]. AR Exh. 11, Intrepid Response at 6-7.

W&K filed this protest with our Office on December 11. The next day, December 12, DLA issued a stop work order and informed the awardee that a protest had been filed. AR Exh. 9, Stop Work Order at 2.

While this protest was proceeding, DLA requested information from Intrepid regarding its TAA certification for the Lot No. 1 shipping containers. On December 13, the agency asked whether the Lot No. 1 shipping containers would be "manufactured in the same way, using the same sources of components and manufacturing source/processes" as described by Intrepid for the Lot No. 2 containers. AR Exh. 10, DLA Letter to Intrepid at 1.

On December 14, Intrepid responded: "Yes, the manufacturing source/processes are the same for Lot 1 as we submitted in our attached [December 11] Clarifications Letter response for Lot 2. All containers may be manufactured at different manufacturing plant facilities, but they are manufactured using the same components and procedures. Please refer to the attached file once again regarding our manufacturer's [ ] production process." AR Exh. 11, Intrepid's Response at 1.

DLA subsequently determined that Intrepid's response indicated that its Lot No. 1 containers were not compliant with the requirements of the TAA. The agency issued a Notice to Cure and Request for Adequate Assurances of Future Performance (Cure Notice) to Intrepid, stating, in relevant part that: "[DELETED] intermodal shipping container components from [DELETED] in a designated country, such as [DELETED], into an end product that the components were made to become (as their original and intended/anticipated use and purpose) does not satisfy the definition of 'substantial transformation' under the TAA and its implementing regulations."[4] AR Exh. 12, DLA Cure Notice at 4.

The cure notice goes on to represent as follows:

> Such containers cannot be accepted under the above referenced Contract. You specified designated country end products in the Trade Agreements Certificate of your proposal and offers of other TAA-compliant end products were received from responsive, responsible offerors in

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[4] In other words, the agency explained that under the TAA, [DELETED] remains the country of origin for the [DELETED] even though they are assembled in another country.

> quantities sufficient to fill the Government's requirements. Therefore, the Contract requires you to deliver only U.S.-made, qualifying country, or designated country end products.

Id.

The agency directed the awardee to cure these defects and to perform in accordance with the terms of its contract. In addition, the agency directed Intrepid to provide assurances that future contract performance will be in full compliance with the TAA sourcing restrictions. *Id.*

On January 2, 2024, Intrepid responded to the cure notice by outlining its corrected manufacturing and assembly processes for the Lot No. 1 shipping containers. AR Exh. 13, Response to Cure Notice at 7-40. The awardee indicated in relevant part:

> We certify that the detailed parts and process changes will be consistently applied to this contract as well as all future awards, ensuring full compliance with the DFARS 252.225-7021(a) clause. We categorically state that our containers are not, and will not be, manufactured from [DELETED] made in non-TAA compliant countries.

Id. at 9. DLA reviewed the documentation provided by Intrepid and concluded that its corrected method of performance was compliant with the TAA.[5] COS at 5.

DISCUSSION

W&K contends that the award was improper and contrary to the terms of the RFP, arguing that the agency unreasonably relied on Intrepid's TAA certification in its proposal that it would provide TAA-compliant shipping containers at its proposed price. W&K alleges that DLA erroneously accepted Intrepid's certification as to the country of origin for its shipping containers at a price approximately $1 million lower than its own which, in the protester's view, indicates that Intrepid would import container kits from China, a non-TAA designated country, for assembly in Korea. *See generally*, Protest at 5-8. The protester also argues that the agency impermissibly allowed Intrepid to change its method of performance without affording other offerors the chance to revise their respective proposals. In this regard, the protester points to the post-award cure notice issued by the agency to Intrepid to ensure compliance with the TAA, and the awardee's response indicating a change in the source of the raw materials to be used. *See generally,* Comments on DLA's Resp. at 1-3. For the reasons that follow, we find no basis on which to sustain the protest.[6]

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[5] The protester acknowledges that Intrepid's changed method of performance complies with the TAA requirements. Comments at 4 n.2.

[6] The protester raises a number of collateral arguments. While our decision does not specifically discuss each issue raised, we have considered all of W&K's allegations and find that they provide no basis on which to sustain the protest.

