The Buy American Act: Requiring Government Procurements to Come from Domestic Sources

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Summary

The Buy American Act is the major domestic preference statute governing procurement by the federal government. Essentially it attempts to protect domestic labor by providing a preference for American goods in government purchases. It was enacted in 1933 and has only been substantively amended four times in the succeeding years. In determining what are American goods, the place of mining, production, or manufacture is controlling. The nationality of the contractor is not considered when determining if a product is of domestic origin.

There are five primary exceptions to the Buy American Act. The act does not apply to procurements to which application would be inconsistent with the public interest or unreasonable in cost. The act does not apply to procurements of products for use outside the United States or of products not produced or manufactured in the United States in sufficient and reasonably available commercial quantities and of satisfactory quality. Lastly, the act does not apply to procurements under $3,000.

In the 2007, a new reporting requirement was added to the Buy American Act. Under P.L. 110-28, the head of each federal agency is required to annually report to Congress concerning procurements from non-domestic sources. This reporting requirement will expire at the end of September 2011.

The American Recovery and Reinvestment Act (ARRA; P.L. 111-5) did not amend the Buy American Act. It did, however, include a provision (§ 1605) attaching domestic content considerations to the funds disbursed under the Plan.

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The Buy American Act[1] is the major domestic preference statute governing procurement by the federal government.[2] Essentially, it attempts to protect domestic labor by providing a preference for American goods in government purchases. It was enacted in 1933[3] and has only been substantively amended four times in the succeeding years.[4] In determining what are American goods, the place of mining, production, or manufacture is controlling. The nationality of the contractor is not considered when determining if a product is of domestic origin.[5]

While the act appears to control most procurements of the federal government, it should be noted, when considering a particular procurement, that the application of the act may be controlled by other legislation or international agreement. For example, the Trade Agreements Act of 1979[6] authorizes the President to waive any otherwise applicable "law, regulation or procedure regarding Government procurement" that would accord foreign products less favorable treatment than that given to domestic products.[7] Article 1004 of The North American Free Trade Agreement (between the United States, Mexico, and Canada) disallows domestic protection legislation, such as the Buy-American Act, in government procurement. Other treaties and agreements also place limitations on the application of the act and must be considered when looking at any Buy American question.

Coverage of the Buy American Act

The domestic preference requirement of the act is quite broad in its scope. The federal government is required to buy domestic "articles, materials, and supplies" when they are acquired for public use unless a specific exemption[8] applies.[9]

The act applies to all federal procurements, but has separate provisions for supply contracts[10] and construction contracts.[11] Most of the rules and definitions used in applying the act are found in the

[1] 41 U.S.C. §§ 10a through 10d.

[2] There are numerous "little Buy American" provisions which generally govern specific types of procurements that are for some reason exempt from the Buy American Act, usually because the procurement is for articles for use outside of the United States. These provisions are beyond the scope of this paper, but should be considered when researching whether or not a domestic preference affects a particular procurement. These provisions are often attached to the appropriations acts for the agencies making the procurement in question. The most well known of these Acts is commonly referred to as the "Berry Amendment" and applies to certain procurements of the Department of Defense, *see*, CRS Report RL31236, *The Berry Amendment: Requiring Defense Procurement to Come from Domestic Sources*, by Valerie Bailey Grasso. The American Recovery and Reinvestment Act of 2009 (ARRA) contains a "little Buy American" provision governing contracts entered into by entities utilizing federal funds received under the act. P.L. 111-5, § 1605, 123 Stat.115, 303 (2009).

[3] Ch. 212, 47 Stat. 1520, 72nd Congress, 2nd Session. (1933).

[4] See, P.L. 100-418, Title VII; 102 Stat. 1545, 100th Congress, 2nd Session (1988), P.L. 103-355, 108 Stat. 3346-7, 103rd Congress, 2nd Session (1994), codified at 41 U.S.C. 10a., P.L. 104-201, § 827, 110 Stat. 2611 104th Congress, 2nd Session (1996), codified at 41 U.S.C. 10b-3, and P.L. 110-28, Title VIII, § 8306, 121 Stat. 112, 211, 110th Congress, 1st Session (2007), codified at 41 U.S.C. 10a(b).

