

DEPARTMENT OF HOMELAND SECURITY
Office of Inspector General

Buy American Act Compliance



Office of Audits

OIG-06-37

May 2006

Office of Inspector General

U.S. Department of Homeland Security
Washington, DC 20528



**Homeland
Security**

May 31, 2006

Preface

The Department of Homeland Security (DHS) Office of Inspector General (OIG) was established by the Homeland Security Act of 2002 (*Public Law 107-296*) by amendment to the Inspector General Act of 1978. This is one of a series of audit, inspection, and special reports prepared as part of our oversight responsibilities to promote economy, efficiency, and effectiveness within the department.

This report assesses DHS's compliance with the Buy American Act and its progress in implementing our prior audit recommendations. It is based on interviews with employees and officials of relevant agencies and institutions, direct observations, and a review of applicable documents.

The recommendations herein have been developed to the best knowledge available to our office, and have been discussed in draft with those responsible for implementation. It is our hope that this report will result in more effective, efficient, and economical operations. We express our appreciation to all of those who contributed to the preparation of this report.

A handwritten signature in cursive script that reads "Richard L. Skinner".

Richard L. Skinner
Inspector General

Table of Contents/Abbreviations

Executive Summary	1
Background.....	3
Results of Audit	5
DHS Compliance On An Agency-Wide Level Not Determined	5
Prior Report Recommendations Status	5

Appendices

Appendix A: Purpose, Scope and Methodology.....	9
Appendix B: Major Contributors to this Report	11
Appendix C: Report Distribution.....	12

Abbreviations

BAA	Buy American Act
CBP	Customs and Border Protection
CG	United States Coast Guard
DAU	Defense Acquisition University
DHS	Department of Homeland Security
FAR	Federal Acquisition Regulation
FEMA	Federal Emergency Management Agency
FLETC	Federal Law Enforcement Training Center
FY	Fiscal Year
FPDS-NG	Federal Procurement Data System – Next Generation
HR	House of Representatives
HSCIS	Homeland Security Contract Information System
ICE	Immigration and Customs Enforcement
OCPO	Office of Chief Procurement Officer
OFPP	Office of Federal Procurement Policy
OPO	Office of Procurement Operations
OE	Operating Entity
OIG	Office of Inspector General
TSA	Transportation Security Administration
USSS	United States Secret Service

*Department of Homeland Security
Office of Inspector General*

Executive Summary

The Buy American Act (BAA) was enacted in 1933 to encourage the federal government to buy from American companies. Since then Congress has modified the law, adding numerous exemptions and trade agreements that permit the federal government to purchase foreign products from other countries.

The House of Representatives Conference Report H.R. 109-79 (Conference Report) for the Department of Homeland Security's (DHS) Appropriations Act, fiscal year (FY) 2006 (Public Law 109-90) directed the Office of Inspector General (OIG) to audit DHS's BAA compliance. In this audit, we focused on follow-up of our prior report recommendations and reviewed a sample of contracts that included contracts with foreign purchases as well as contracts without foreign purchases to determine whether those contracts were in compliance with BAA.¹ We performed fieldwork from December 2005 through April 2006 at several DHS Operating Entities (OEs). See Appendix A for a more detailed description of our objective, scope, and methodology.

In our review of contracts, we noted no significant BAA compliance issues. Our contract review included looking at a sample of contracts from the FY 2005 foreign purchase reports, contracts awarded during FY 2005, and contracts shown in the Homeland Security Contract Information System (HSCIS) as having foreign countries of origin. Contracts reviewed totaled \$199 million; BAA compliance exceptions represented less than one percent of contracts reviewed.

We cannot, however, determine whether DHS complied with BAA requirements on a comprehensive, agency-wide level because of system limitations and manual reporting errors. Neither the HSCIS nor the Federal Procurement Data System – Next Generation (FPDS-NG) has the current capability to identify all contracts used to purchase foreign products.² Additionally, because of reporting inaccuracies in the manual monitoring

¹ *Audit of Buy American Act Compliance*, OIG-05-23, June 2005.

² HSCIS is a DHS database of procurement actions that are reported to FPDS-NG. FPDS-NG collects historical and statistical information about the federal government's procurement contracts to meet the information needs of Congress, federal agencies, and the public.

process, DHS continues to revise its FY 2005 Foreign Purchase report. Therefore, we cannot ascertain whether the report is accurate or complete. As of the end of fieldwork, DHS had identified \$219 million in FY 2005 foreign purchases.