As noted above, this procurement was subject to the TAA sourcing restrictions as implemented by DFARS clause 252.225-7021. We have stated previously that when an offeror represents that it will furnish domestic, qualifying country, or designated country end products in accordance with the TAA, it is obligated to comply with that representation in any resultant contract. *See E.D.I., Inc.,* B-251750, B-252128, May 4, 1993, 93-1 CPD ¶ 364 at 5. However, if prior to award, an agency has reason to believe that a firm will not provide compliant end products, the agency should go beyond a firm's representation of compliance with the TAA. Where the agency has no information which would lead to such a conclusion, the agency may reasonably rely upon an offeror's representation without further investigation. *See*, *e.g.*, *Coast to Coast Computer Prods.,* B-419116, B-419116.2, Dec. 18, 2020, 2020 CPD ¶ 370 at 7; *Kipper Tool Co.*, B-409585.2, B-409585.3, June 19, 2014, 2014 CPD ¶ 184 at 5 (agency reasonably relied upon vendors' quotation sheets to determine quoted products were TAA-compliant); *Spectrum Sys., Inc.*, B-401130, May 13, 2009, 2009 CPD ¶ 110 at 3 (agency may accept a quotation's representation indicating compliance with the solicitation requirements, where there is no significant countervailing evidence reasonably known to the agency that should create doubt as to whether the vendor will or can comply with the requirement). When an agency has reasonably made award relying on an offeror's representation, whether the firm ultimately delivers end products in accordance with its TAA representations as required by its contract is a matter of contract administration, which our Office will not review. Bid Protest Regulations, 4 C.F.R. § 21.5(a); *see also*, C*oast to Coast Computer Prods., supra* at 8 n.12.

Here, the record reflects that Intrepid provided a completed TAA certificate with its proposal, as required by the RFP. COS at 3; AR Exh. 2, Intrepid Proposal at 8. As stated previously, the awardee's TAA certificate indicated that the final end products would be manufactured in the country of Korea and identified a Korean manufacturer as its manufacturing source of supply. *See* AR Exh. 2, Intrepid's Proposal at 8. Since Korea is on the TAA designated country list, there was nothing patent on the face of the awardee's TAA certificate that would put the agency on notice that Intrepid would not supply compliant products from a TAA designated country. Under such circumstances, DLA's reliance on Intrepid's certification without further investigation would generally be reasonable. *See Leisure-Lift, Inc.*, B-291878.3, B-292448.2, Sept. 25, 2003, 2003 CPD ¶ 189 at 8 (agency properly may rely upon a firm's representations/certification of TAA compliance without further investigation unless the agency has reason to believe that the firm will not provide a compliant product). Ultimately, whether Intrepid delivers end products in accordance with its TAA representations is a matter of contract administration, which, as noted above, our Office will not review.

Notwithstanding Intrepid's apparent compliant certification, however, W&K insists that, prior to award, DLA nevertheless should have had reason to question Intrepid's TAA representations. Among other things, the protester alleges that it filed a 2022 agency-level protest of an award to Intrepid for the supply of 8-foot shipping containers. In that agency-level protest, W&K raised the identical concern as here; *i.e.*, that Intrepid's very low price could only be explained by Intrepid's use of Chinese container kits for assembly in Korea. Protest Exh. 5, Agency-Level Protest at PDF 82-84; Comments at 7-8; Comments on DLA's Resp. at 3-4.

In this regard, W&K asserts that the solicited shipping containers are made almost entirely of corrugated steel and that the price of steel is a large factor in determining the pricing of shipping containers. Protest attach. A, Decl. of W&K's Principal at ¶ 5. The protester also asserts that China is the lowest cost producer of industrial steel products, including shipping containers and China supplies about 95 percent of the shipping container market. Additionally, the protester states that Chinese companies sell container kits that include the majority of the required shipping components that are flat packed and shipped to buyers' facilities in other countries for assembly. *Id.* at ¶¶ 5, 6. DLA dismissed the protest as a challenge to the agency's affirmative determination of Intrepid's responsibility and to matters of contract administration. In doing so, the agency noted that it would take "additional steps to confirm that the supplies offered by Intrepid are TAA-compliant." Protest Exh. 6, Agency-Level Protest Decision at PDF 86.

DLA responds that W&K's 2022 agency-level protest did not provide a basis for the agency to believe that Intrepid would not provide TAA compliant shipping containers. The agency explains that the award to Intrepid in 2022 involved a different size, shape, style, and quantities of shipping containers than this procurement. The agency also states that the contracting officer involved with the 2022 procurement left the agency approximately 18 months prior to issuance of the current solicitation. COS at 5 (*citing*, AR Exh. 14, Intrepid's 2022 Contract). In any event, the agency contends that each procurement stands on its own and any decisions or evaluations made by a different contracting officer in prior procurements do not necessarily govern the agency's decisions in the instant acquisition. *Id.*; *Shertech Pharmacy,* B-419069, Oct. 29, 2020, 2020 CPD ¶ 336 at 3.