[5] See, E-Systems, Inc., 61 Comp. Gen. 431 (1982); and Patterson Pump Co., B-200165, 80-2 CPD ¶ 453 (1980).

[6] 19 U.S.C. §§ 2501 et seq.

[7] 19 U.S.C. § 2511. This provision was implemented by E.O. 12260, 46 *Fed. Reg.* 1653 (1981). See, also, FAR § 25.4.

[8] See discussion below. "Exceptions to the Buy American Act"

[9] 41 U.S.C. §§ 10a & 10b. The act applies to leases as well as purchases. National Office Equipment Co., B-191003, 78-1 CPD ¶ 413 (1978).

[10] 41 U.S.C. § 10a and Federal Acquisition Regulation (FAR) § 25.1.

Federal Acquisition Regulation part 25, not in the act itself. The rules for determining whether products are of foreign or domestic origin are the same for both types of procurements, but different terminology is used and the step in the manufacturing or construction process at which the test is applied is different.[12] The test of origin is applied to supplies delivered to the government.[13] In contrast, under construction contracts, the test is applied to articles, materials, and supplies used by the contractor and subcontractors in constructing, altering, or repairing the building or work.[14] In the case of supply contracts the test is applied to "end products."[15] Construction contracts are concerned with the origin of "construction materials."[16]

The act differentiates between manufactured and un-manufactured articles. An un-manufactured article will be deemed a domestic end product or construction material if it has been mined or produced in the United States.[17] Manufactured articles are considered domestic if they have been manufactured in the United States from components, "substantially all" of which have been mined, produced, or manufactured in the United States.[18] Since its inception,[19] the term "substantially all" has never been statutorily defined.

For the first 20 years the regulations provided a 75% rule. For example the Armed Services Procurement Regulations provided,

> Supplies shall be considered manufactured "substantially all" from United States supplies whenever the cost of foreign supplies used in manufacture constitutes 25% or less of the cost of all supplies used in such manufacture.... Any supplies of an unknown origin used in such manufacture shall be considered to be foreign supplies.[20]

In 1954, President Eisenhower, "in an attempt to meet the demands for enlargement of international trade in a manner consistent with a sound domestic economy,"[21] by executive order, lowered the standard to 50%.[22] This standard has not been substantially changed in the subsequent 56 years and may currently be found in the Federal Acquisition Regulation.[23] Today,

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(...continued)

[11] 41 U.S.C. § 10b and FAR § 25.2.

[12] See Cibinic and Nash, Formation of Government Contracts, 1449 (3rd ed.) (1998).

[13] FAR § 25.1.

[14] 41 U.S.C. § 10b and FAR § 25.2.

[15] FAR § 25.101.

[16] FAR § 25.201.

[17] 41 U.S.C. §§ 10a & 10b. The United States is defined to include "the United States and any place subject to the jurisdiction thereof." 41 U.S.C. § 10c(a).

[18] 41 U.S.C. §§ 10a & 10b. This two part test is only applied to end products or construction materials. A component is of domestic origin if it was manufactured in the United States, regardless of where its components were manufactured. Hamilton Watch Co., B-179939, 74-1 CPD ¶ 306 (1974).

[19] The original proposal, H.R. 10743, 72nd Congress, utilized the standard of "wholly of" United States materials. This was changed to the "substantially all" language by amendment adopted in the Senate Committee on Commerce. *See*, S. Rept. 1,091, 72nd Cong. 2nd Sess. (1933).

[20] ASPR 6-103.2 (1953).

[21] Presidential press release, December 17, 1954.

[22] E.O. 10582, December 17, 1954.

[23] 48 C.F.R. subpart 25.