DHS agreed with the recommendations in our June 2005 report and continues to implement corrective actions. Specifically, our recommendations included providing BAA training, completing implementation of automated contract writing systems, improving automated reporting systems for tracking BAA compliance, and continuing manual data collection requirements until these systems are improved. Therefore, we made no additional recommendations. We discussed our report with DHS on April 6, 2006. DHS concurred with the report information.

Background

Congress enacted the BAA of 1933³ during the Depression to protect American industry and workers by eliminating unfair foreign competition and guaranteeing the continuance of certain critical industrial bases necessary for national security. The BAA requires the federal government to purchase, with certain exceptions, only domestic end products from U.S. companies. It does not apply to professional or personal services.

Since its inception, Congress has modified the law, adding numerous exemptions and trade agreements that permit the federal government to purchase foreign products from other countries. The Federal Acquisition Regulations (FAR) Part 25, “Foreign Acquisitions” lists BAA exceptions. The federal government may purchase a foreign-end product if one of the following conditions exists:

- The products acquired are for use outside the U.S.
- It would be in the public’s interest to do so.⁴
- The product is not reasonably available in sufficient commercial quantities in the domestic market.
- The cost of the domestic product is unreasonable.
- The product is for resale.
- The products are commercial information technology items.
- The products are eligible products acquired under Trade Agreements.

The reasonableness of cost is determined by applying certain evaluation factors to the foreign offeror’s proposed price before performing the price evaluation.⁵ If the price of the domestic offer exceeds the price of the foreign offer after the addition of the evaluation factors, then the agency may purchase the foreign end product.

³ 41 U.S.C. 10a-10d

⁴ FAR does not specifically define “in the public’s interest”, except to say that this exception applies when an agency has an agreement with a foreign government that provides a blanket exception to the BAA. Se, e.q., 48 C.F.R. 25.103(a).

⁵ Federal Acquisition Regulation, 48 C.F.R. §§ 25.501 et seq.

A domestic end product can also include foreign components.⁶ The FAR defines a domestic-end product as (1) an un-manufactured end product mined or produced in the United States; or, (2) an end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Therefore, a domestic acquisition may include as much as 49 percent of foreign component cost and still be considered a domestic purchase.

Prior OIG Audit

In the Conference Report accompanying DHS' FY 2005 appropriations, Congress directed the Secretary of DHS to report to the Committees on Appropriations on the supplies acquired by DHS during FY 2005 that were manufactured outside of the United States, as well as an itemized list of all waivers granted with respect to such supplies. The report required a summary of the total funds spent by DHS on goods manufactured within the United States compared with funds spent on goods manufactured outside of the United States. The Conference Report also directed us to perform an audit of DHS' BAA compliance.

DHS issued Acquisition Alert Number 05/04 on November 16, 2004, which required DHS OEs to provide the required information to the DHS Office of Chief Procurement Officer (OCPO). Although the Conference Report did not specify a deadline for reporting to Congress, OCPO required all OE's to submit agency specific FY 2005 Foreign Purchase Reports by October 31, 2005 to DHS.

We issued *OIG-05-23, Audit of Buy American Act Compliance*, in June 2005. The audit focused primarily on DHS' policies, procedures, and practices to determine whether sufficient controls were in place to ensure that DHS fully complied with BAA requirements. We reported that DHS and its OEs had sufficient policies and procedures to ensure BAA compliance. However, we could not fully validate BAA compliance because of DHS's inability to identify conclusively all procurements subject to BAA requirements.

We recommended that DHS provide additional BAA training, complete the implementation of automated contract writing systems for all DHS OEs, consult with OMB regarding the necessity of government-wide tracking of BAA compliance, revise HSCIS guidance to make the country of origin field required, when applicable, and to continue manual data collection until an automated system becomes available.

⁶ Component means an article, material, or supply incorporated directly into an end product or construction material (48 C.F.R. § 25.003).

Results of Audit

DHS Compliance On An Agency-Wide Level Not Determined

We noted no significant BAA compliance issues through our review of 74 contracts totaling \$199 million for domestic and foreign end item purchases. Contracts reviewed contained FY 2005 foreign purchases totaling \$31 million.⁷ Our sample of contracts included contracts selected from three sources: the FY 2005 Foreign Purchase Reports; reports, obtained from various OEs, of contracts awarded during FY 2005; and, supply contracts shown in the HSCIS system containing foreign countries of origin. Our review identified only \$22 thousand in foreign purchases from DHS that did not have proper BAA exemptions—less than one percent of the total contracts reviewed. DHS acknowledged that it had no exemptions for these purchases and immediately required BAA training for some of the procurement staff.