The protester also contends that Intrepid's allegedly low price should have alerted the contracting officer to the probability that the awardee would provide containers made with Chinese raw materials. *See* Comments at 6-8. In this regard, W&K contends that the probability that Intrepid would provide Chinese containers should be viewed in the context of China's dominant position in the transmodal container marketplace. According to the protester, "a reasonably vigilant contracting officer should have been on the lookout for any signs that an offer may have been based on using Chinese container kits." *Id.* at 7. The protester further argues that based on the awardee's proposed delivery of Korean containers and proposed price the contracting officer should have investigated whether Intrepid would use container kits from China, the world's predominate container manufacturer, and a neighbor of Korea. *Id.*

We find no merit to the protester's claims. As discussed above, Intrepid's proposal, on its face, demonstrated that it did intend to comply with the requirements of DFARS clause 252.225-7021. Despite the "series of data points" identified by W&K that should have caused DLA to question Intrepid's self-certification prior to award of the contract, *see* Comments at 8, the agency's decision not to question or otherwise investigate Intrepid's TAA certification was reasonable where nothing on the face of the proposal reasonably indicated the possibility of non-compliance. *See Sea Box, Inc.*, B-420130, B-420130.2, Nov. 18, 2021, 2021 CPD ¶ 364 at 4 ("Unsupported allegations that a competitor's product is not in compliance with its Buy American Act certification do not impose an obligation on the contracting officer to conduct a detailed investigation behind that certification."). Moreover, we agree with the agency that it was prohibited from making any assumptions based on Intrepid's low-priced proposal. In this regard, absent a price realism evaluation criterion, there is no prohibition against an agency accepting below-cost prices on a fixed price contract. *Louis Berger Power, LLC*, B-416059, May 24, 2018, 2018 CPD ¶ 196 at 8.

Lastly, W&K also argues the agency's post-award communications with the awardee constituted improper and unequal discussions.

Discussions, when conducted, must be meaningful; that is, they may not mislead offerors and must identify proposal deficiencies and significant weaknesses that could reasonably be addressed in a manner to materially enhance the offeror's potential for receiving award. FAR § 15.306; *Unisys Corp.*, B-406326 *et al.*, Apr. 18, 2012, 2012 CPD ¶ 153 at 5. In connection with the requirement for meaningful discussions, offerors may not be treated unequally; that is, offerors must be afforded equal opportunities to address the portions of their proposals that require revision, explanation, or amplification. *Id.* at 7. As discussed below, we find no basis to conclude that DLA's post-award communications with Intrepid constituted discussions.

After receiving the agency report, W&K argues that it was prejudiced by the agency sending the awardee a post-award cure notice, which provided an opportunity for Intrepid to change its method of performance from supplying shipping containers made from [DELETED] to supplying these products manufactured from [DELETED] steel assembled in [DELETED]. *See generally*, Comments at 2, 4; Comments on DLA's Resp. at 1-3. In doing so, the protester alleges, the agency impermissibly allowed "Intrepid alone to materially alter its bid." Comments at 5.

The agency counters that its post-award communications with the awardee were not prejudicial to the competing offerors, but, rather, constituted matters of contract administration not for GAO's consideration as part of our bid protest function. *See* 4 C.F.R. § 21.5(a). The agency states that the cure notice neither allowed Intrepid to modify its proposal to supply non-TAA compliant shipping containers nor to materially alter its proposal or pricing. DLA Resp. to Comments at 1. As DLA explains, Intrepid had certified that it would supply TAA compliant products from the country of [DELETED] at a fixed-price lower than that of W&K and the only change Intrepid made in response to the cure notice was to conform the awardee's manner of performance with the representations in its TAA certificate. *Id.* DLA further explains that despite W&K's claims that the agency should have rescinded Intrepid's award based on its defective TAA certificate, the agency was obligated to give Intrepid an opportunity to cure its performance even if the agency subsequently decided to terminate Intrepid's contract. *Id.* at 2; *see* FAR 49.402-3 (requiring, prior to a termination for default based on other than failing to deliver supplies within the specified time, that "the contracting officer shall give the contractor written notice specifying the failure and providing a period of 10 days (or longer period as necessary) in which to cure the failure").

On this record, we find no basis to conclude that the agency's post-award communications with Intrepid ensuring that the awardee met its contractual obligations to deliver TAA compliant products amount to impermissible or unequal discussions. As addressed above, following award, whether an offeror does in fact furnish a foreign end product in violation of its certification is a matter of contract administration. *Sea Box*, *supra* at 4; C*oast to Coast Computer Prods., supra* at 8 n.12. The agency's post-award cure notice ensuring Intrepid's compliance with its certification therefore squarely presents a question of the agency's administration of its contract, and therefore fails to state a legally or factually sufficient on which to sustain the protest.

The protest is denied.

