



DEPARTMENT OF JUSTICE | OFFICE OF THE INSPECTOR GENERAL

MANAGEMENT ADVISORY MEMORANDUM

22-070

APRIL 2022

Notification of a Need to Heighten Awareness
of and Compliance with Laws and Regulations
Relating to Procurements from Foreign
Countries

INVESTIGATIONS DIVISION



April 26, 2022

Management Advisory Memorandum

To: Michael Carvajal
Director
Federal Bureau of Prisons

A handwritten signature in blue ink that reads "Michael E. Horowitz".

From: Michael E. Horowitz
Inspector General

Subject: Notification of a Need to Heighten Awareness of and Compliance with Laws and Regulations
Relating to Procurements from Foreign Countries

The purpose of this memorandum is to notify you of a concern that resulted from an Office of the Inspector General (OIG) investigation of a procurement by the Federal Prison Industries, Inc. (UNICOR).¹ The OIG investigation involved a UNICOR contractor that had allegedly misrepresented that its products were made in the United States when they were in fact made in China. We found that certain UNICOR staff were aware that the contractor manufactured its products in China but believed and advised the contractor that UNICOR could procure the products in compliance with laws and regulations concerning procurements from foreign countries. We did not find that the UNICOR staff or the contractor engaged in misconduct. However, we found that certain UNICOR staff did not adequately understand the relevant laws and regulations that governed UNICOR's contracts and did not seek guidance from UNICOR's Office of General Counsel (OGC) before entering into the contracts or providing compliance guidance to the contractor. During the course of our investigation, UNICOR's OGC proactively provided written guidance regarding foreign procurement laws to UNICOR staff. In addition, UNICOR OGC stated that it intends to provide training to UNICOR staff regarding the same laws. The OIG makes three recommendations to address the concerns we identified.

Relevant Authorities

Foreign procurements are governed by a complicated body of laws and regulations, including the Buy American Act (BAA), 41 U.S.C. §§ 8301 et seq., and the Trade Agreements Act of 1979 (TAA), 19 U.S.C. §§ 2501

¹ UNICOR is a "government corporation of the District of Columbia" which is administered by a board of six directors, appointed by the President. 18 U.S.C. § 4121. UNICOR "provides training and employment for prisoners confined in Federal penal and correctional institutions through the sale of its supplies and services to Government agencies." 48 C.F.R. § 8.601. According to the website of the Federal Bureau of Prisons (BOP), UNICOR is "an integral component" of BOP, and the BOP Director services as its Commissioner. https://www.bop.gov/inmates/custody_and_care/unicor_corporate.jsp. Sales by UNICOR "are considered intragovernmental transfers." See 18 U.S.C. § 4124(c).

et seq.² The BAA establishes a long-standing preference for the purchase of domestically manufactured goods or end products in federal procurement. See Xerox Corp. v. United States, 753 F.Supp.2d 1355, 1358 (U.S. Ct. Int'l Trade 2011). The BAA states, subject to certain exceptions and monetary thresholds:

Only unmanufactured articles, materials, and supplies that have been mined or produced in the United States, and only manufactured articles, materials, and supplies that have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States, shall be acquired for public use unless the head of the department or independent establishment concerned determines their acquisition to be inconsistent with the public interest, their cost to be unreasonable, or that the articles, materials, or supplies of the class or kind to be used, or of the articles, materials, or supplies from which they are manufactured, are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

41 U.S.C. § 8302(a)(1).

The TAA, also subject to certain exceptions and monetary thresholds, contains both (1) a provision that allows for waiver of the BAA and other discriminatory purchasing requirements with respect to “eligible products” from designated foreign countries and instrumentalities (“designated countries”) and (2) a provision that provides for prohibition of procurements from non-designated countries. See Xerox, 753 F.Supp.2d at 1358. The waiver provision of the TAA states:

[T]he President may waive, in whole or in part, with respect to eligible products of any foreign country or instrumentality designated under subsection (b), and suppliers of such products, the application of any law, regulation, procedure, or practice regarding Government procurement that would, if applied to such products and suppliers, result in treatment less favorable than that accorded—

- (1) to United States products and suppliers of such products; or
- (2) to eligible products of another foreign country or instrumentality which is a party to the Agreement [on Government Procurement (the Agreement)] and supplier of such products.

19 U.S.C. § 2511(a). The TAA defines the term the term “eligible product” as a “product or service” of a country that is a party to one of several enumerated trade agreements with the United States. 19 U.S.C. § 2518(4)(A). Subsection (b) of 19 U.S.C. § 2511 sets forth the circumstances under which the President may designate a foreign country or instrumentality for purposes of subsection (a). Designated countries are identified in the Federal Acquisition Regulation (FAR), 48 C.F.R. §§ 25.003 and 52.225-5, and China is not one of the designated countries.

The prohibition provision of the TAA states:

² There are additional legal authorities that govern foreign procurements, including Executive Order (EO) 14005 which the President signed on January 25, 2021. Among other things, EO 14005 established new requirements for granting BAA waivers. While EO 14005 and related policy memoranda were issued after the events that formed the basis of this memorandum, the BOP and UNICOR should consider all relevant legal authorities on foreign procurements, including EO 14005, in addressing the concerns and recommendations described in this memorandum.