"substantially all" means that the cost of foreign components does not exceed 50% of the cost of all components.[24]

Exceptions to the Buy American Act

There are five primary exceptions to the Buy American Act. The act does not apply to procurements to which application would be inconsistent with the public interest or unreasonable in cost.[25] The act does not apply to procurements of products for use outside the United States or of products not produced or manufactured in the United States in sufficient and reasonably available commercial quantities and of satisfactory quality.[26] Lastly, the act does not apply to procurements under $3,000.[27]

Inconsistent with the public interest

The head of the procuring agency may waive the requirements of the act if a determination is made that the application of the act would be inconsistent with the public interest. This public interest exception has often been used like a national security exception by the Department of Defense,[28] but is also available for non-defense purposes. This exception places considerable discretion in the head of the agency. For example, this exception has been invoked after bids have been opened.[29]

Unreasonable in cost

A federal agency is permitted to use a foreign product if the head of the agency determines that the cost of the lowest priced domestic product is "unreasonable."[30] A system of price differentials has been established for use in making this determination.[31] The general differential, applicable to most federal contracts, is 6%. A 12% differential is used if the contract involves a small business or labor surplus area. A 50% differential is applied to Department of Defense procurements.[32]

The differential is added to the lowest acceptable foreign offer and then compared to the domestic offer. The differential is applied only to the bid price for material to be delivered under the contact, not the total contract price.[33] Generally the differential is applied on an item by item

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[24] FAR § 25.101; and E.O. 10582, 19 *Fed. Reg.* 8723 (1954).

[25] 41 U.S.C. § 10a.

[26] Id.

[27] FAR § 2.101.

[28] See Self-Powered Lighting, Ltd., 492 F.Supp. 1267 (S.D.N.Y. 1980); and American Hospital Supply, B-221357, 86-1 CPD ¶ 70 (1986).

[29] E-Systems, Inc., 61 Comp. Gen. 431 (1982).

[30] 41 U.S.C. §§ 10a & 10b.

[31] E.O. 10582, 19 Fed. Reg. 8723 (1954). These differentials have been codified in the FAR at FAR §§ 25.105 and 25.204.

[32] Id.

[33] See Allis-Chalmers Corp. v. Freidkin, 635 F.2nd 248 (3rd Cir. 1980).

basis, but a solicitation may provide that, for purposes of the act, certain items will be lumped together.[34]

Use outside of the United States

The act exempts articles purchased "for use outside of the United States."[35] This exception is not limited to the country of use, but applies to products of any origin.[36] For example, the exemption has applied to purchase of Canadian made steel towers for use in West Germany for a communications system procured by the U.S. military.[37]

Not produced or manufactured in the United States in sufficient and reasonably available commercial quantities and of satisfactory quality

The act exempts articles not produced or manufactured in the United States in sufficient and reasonably available commercial quantities and of satisfactory quality.[38] The FAR provides a list of articles which come under this exemption.[39] If an agency makes a determination that an article not on the list is eligible for this exception, the agency must document this determination and submit the documentation to the appropriate FAR Council.[40]

Micro Purchase Threshold

The Buy American Act is not applicable to procurements under $ 3,000.[41]

Amendments to the Buy American Act

There have been four substantive amendments to the Buy American Act in its long history. The first such amendment was the Buy American Act of 1988, enacted as part of the Trade and Competitiveness Act of 1988.[42] The 1988 Act's general purpose was to prohibit federal

[34] FAR § 25.105(b).

[35] 41 U.S.C. § 10a. As noted above, this exception is often the reason for enactment of "Little Buy American Acts."

[36] B-166137, 49 Comp. Gen. 176 (1969).

[37] Id.

[38] 41 U.S.C. § 10a; and FAR § 25.104. The provision of the act which covers construction contracts includes an additional exception for situations where the head of an agency determines that use of a domestic article would be impractical. See 41 U.S.C. § 10b. See also 48 C.F.R. § 25.202(a)(1). Neither the act or the regulations give any guidance as to the definition of this term. The regulations do require that if any of the exceptions are used, the excepted materials must be listed in the contract and a written finding must be produced and be available for public inspection. See FAR. § 25.202(b). We were unable to find any case which discussed this term in the context of the Buy American Act. It should be noted that this is a separate exception from the one provided for situations where the material is unavailable. Therefore, one might conclude that impractical is different from unavailable.