Edda Emmanuelli Perez
General Counsel

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Hudson Technologies Company

File: B-424395; B-424395.2; B-424395.3

Date: July 7, 2026

Aron C. Beezley, Esq., Steven C. Herrera, Esq., and Jenna R. Mazzella, Esq., Bradley Arant Boult Cummings LLP, for the protester.
Hal J. Perloff, Esq., Samuel W. Jack, Esq., and Bhargavi Kalaga, Esq., Husch Blackwell LLP, for RGAS LLC, the intervenor.
Robert E. Sebold, Esq., Defense Logistics Agency, for the agency.
Kenneth Kilgour, Esq., and Heather Weiner, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the agency unreasonably relied on awardee's certification that it was offering domestic end products is denied where the record reflects the reasonableness of the agency's evaluation.

2. Protest challenging agency's past performance evaluation is denied where the evaluation was consistent with the requirements of the solicitation and reasonable.

DECISION

Hudson Technologies Company, of Woodcliff Lake, New Jersey, protests the award of a contract to RGAS LLC, of Houston, Texas, under request for proposals (RFP) No. SPE4A7-25-R-0788, issued by the Defense Logistics Agency (DLA) for hydrofluorocarbon (HFC) gases. The protester asserts that the agency unreasonably relied on the awardee's domestic end product certification and unreasonably evaluated the awardee's past performance.

We deny the protest.

BACKGROUND

On August 1, 2025, DLA issued the solicitation in accordance with Federal Acquisition Regulation (FAR) part 12 (acquisition of commercial items/services) and part 15 (contracting by negotiation), seeking to award one or more fixed-price indefinite-delivery, indefinite-quantity contracts for eleven types of HFC gases, listed by national stock number (NSN).[1] Agency Report (AR), Tab 3, RFP at 3. Offerors also were to provide cylinders listed under NSN 8120-01-204-0182 and NSN 8120-01-316-2208. *Id.* The solicitation contemplated the award of the contracts on a line-by-line basis for a one-year base period and two one-year option periods. *Id.* Award was to be made on a lowest-priced, technically acceptable basis, considering price and two technical factors--technical capability and past performance--which were to be evaluated as acceptable or unacceptable. AR, Tab 3(3), RFP sects. L & M at 1; Tab 4, SAM Synopsis at 2. The evaluation of technical capability is not at issue in this protest.

With regard to past performance, the RFP advised offerors that the agency would evaluate recent and relevant past performance to assess the government's confidence in the offeror's ability to perform as proposed. RFP at 3. The RFP defined current past performance as "ongoing or completed within the last three calendar years from the solicitation open date" and relevant past performance as supplying services and products that are "the same or similar in scope, complexity, and magnitude (*i.e.*, dollar value, volume) to the requirements of the solicitation." *Id*. The past performance evaluation was to consider the number and severity of problems, the effectiveness of any corrective actions taken, and the offeror's overall performance record. *Id*. The RFP did not request offerors to submit any past performance information. *Id.*; Supp. Contracting Officer's Statement and Memorandum of Law (Supp. COS/MOL) at 2. Rather, the solicitation advised offerors that the agency would evaluate "suppliers' past performance"[2] using the Supplier Performance Risk System (SPRS).[3] *Id.* Under the past performance factor, the RFP defined an acceptable proposal as one that provides the government "a reasonable expectation that the offeror will successfully perform the required effort." RFP at 7.

The RFP incorporated Defense Federal Acquisition Regulation Supplement (DFARS) provision 252.225-7000, Buy American--Balance of Payments Program Certificate (Buy American certificate), which requires offerors to certify whether their proposed products are domestic end products from the United States, foreign end products from a

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[1] Citations to the record use the Adobe PDF pagination of the documents produced.

[2] In response to the protest, the agency explained that, for purposes of the past performance evaluation, the terms "offeror" and "supplier" are interchangeable. Supp. COS/MOL at 2, n.1.

[3] "SPRS is a procurement risk analysis tool for the areas of Price, Item, and Supplier risk. The Price Risk tool compares industry prices to the average price paid by the government. The Item Risk tool flags items identified as high risk (based on critical safety/application or risk of counterfeiting). The Supplier Risk tool scores vendors on [Department of Defense (DoD)]-wide contract performance." https://dodprocurementtoolbox.com/site-pages/supplier-performance-risk-system-sprs (last visited June 18, 2026).

qualifying country, or foreign end products from a non-qualifying country. RFP at 53; DFARS provision 252.225-7000(c).

The agency received proposals from five firms, including the protester, the awardee, and A-Gas US, Inc. AR, Tab 8, First Price Negotiation Memorandum (PNM) at 3. The agency created a competitive range of those three offerors. *Id.* at 7. The agency concluded that all three proposals were acceptable under the technical capability factor. *Id.* DLA also found that all three proposals were acceptable under the past performance factor, stating:

> The Supplier Performance Risk System (SPRS) is utilized to determine the overall assessment of the supplier performance and supplier risk. As of 9/22/2025, A-GAS was scored 319.88 (Color Green, 14.8% above the average score) in SPRS, Hudson was rated 341.20 (Color Green, 22.3% above the average score), while RGAS was rated 226.0 (Color Green, 18.9% below the average score). The average SPRS score is 278.76. None of the vendors are suspected of providing counterfeit products and none are listed on SPRS Exclusion List. The vendors are currently active on www.sam.gov. In conclusion, under past performance criteria, all vendors are determined acceptable.