Although we identified no significant BAA compliance issues, we could not validate DHS's BAA compliance on a comprehensive, agency-wide level because of system limitations and manual reporting errors. DHS and its OEs did not have controls in place to conclusively identify all foreign purchases and corresponding BAA exceptions. Contract information systems, such as HSCIS and FPDS-NG, do not have the current capability to identify all BAA-related contract activity and to report accurately on the types and amounts of foreign products purchased by DHS.

Instead of using automated systems, DHS requires its OEs to manually collect the BAA data required for the Conference Report. Initially DHS OEs reported foreign product purchases totaling \$164 million to the OCPO. Because of reporting inaccuracies in the manual monitoring process, DHS continues to revise the FY 2005 Foreign Purchase report. Furthermore, we could not ascertain whether the report is accurate or complete because some OE's could not provide supporting documentation for foreign purchases reported. At the end of fieldwork, OCPO had identified \$219 million in foreign purchases.

⁷ Amount represents total contract values. The exact amount of foreign and domestic-end products was not ascertainable.

Prior Report Recommendations Status

BAA Training Still Needed

Although DHS has not yet provided specific BAA training to all of its procurement personnel, the Federal Law Enforcement Training Center (FLETC) and the United States Coast Guard (CG) have made some progress. In response to our current audit, FLETC required all of its procurement personnel to take online BAA training through the Defense Acquisition University (DAU). CG also provides online BAA training through the DAU to its procurement staff on an as needed basis.

BAA is a complex law. Knowing exactly when the BAA applies is not always clear. While our limited review did not disclose any significant instances of BAA noncompliance, periodic training would further ensure BAA compliance. DHS stated that it would issue an acquisition alert requiring its procurement personnel to take the DAU BAA specific training as part of its mandatory training requirements.

Automated Contract Writing Systems Still Necessary

DHS is still in the process of deploying automated contract-writing systems to all of its OEs. Most of DHS's OEs have automated contract-writing systems. Depending on the contract type selected, the automated systems will help contracting personnel by inserting applicable BAA clauses. FLETC and CG still have some individual procurement offices without access to automated contract writing systems.

Offices without this capability must rely on the contracting officers to have the knowledge, training, and experience to know when to insert applicable clauses. This practice increases the risk of awarding contracts without full compliance with BAA requirements.

FLETC plans on deploying an automated contract writing system during FY 2007. CG plans to deploy an automated contract writing system in two of its nine major procurement offices during FY 2006, with deployment to the remaining seven dependent on available funding.

Improvements to HSCIS and FPDS-NG Systems

Although HSCIS and FPDS-NG systems include fields for reporting the country of origin and the place of manufacture, the systems do not require users to complete these fields for many contract types. Further, DHS does not record the place of manufacture for any of its contract actions. DHS can require its OEs to complete these fields with minimal changes to the systems.

Buy American Act Compliance

Requiring OE's to identify foreign countries of origin and place of manufacturer will help identify contracts with foreign purchases. However, it will not help determine whether DHS complied with the BAA by identifying applicable exemptions or clarify the reporting requirements.

Future changes to BAA reporting capabilities will be made in FPDS-NG because DHS will phase out HSCIS when FPDS-NG becomes fully operational at the end of FY 2006. Therefore, OCPO will not modify BAA reporting capabilities within HSCIS.

According to representatives from the OMB Office of Federal Procurement Policy (OFPP), FPDS-NG's Place of Manufacture field does not meet the current reporting needs. FPDS-NG does not clearly define the data required in the Place of Manufacture field, an issue that has contributed to inconsistent reporting among some Federal agencies. In addition, it does not require the user to identify the applicable BAA exemptions required by the Conference Report.

In response to the confusion surrounding the foreign purchase reporting requirements, in October 2005, the Federal Acquisition Regulation (FAR) Principals tasked the FAR Law Team to prepare a report and draft a proposed rule on Reporting of Overseas Purchases.⁸ The FAR Law Team has drafted an interim rule concerning the reporting of overseas purchases and, once approved by the appropriate counsels, will publish the interim rule in the Federal Register. The FAR Law Team will require FPDS-NG changes necessary to meet the reporting requirements.

The proposed new interim rule, if approved, will create a new solicitation provision to collect data on the place of manufacture for acquisitions pertaining to the purchase of manufactured-end products only. The FAR will also define manufactured-end products and will require reporting on the acquisition, not line item, level. Contracting officers will place the new provision and corresponding clauses in solicitations and contracts that are predominately for acquisitions of manufactured-end products, as defined by the FAR. Agencies will use this information to complete the revised reporting fields in FPDS-NG that will meet reporting requirements. We believe this will help DHS monitor and report its foreign purchases.