(1) In general

Subject to paragraph (2), the President, in order to encourage additional countries to become parties to the Agreement and to provide appropriate reciprocal competitive government procurement opportunities to United States products and suppliers of such products—

(A) shall, with respect to procurement covered by the Agreement, prohibit the procurement, after the date on which any waiver under section 2511(a) of this title first takes effect, of products—

(i) which are products of a foreign country or instrumentality which is not designated pursuant to section 2511(b) of this title, and

(ii) which would otherwise be eligible products; and

(B) may, with respect to procurement covered by the Agreement, take such other actions within the President's authority as the President deems necessary.

(2) Exception

Paragraph (1) shall not apply in the case of procurements which—

(A) there are no offers of products of the United States or of eligible products; or
(B) the offers of products or services of the United States or of eligible products are insufficient to fulfill the requirements of the United States Government.

19 U.S.C. § 2512(a)(1). In order to determine whether the TAA prohibits a particular procurement, the government must first determine the country of origin of the item at issue. In this regard, the TAA states:

An article is a product of a particular country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

19 U.S.C. § 2518(4)(B). The determination of whether something has been “substantially transformed” pursuant to this provision is a complex, fact-intensive analysis. See *Energizer Battery, Inc. v. United States*, 190 F.Supp.3d 1308, 1315-1321 (U.S. Ct. Int’l Trade 2016) (holding that assembly of prefabricated flashlight components imported from China with predetermined use did not constitute substantial transformation sufficient to change country of origin of product; noting that 40% of flashlight parts were fastening devices and that assembly took only 7 to 13 minutes).

The FAR establishes certain exceptions to the TAA in 48 C.F.R. § 25.401. According to this provision, the TAA does not apply to, among other things, “[a]cquisitions from Federal Prison Industries, Inc.” This FAR provision does not contain an exception for acquisitions by Federal Prison Industries, Inc. (UNICOR).

The Issue

During an OIG investigation, the OIG found that certain UNICOR staff did not appear to adequately understand the laws and regulations governing procurements from foreign countries, yet they did not seek legal advice before entering into contracts involving foreign made products and providing guidance to contractors regarding compliance with the laws regarding foreign procurements. The contracts at issue contained a provision indicating that the procurements were subject to the TAA.

Certain UNICOR staff told the OIG that they were aware at the time UNICOR entered into the contracts that the contractor's products were produced in China. However, the contractor's certifications in connection with the contracts did not state that the products were from China, although the certifications contained a space for the contractor to do so. The UNICOR staff provided the OIG varying statements as to why they believed the procurements were nonetheless compliant with the laws described above. These statements included that: China was the only source country supplier of the products; the products were substantially transformed in the United States when they were assembled by UNICOR after procurement; the products were commercial off-the-shelf products; and the contractor was penalized during the bidding process to account for its products being produced in China. One of the UNICOR staff acknowledged that the FAR, especially the portion dealing with trade agreements, was difficult to understand.

Attorneys from UNICOR's OGC, who reviewed the contracts following the initiation of the OIG's investigation, provided a legal assessment that differed from the explanations by the UNICOR staff described above. These attorneys told the OIG that the contract certifications should have stated that the contractor's products were made in China, if the certification document indicated the necessity of such a statement. In addition, these attorneys told the OIG that whether UNICOR substantially transformed the products after procurement was irrelevant to the TAA analysis. They explained that procurements are considered TAA-compliant based on substantial transformation only if the products are substantially transformed by the contractor before UNICOR purchases them. These attorneys further told us that the UNICOR procurement officials may not have fully understood the contracts or relevant laws due to their complicated nature. In addition, the attorneys told us that UNICOR OGC had not reviewed the contracts prior to UNICOR entering into them, because UNICOR contracts are generally reviewed by UNICOR OGC only when UNICOR procurement officials request UNICOR OGC's review or guidance.

Given the complexity of the laws described above, including the complicated, fact-intensive analysis for determining whether a product has been "substantially transformed" within the meaning of the TAA, we believe it would be beneficial for procurement staff to seek OGC guidance before entering into contracts for foreign goods or providing guidance to contractors regarding compliance with the laws regarding foreign procurements.

Conclusions

We concluded that certain UNICOR staff did not adequately understand the laws and regulations governing foreign procurements. Despite this lack of understanding, they entered into contracts for foreign goods, and provided compliance guidance to a contractor supplying foreign goods, without seeking and obtaining legal review or guidance. As a result, we believe that UNICOR is at risk of entering into contracts that are not compliant with laws intended to promote U.S. policies regarding foreign procurements.

Recommendations

The OIG recommends that the BOP, in coordination with UNICOR's OGC, take the following actions in order to remedy the issues identified.