Id.

DLA awarded A-Gas a contract for six NSNs; Hudson was awarded a contract for the remaining five NSNs. *Id.* at 10. Hudson submitted a size protest concerning A-Gas to the Small Business Administration (SBA); that protest was dismissed as premature pending the outcome of the reevaluation the agency was to undertake in response to an agency-level protest filed by RGAS. AR, Tab 12, RGAS Agency Level Protest at 1 (asserting that the agency improperly applied the DFARS 225.502 50 percent price preference to A-Gas because A-Gas was not offering a domestic end product); Tab 13, Agency Resp. to RGAS Protest (stating that the agency would suspend the awards, reevaluate offers, and make new award decisions); Tab 11, SBA Resp. to Size Challenge at 1.

The agency subsequently awarded contracts for three NSNs to A-Gas, three NSNs to Hudson, and five NSNs to RGAS. AR, Tab 14, 2nd PNM at 11-12. Hudson filed an agency-level protest of the award of the five NSNs to RGAS, arguing that the agency should have investigated RGAS's certification that it would provide domestic end products; the agency denied that protest because, "Hudson's disagreement notwithstanding, the contracting officer had no reason to challenge RGAS' pre-award certification of domestic end product." AR, Tab 22, Agency Resp. to Hudson Agency-Level Protest at 1. Because the SBA ultimately determined that A-Gas was other-than-small and thus ineligible for award, AR, Tab 15, SBA Resp. to Second Size Status Challenge at 1, DLA resolicited those three NSNs. AR, Tab 16, Final PNM. The final contract awarded to RGAS included the three recompeted NSNs. *Id*. at 9. In the final contract, Hudson received 3 NSNs and RGAS received 8 NSNs--the five it had received initially and the three that were recompeted. *See id*.

After a requested and provided debriefing, COS/MOL at 5, Hudson filed this protest challenging the award of the three recompeted NSNs to RGAS.

DISCUSSION

Hudson contends that the agency unreasonably relied on RGAS's certification that it would provide domestic end products and that the agency unreasonably evaluated the awardee's past performance as acceptable. As discussed below, the record supports neither allegation, and we deny them.[4]

Reliance on Certifications

Hudson argues that "RGAS has made multiple assertions that it is not providing domestically sourced products." Protest at 13. The protester further argues that the agency unreasonably relied upon RGAS's certifications that it would provide domestically produced items when "RGAS's misrepresentations are plainly material." *Id.* at 14. Hudson contends that an agency may not rely solely upon representations as part of its evaluation when the agency has reason to doubt the representations' veracity. Comments and 2nd Supp. Protest at 20-21, *citing Leisure Lift, Inc*., B-291878.3, B-292448.2, Sept. 25, 2003, at 3; *Sea Box, Inc*., B-420130, B-420130.2, Nov. 18, 2021, at 2. DLA asserts that the contracting officer "acted reasonably in investigating and relying upon RGAS's domestic end product certification." COS/MOL at 7.

Generally, where a contracting officer has no information prior to award that would lead to the conclusion that the product to be furnished is not a domestic end product, the contracting officer may properly rely upon an offeror's self-certification without further investigation. *Sea Box, Inc*., *supra* at 4. However, if, prior to award, an agency has reason to believe that a firm will not provide domestic products, the agency should go beyond a firm's representation of compliance with the BAA. *Id.* Unsupported allegations that a competitor's product is not in compliance with its BAA certification do not impose an obligation on the contracting officer to conduct a detailed investigation behind that certification. *Id*. Our decisions have consistently stated that an agency is not required to look behind a vendor's certification prior to award, absent a belief that a vendor's BAA certification is invalid. *Id*. An agency's decision not to question or otherwise investigate a certification is reasonable where nothing on the face of the proposal reasonably indicates the possibility of non-compliance. *W&K Container, Inc*., B-422234.2, Mar. 12, 2024, at 7-8 (denying protest where nothing on the face of the

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[4] Hudson asserts variations on these two allegations. We have considered the entirety of the protester's protest grounds and, while we do not discuss every nuance, we find that no portion of the allegations provide a basis upon which to sustain the protest.

awardee's protest reasonably indicated a possibility of non-compliance with Trade Agreements Act).