Continue Manual Data Collection

DHS issued *Acquisition Alert 06/02 DHS: BAA Reporting Requirement* that required all OEs to continue manual data collection required for reporting on

⁸ Department of Defense, General Services Administration, and the National Aeronautics and Space Administration.

foreign and domestic purchases. DHS plans to continue manual data collection until completion of the FPDS-NG revisions.

Recommendations

We are making no additional recommendations at this time, but will continue to monitor the status of our June 2005 recommendations.

Management's Response

We provided management a discussion draft and held an exit conference to discuss the report on April 6, 2006. Management concurred with all of the report information. DHS will continue to manually monitor BAA compliance until changes to FPDS-NG are complete.

Our audit objective was to determine whether DHS complied with the BAA as required by FAR Part 25. In this audit, we focused on follow-up of our prior June 2005 report recommendations and reviewed a sample of contracts with and without foreign purchases to determine if those contracts were in compliance with BAA. Our contract review was limited to BAA compliance.

Our fieldwork began in December 2005 and continued through April 2006. Fieldwork included interviews and discussions at OCPO, CBP, ICE, TSA, USCG, OPO, FEMA, FLETC and USSS. We conducted the audit pursuant to the Inspector General Act of 1978, as amended, and according to generally accepted government auditing standards.

To identify the process DHS uses to monitor and report its BAA compliance, we interviewed each DHS OE's Head of Contracting Authority (HCA). The discussions addressed issues concerning BAA policies and procedures, automated contract writing systems, BAA compliance review process, and BAA reporting. Our discussions focused on changes made in each OE's policies and procedures for monitoring and reporting since issuance of our last audit in June 2005. Also, we interviewed the HSCIS administrator and the program manager for the FPDS-NG to discuss system limitations and capabilities for monitoring BAA compliance.

As noted in our June 2005 report, system limitations impacted DHS's ability to identify its total population of foreign purchases. These limitations continue to exist. Further, although DHS required its OEs to manually monitor FY 05 foreign purchases and to submit an FY 05 Foreign Purchase Report to the OCPO by October 31, 2005, the majority of the OEs initially either failed to submit a report or showed a negative response to the data request at the time of our review. Consequently, we could not identify a complete universe of foreign purchases and could not use statistical sampling methods to assess BAA compliance. Instead, we selected a nonbiased sample of contracts to review for BAA compliance. As a result, we could not determine whether DHS fully complied with BAA requirements on an agency-wide level.

We reviewed a total of 74 contracts totaling \$199 million. Contracts reviewed that contained FY 2005 foreign purchases totaled \$31 million.⁹ We made our initial selection from contracts included in the FY 2005 Foreign Purchase Reports from each OE. For OE's that did not report any foreign purchases, we selected a sample of FY 2005 contract awards. We also compared the FY 2005 Foreign Purchase Reports to HSCIS generated reports of supply

⁹ Amount represents total contract values. The exact amount of foreign and domestic-end products was not ascertainable.

contracts awarded with foreign countries of origin and noted any discrepancies between the two reports.

Appendix B
Major Contributors To This Report

Tonda Hadley, Director, Dallas Field Office of Audits
Ruth Blevins, Audit Manager
James Nelson, Auditor-In-Charge
Greg Huff, Auditor
Cheryl Johnson, Auditor

Department of Homeland Security

Secretary
Deputy Secretary
Chief of Staff
General Counsel
Executive Secretariat
Acting Under Secretary for Management
Chief Procurement Officer
Assistant Secretary for Public Affairs
Assistant Secretary for Policy
Assistant Secretary for Legislative and Intergovernmental Affairs
DHS OIG Liaison
CBP Audit Liaison
FEMA Audit Liaison
FLETC Audit Liaison
ICE Audit Liaison
S&T Audit Liaison
TSA Audit Liaison
USCG Audit Liaison
USSS Audit Liaison

Office of Management and Budget

Chief, Homeland Security Branch
DHS OIG Program Examiner

Congress

Congressional Oversight and Appropriations Committees as appropriate

Budget

Chief, Homeland Security Branch
DHS OIG Program Examiner

Additional Information and Copies

To obtain additional copies of this report, call the Office of Inspector General (OIG) at (202) 254-4100, fax your request to (202) 254-4285, or visit the OIG web site at www.dhs.gov/oig.

OIG Hotline

To report alleged fraud, waste, abuse or mismanagement, or any other kind of criminal or noncriminal misconduct relative to department programs or operations, call the OIG Hotline at 1-800-323-8603; write to DHS Office of Inspector General/MAIL STOP 2600, Attention: Office of Investigations - Hotline, 245 Murray Drive, SW, Building 410, Washington, DC 20528, fax the complaint to (202) 254-4292; or email DHSOIGHOTLINE@dhs.gov. The OIG seeks to protect the identity of each writer and caller.