[39] FAR § 25.104.

[40] FAR § 25.103(b)(2).

[41] FAR § 2.101.

[42] P.L. 100-418, 102 Stat. 1107, 100th Congress, 2nd Session (1988), codified at 41 U.S.C. 10b-1.

procurement from countries that discriminate against the United States in their procurement practices.[43] The 1988 Act, by its terms, was to expire if not specifically extended by Congress. Congress did not extend this act, and it expired on April 30, 1996.

The 1988 Act did contain one general amendment which applied to the Buy American Act as a whole (i.e., it was not just limited to the prohibition on procurement from discriminating countries). This amendment provided a definition for the Buy American Act of the term "federal agency."[44] Because Congress placed this definition in the 1988 Act following the expiration provision, one could argue that Congress did not intend for this provision to expire with the rest of the amendments. However, due to the unequivocal nature of the expiration language of the statute, the stronger argument appears to be that the definition lapsed as well, and that there is no definition of "federal agency" in the current Buy American Act.[45]

The second substantive amendment to the Buy American Act added the micro purchase threshold exception to the act.[46]

The third amendment to the Buy American Act was contained in the National Defense Authorization Act for Fiscal Year 1997.[47] It requires the Secretary of Defense to submit a report to Congress detailing the amount of purchases from foreign entities each year. The report must contain the dollar value of items for which the act was waived in that year.

The 110th Congress extended the requirement of annual reporting of purchases from foreign sources to all federal agencies.[48] These reports must include the total dollar value of procured non-domestic articles, an itemized list of all waivers of the Buy American Act with a citation to the authority for the waiver, citation of the specific exemption utilized, and a summary of all the agency's procurements. This requirement will expire at the end of September 2011.

The American Recovery and Reinvestment Act

The American Recovery and Reinvestment Act[49] (ARRA) did not amend the Buy American Act. It did, however, include a provision attaching domestic content considerations to the funds disbursed under the ARRA. Section 1605 of ARRA provided:

> Use of American Iron, Steel, and Manufactured Goods. (a) None of the funds appropriated or otherwise made available by this Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.

[43] P.L. 100-418, § 7004, 102 Stat. 1552.

[44] P.L. 100-418, § 7005, 102 Stat. 1552, codified at 41 U.S.C. § 10c.

[45] *See*, explanatory notes following 41 U.S.C.A. § 10c and 41 U.S.C.S. § 10c.

[46] P.L. 103-355, 108 Stat. 3346-7, 103rd Congress, 2nd Session (1994), codified at 41 U.S.C. 10a.

[47] P.L. 104-201, § 827, 110 Stat. 2611 104th Congress, 2nd Session (1996), codified at 41 U.S.C. 10b-3.

[48] P.L. 110-28, Title VIII, § 8306, 121 Stat. 112, 211, 110th Congress, 1st Session (2007), codified at 41 U.S.C. § 10a(b).

[49] P.L. 111-5, 123 Stat.115 (2009).

> (b) Subsection (a) shall not apply in any case or category of cases in which the head of the Federal department or agency involved finds that—
>
> (1) applying subsection (a) would be inconsistent with the public interest;
>
> (2) iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or
>
> (3) inclusion of iron, steel, and manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.
>
> (c) If the head of a Federal department or agency determines that it is necessary to waive the application of subsection (a) based on a finding under subsection (b), the head of the department or agency shall publish in the Federal Register a detailed written justification as to why the provision is being waived.
>
> (d) This section shall be applied in a manner consistent with United States obligations under international agreements.

The FAR has been amended to implement Section 1605.[50] This new subpart of the FAR applies to construction projects that use funds appropriated or otherwise provided by ARRA.[51]

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[50] FAR Subpart 25.6.

[51] FAR § 25.601.