Hudson offers the following evidence in support of its assertion that it was unreasonable for DLA to rely on the awardee's certification that the awardee would provide domestic end products. The protester argues that RGAS's GAO protest of the award of a contract under solicitation No. SPE4A2-25-Q-0001 put the agency on notice that, in that procurement, the awardee offered cylinders that were foreign-made. Protest at 16, *citing* Protest exh. M, RGAS Protest at 1-2. Hudson also asserts that RGAS's claims that it can provide domestic cylinders in this procurement are directly contradicted by statements from RGAS's supplier confirming that RGAS purchased cylinders from a company based in Thailand. Protest at 17, *citing* Protest, exh. N, Hudson Agency Level Protest at 13-14.

RGAS and the agency both argue that the protester's arguments are misplaced because they concern where the cylinders are produced rather than the gases, which are the actual end-product for purposes of DFARS provision 252.225-7000. More specifically, RGAS contends that "it was apparent from the face of the solicitation that the *gas*--not the receptible used to store the gas--was the 'end product' for purposes of this acquisition." Intervenor's Comments at 3, *citing* RFP at 3. The agency, as well, asserts that the end products were the gases being procured and not the cylinders. COS/MOL at 4 n.3.

Hudson does not dispute the assertion of the intervenor and the agency that the containers themselves are not end products.[5] Supp. Protest at 3. Thus, because the end product at issue in this procurement is HFC gases--not the cylinders--the protester's allegation that the agency was on notice that the awardee would supply foreign-made cylinders for the HFC gases and unreasonably relied on a certification that the cylinders would comply with the BAA fails to assert or establish a claim of improper agency action. Accordingly, this allegation is dismissed for failing to state a valid basis of protest. 4 C.F.R. § 21.1(c)(4) and (f); *Warfighter Focused Logistics, Inc.*, B-423546; B-423546.2, Aug. 5, 2025, at 4 (noting that for a protest allegation to be legally sufficient under our Bid Protest Regulations, a protester must provide, at a minimum, credible allegations that are supported by evidence and are sufficient, if uncontradicted, to establish the likelihood of the protester's claim of improper agency action).

The protester presents only one argument challenging the reasonableness of the agency's reliance on the certifications with respect to gases instead of cylinders;

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[5] A plain reading of the solicitation, which states that "DLA intends to award an Indefinite Delivery Indefinite Quantity contract supporting [ ] 11 HFC gases[,]" supports that assertion. RFP at 3. Moreover, the first award in July 2025 was for gases only. *See* AR, Tab 8, First PNM at 10. The protester was thus on notice as early as July 2025 that the agency was, in accordance with the solicitation, awarding contracts for gases and not for cylinders.

Hudson asserts that one of the three gases could not be sourced domestically at the price offered by the awardee. Supp. Protest at 8, *citing* Supp. Protest, exh. S, Decl. of Hudson Senior Vice President (SVP) of Operations. Hudson's proof of this assertion is as follows: the commercial name for one of the gases is R507a, which is a blend of 50 percent R-125 and 50 percent R-143a; and, based upon the SVP's "direct knowledge," the protester asserts that R143a is "primarily produced" in China. Protest exh. S, Decl. of Hudson SVP at 1.

Based on our review, we find no merit to the protester's claim that the agency unreasonably relied on the awardee's certification that it would provide domestic end products. As noted above, the RFP incorporated DFARS provision 252.225-7000, which requires offerors to certify whether their proposed products are domestic end products from the United States, foreign end products from a qualifying country, or foreign end products from a non-qualifying country. RFP at 53. RGAS's proposal, on its face, certified under the applicable DFARS 252.225-7000 certificate that the end product for the three NSNs at issue here[6] were domestic end products. AR, Tab 9, RGAS Proposal at 60. In addition, as the agency explains in response to the protest, RGAS's proposal "also provided specific granularity with respect to the sourcing of gas for each [NSN], providing a narrative of its relationship with [DELETED] refrigerant producers[.]" COS/MOL at 6, *citing* AR, Tab 9, RGAS Proposal at 150-153. Furthermore, the agency explains that, prior to the reevaluation of the three NSNs, the contracting officer requested that RGAS confirm the place of manufacture of the three NSNs, and RGAS again provided assurance that it would provide domestic products. COS/MOL at 7.

Although the protester submitted a declaration as proof that a component of one of the gases is primarily produced in China, that declaration does not demonstrate that the gases could not be sourced domestically at the price offered by the awardee, as the protester asserts. Protest exh. S, Decl. of Hudson SVP at 1. Nor does Hudson claim that the one component of the gas is available only from China. *See id*. (noting that the gas is primarily produced in China). As referenced above, unsupported allegations that a competitor's product is not in compliance with its BAA certification do not impose an obligation on the contracting officer to conduct a detailed investigation behind that certification. *W&K Container, Inc*., *supra*, *citing Sea Box, Inc*., *supra*. Here, the protester has failed to provide evidence that the contracting officer had information prior to award that would lead to the conclusion that RGAS's products were not domestic end products. As such, there was nothing improper regarding the agency's reliance on RGAS's certification in its proposal that the three NSNs were domestic end products. Accordingly, this allegation is denied.