1. Ensure that all current UNICOR contracts are compliant with laws and regulations governing foreign procurements.
2. Ensure that relevant UNICOR officials are trained to understand the laws and regulations governing foreign procurements.
3. Consider whether all UNICOR procurements involving products with any foreign nexus, or UNICOR procurements involving products with any foreign nexus over a certain threshold dollar amount, should undergo legal review before being finalized.

The OIG provided a draft of this memorandum to the BOP, and the BOP's response is incorporated in Appendix 1. The BOP indicated in its response that it agreed with the OIG's recommendations. Appendix 2 provides the OIG's analysis of the BOP's response and a summary of the actions necessary to close the recommendations in this memorandum. The OIG requests that the BOP provide an update on the status of its response to the recommendations within 90 days of the issuance of this memorandum.

If you have any questions or would like to discuss the information in this memorandum, please contact me at (202) 514-3435 or Sarah E. Lake, Assistant Inspector General for Investigations, at (202) 616-4730.

cc: Bradley Weinsheimer
Associate Deputy Attorney General
Department of Justice

Appendix 1: The BOP's Response



U. S. Department of Justice

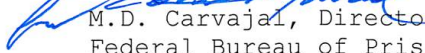
Federal Bureau of Prisons

Office of the Director

Washington, DC 20534

April 11, 2022

MEMORANDUM FOR MICHAEL E. HOROWITZ, INSPECTOR GENERAL
OFFICE OF THE INSPECTOR GENERAL

FROM:  M.D. Carvajal, Director
Federal Bureau of Prisons

SUBJECT: Response to the Office of Inspector General's
OIG) Draft Management Advisory Memorandum:
Notification of a Need to Heighten Awareness of
and Compliance with Laws and Regulations Relating
to Procurements from Foreign Countries

The Bureau of Prisons (BOP) appreciates the opportunity to provide a response to the Office of the Inspector General's above-referenced memorandum.

The BOP concurs with the three recommendations furnished in the memorandum. We also note that the BOP has already taken actions to address the concerns raised in the memorandum and reflected in the recommendations. In particular, since activity on the contracts at issue concluded in 2017, Federal Prison Industries (UNICOR) realigned its procurement functions within a more centralized Procurement Branch, which provides enhanced oversight and guidance for contracting issues, including those pertaining to acquisitions from foreign countries. Additionally, after the start of the OIG investigation, which found no wrongdoing by UNICOR or the relevant contractor, UNICOR's OGC prepared training material and plans to conduct additional training this spring pertaining to foreign-country acquisition laws and regulations.

I expect that the proactive steps taken by UNICOR and its implementation of the furnished recommendations will further enhance its procurement functions.

Appendix 2: Office of Inspector General Analysis and Summary of the Actions Necessary to Close the Recommendations

The OIG provided a draft of this memorandum to the BOP, and the BOP's response is incorporated in Appendix 1. The BOP indicated in its response that it agreed with the OIG's recommendations.

The following provides the OIG's analysis of the BOP's response and a summary of the actions necessary to close the recommendations in this memorandum. The OIG requests that the BOP provide an update on the status of its response to the recommendations within 90 days of the issuance of this memorandum.

Recommendation 1: The BOP, in accordance with UNICOR's OGC, should ensure that all current UNICOR contracts are compliant with laws and regulations governing foreign procurements.

Status: Resolved.

BOP Response: The BOP stated that it concurs with the recommendation and reported that UNICOR has "realigned its procurement functions within a more centralized Procurement Branch, which provides enhanced oversight and guidance for contracting issues, including those pertaining to acquisitions from foreign countries."

OIG Analysis: The BOP's response is responsive to the recommendation. The OIG will consider whether to close this recommendation once the BOP, in coordination with UNICOR OGC, provides evidence to the OIG that it has ensured that all current UNICOR contracts are compliant with the laws and regulations governing foreign procurements.

Recommendation 2: The BOP, in accordance with UNICOR's OGC, should ensure that relevant UNICOR officials are trained to understand the laws and regulations governing foreign procurements.

Status: Resolved.

BOP Response: The BOP stated that it concurs with the recommendation and reported that UNICOR has prepared training material and plans to conduct training this spring pertaining to foreign-country acquisition laws and regulations.

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OIG Analysis: The BOP's response is responsive to the recommendation. The OIG will consider whether to close this recommendation once the BOP, in coordination with UNICOR OGC, provides the OIG with copies of the training materials described above and confirms that relevant UNICOR officials have been trained to understand the laws and regulations governing foreign procurements.

Recommendation 3: The BOP, in accordance with UNICOR's OGC, should consider whether all UNICOR procurements involving products with any foreign nexus, or UNICOR procurements involving products with any foreign nexus over a certain threshold dollar amount, should undergo legal review before being finalized.

Status: Resolved.

BOP Response: The BOP stated that it concurs with the recommendation.

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OIG Analysis: The BOP's response is responsive to the recommendation. The OIG will consider whether to close this recommendation once the BOP, in coordination with UNICOR OGC, advises the OIG as to its plan

for legal review of UNICOR's procurements involving products with any foreign nexus, or UNICOR procurements involving products with any foreign nexus over a certain threshold dollar amount.