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[6] These included: NSN 6830-01-732 (R407), NSN 6830-01-732-2750 (R407C), and NSN 6830-01-732-2787 (R507A).

Past Performance

Hudson challenges the agency's evaluation of RGAS's past performance, arguing that the agency conducted no substantive review of the information it pulled from SPRS but instead relied on RGAS's total supplier risk score alone to judge its past performance. Comments and 2nd Supp. Protest at 12, *citing* AR, Tab 16, Final PNM at 7. As a result, Hudson argues, the agency "conducted no evaluation of the relevance, recency, or context of RGAS's prior work." Comments and 2nd Supp. Protest at 12. Hudson contends that the agency "did not even evaluate the various component scores that underpinned the final Supplier Risk Score, even though those scores would have shed light on potential quality risks, delivery risks, and other possibly relevant performance information."[7] *Id*. The agency responds that its evaluation was reasonable and in accordance with the terms of the RFP. Supp. AR at 1. For the reasons discussed below, we find no basis upon which to sustain the protest.

In reviewing a protest challenging an agency's evaluation, our Office will not reevaluate proposals or substitute our judgment for that of the agency, as the evaluation of proposals is a matter within the agency's discretion. *See SDS Int'l, Inc.*, B-291183.4, B-291183.5, Apr. 28, 2003, at 5-6. Rather, we will review the record to determine whether the agency's evaluation was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. *MVM, Inc.*, B-407779, B-407779.2, Feb. 21, 2013, at 6. A protester's disagreement with the agency's judgment, without more, is insufficient to establish that an evaluation was unreasonable. *Id*. at 5.

Based on our review, we find nothing unreasonable regarding the agency's evaluation of RGAS's past performance as acceptable. As previously mentioned, the solicitation put offerors on notice that DLA would use SPRS to evaluate past performance. RFP at 3. In conducting this evaluation, the solicitation provided that the agency would

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[7] The protester raises other collateral past performance arguments that are not discussed in this decision. For example, the protester also argues: "Although RGAS provided past performance information as part of its proposal, the Agency did not consider this information as part of its evaluation. Rather, the Agency relied ***solely*** upon information drawn from SPRS." Comments and 2nd Supp. Protest at 11-12, *citing* AR, Tab 9, RGAS Tech. Proposal at 139-144. Other than these two sentences, however, the protester does not describe the information RGAS provided in its proposal that it contends the agency should have considered, make any assertions as to what conclusions the agency should have drawn from the information, or argue why the agency's consideration of the information would have rendered RGAS's past performance unacceptable. *See* Comments and 2nd Supp. Protest at 11-12. This sparse allegation, without more, fails to set forth a clear statement articulating a factual and legal basis in support of the protester's argument. As such, we dismiss this argument for failure to state a valid basis of protest. 4 C.F.R. § 21.1(c)(4) and (f); *Warfighter Focused Logistics, Inc.*, *supra*.

evaluate recent and relevant past performance to assess the government's confidence in the offeror's ability to perform as proposed, as well as consider the number and severity of problems, the effectiveness of any corrective actions taken, and the offeror's overall performance record. *Id*. The RFP provided that past performance would be evaluated as acceptable or unacceptable and defined an acceptable proposal as one that provides the government "a reasonable expectation that the offeror will successfully perform the required effort." AR, Tab 3(3), RFP sects. L & M at 7.

As also noted above, the SPRS is used to "determine the overall assessment of the supplier performance and supplier risk" and in so doing the SPRS score considers price risk (how an offeror's prices compare to the average price paid by the government), item risk (which flags items identified as high risk based on critical safety/application or risk of counterfeiting), and supplier risk (which scores vendors on Department of Defense (DoD)-wide contract performance). AR, Tab 16, Final PNM at 7. Moreover, as the intervenor describes at length, the supplier risk score is comprised of "10 factors of vendor performance" that are weighted "based on age and relative importance" and combined to produce a numerical and color score "for every company which has either a DoD contract or factor data within the last three years." Intervenor's Comments at 4, *quoting* Supp. AR, exh. 1, SPRS Evaluation Criteria Manual at 8 (intervenor's emphasis omitted). In this regard, SPRS receives contract award and delivery data from the Federal Procurement Data System and DLA, and program performance data from the Defense Contract Management Agency and the Contractor Performance Assessment Reporting System, among other sources.[8] Intervenor's Supp. Comments at 4, *citing* Supp. AR, exh. 1, SPRS Evaluation Criteria Manual at 8-9.

In evaluating past performance, DLA reviewed RGAS's and Hudson's SPRS supplier risk scores, which were 309 and 345, respectively. AR, Tab 16, Final PNM at 7. DLA observed that both scores were rated "Green" and above the average score of 278. *Id*. The offerors' updated SPRS reports were attached to DLA's final negotiation memorandum. *See* Supp. AR, Tab 18, Updated SPRS Reports. As part of its past performance evaluation, DLA also confirmed that neither offeror was suspected of

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[8] In addition, SPRS organizes a supplier's information based on a "supply code"--that is, the Federal Supply Classification/Product Service Code (PSC) and North American Industry Classification System (NAICS) code associated with each record. Supp. AR, exh. 1, SPRS Evaluation Criteria Manual at 11, 15. Each supply code for which there is quality performance data is ranked by magnitude and assigned a color. *Id.* at 13. In making this calculation, SPRS classifies suppliers based on quality performance comparisons for all competitors within the applicable supply code. *Id*. For purposes of this procurement, DLA utilized records falling within three supply codes: PSC 6830 (Gases: Compressed and Liquified); NAICS 211112 (Natural Gas Liquid Extraction); and NAICS 325120 (Industrial Gas Manufacturing). *See* Supp. AR, Ex. 9, Past Performance Evaluation at 7-8; *see also* PSC Manual, Apr. 2025 (available at: https://www.acquisition.gov/psc-manual); 2012 NAICS Guide (available at: https://www.census.gov/naics/?58967?yearbck=2012).

providing counterfeit products, and neither was listed as suspended or debarred. *See id*. Separately, DLA confirmed "multiple times throughout the procurement" that the offerors were actively registered on SAM.gov. AR, Ex. 16, Final PNM at 7. Considering this information, both RGAS and Hudson were deemed acceptable for past performance. *Id*.

Although the protester asserts that the agency should have conducted a more detailed assessment of past performance using SPRS, its disagreement with the agency's reliance on the overall score does demonstrate that DLA's evaluation was unreasonable. *Markon LLC*, B-423767 *et al*., Dec. 12, 2025, at 13 (noting that a protester's disagreement with an agency's interpretation of a solicitation's requirement does not render the agency's interpretation unreasonable). Here, the solicitation does not specify how DLA would use SPRS, just that it would be used to evaluate past performance. RFP at 3. The protester has not demonstrated that DLA's past performance evaluation of RGAS's past performance as acceptable was inconsistent with the terms of the RFP or otherwise unreasonable. Accordingly, this protest ground is denied.

The protest is denied.

Edda Emmanuelli Perez
General Counsel

U.S. General
Services
Administration

Trade Agreements Act compliance and supply chain security on MAS

Our Multiple Award Schedule contracts are a great way to acquire safe, secure products and services that comply with foreign acquisition rules.

TAA compliance

What is prohibited: MAS contract offerings are subject to the TAA, meaning contractors must provide only U.S.-made or designated country end products and services.

What we do: GSA incorporates the required TAA clause and provision into the MAS solicitation and resulting contracts. MAS contractors certify the country of origin for each product which is displayed on GSA Advantage (U.S. products are highlighted with an American flag icon). Contracting officers have extensive access to supply chain data that flags potentially non-compliant products offered to us.

Order-level actions: No additional steps are required. If product or package marketing suggests an item was manufactured in a non-TAA compliant country, please report it using the “Report Incorrect Product Listing” feature on GSA Advantage.

Supply chain security

What is prohibited: Federal agencies face an increasing number of threats that pose risks to the integrity, security, and resilience of the federal supply chain. Specific prohibitions are outlined in FAR part 40 (GSA Class Deviation RFO-2025-40) Information Security and Supply Chain Security.

What we do: We reduce supply chain risk by incorporating the security prohibition provision and clause at 52.240-90 (GSA Class Deviation RFO-2025-52) and 52.240-91 (GSA Class Deviation RFO-2025-52), respectively, into the MAS solicitation and resulting contracts. This ensures that suppliers are contractually obligated to meet specific security requirements. In addition, we conduct upfront compliance screenings, perform ongoing monitoring, and leverage supply chain illumination tools to identify and remove prohibited or high-risk products and suppliers from the program. When new exclusion orders are issued, we notify impacted customers when possible.

Order-level actions (when needed): Most MAS acquisitions do not require additional steps. However, ordering agencies may need to take additional actions such as:

- Including additional order-level security controls for higher-risk requirements such as patching, maintenance, incident reporting, enhanced security standards, and so on.
- Awarding software in accordance with agency-level policies and processes that match agency risk determination and needs .
- Reviewing items awarded as order-level materials, since OLMs are not awarded under the MAS contract and have not been reviewed or approved by our agency.

- Taking action to remove or replace prohibited items if new governmentwide restrictions apply.
- Using GSA's SCRIPTS BPAs to acquire tools and services that support supply chain risk identification and mitigation for higher-risk acquisitions

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