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The Buy American Act—Preferences for "Domestic" Supplies: In Brief

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Summary

The Buy American Act of 1933 is the earliest and arguably the best known of various statutes regarding federal procurement of domestic products. Essentially, the act attempts to protect U.S. businesses and labor by restricting the acquisition and use of end products or construction materials that are not "domestic." For purposes of the act, *domestic end products* and *domestic construction materials* include (1) unmanufactured end products or construction materials mined or produced in the United States, as well as (2) end products or construction materials manufactured in the United States, provided that (a) the cost of the components mined, produced, or manufactured in the United States exceeds 50% of the cost of all components, or (b) the product is a commercially available off-the-shelf item. End products or construction materials that do not qualify as domestic under these definitions are generally treated as foreign, and offers that supply foreign end products or construction materials are *foreign offers*, regardless of the offeror's nationality. Purchases of services are generally not subject to the Buy American Act.

As implemented, the Buy American Act limits the purchase of foreign end products and the use of foreign construction materials by establishing price preferences for domestic offers. Specifically, the provisions of the Federal Acquisition Regulation (FAR) implementing the Buy American Act provide that, when a domestic offer is not the low offer, the procuring agency must add a certain percentage of the low offer's price to that offer before determining which offer is the lowest priced or "best value" for the government. This percentage generally ranges from 6%, in cases where the lowest domestic offer is from a large business; to 12%, when the lowest domestic offer is from a small business; to 50%, for Department of Defense procurements, although agencies may adopt higher percentages by regulation. If the domestic offer is the lowest, or tied for lowest, after the application of this price preference, the agency must award the contract to the domestic offeror. However, if the foreign offer still has the lowest price, the agency generally awards the contract to the foreign offeror pursuant to provisions of the Buy American Act permitting the purchase of foreign end products when the costs of domestic ones are "unreasonable."

There are also other "exceptions" to the Buy American Act, which permit the purchase of foreign end products and the use of foreign construction material when (1) the expected value of the procurement is below the micro-purchase threshold (generally $3,500); (2) the goods are for use outside the United States; (3) the procurement of domestic goods or the use of domestic construction materials would be inconsistent with the public interest; (4) domestic end products or construction materials are unavailable; (5) the agency is procuring information technology that is a commercial item; or (6) the goods are acquired specifically for commissary resale.

In addition, the Buy American Act is often waived pursuant to the Trade Agreements Act. When this happens, certain products that are wholly grown, produced, or manufactured in foreign jurisdictions, or "substantially transformed" into new and different articles within foreign jurisdictions, are treated the same as "domestic" ones for purposes of the procurement.

The Buy American Act is of perennial interest to Congress, which has periodically enacted or considered measures to expand the scope of domestic preferences in federal procurements or, more rarely, to narrow it. The act itself has seldom been amended. However, numerous statutory requirements like those of the Buy American Act have been enacted. See CRS Report R43354, *Domestic Content Restrictions: The Buy American Act and Complementary Provisions of Federal Law*, by Kate M. Manuel et al.

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The Buy American Act of 1933[1] is the earliest and arguably the best known of the various statutes regarding federal procurement of domestic products. Essentially, the act attempts to protect domestic businesses and labor by establishing a price preference for domestic end products and construction materials in government acquisitions.[2]

The act is of perennial interest to Congress, which has periodically enacted or considered measures to expand the scope of domestic preferences in federal procurements[3] or, more rarely, to narrow it.[4] The act itself has seldom been amended.[5] However, numerous statutory requirements like those of the Buy American Act have been enacted. See generally CRS Report R43354, *Domestic Content Restrictions: The Buy American Act and Complementary Provisions of Federal Law*, by Kate M. Manuel et al.

This report supersedes CRS Report 97-765, *The Buy American Act: Requiring Government Procurements to Come from Domestic Sources*, by John R. Luckey.

Coverage of the Buy American Act

On its face, the Buy American Act appears to prohibit the acquisition[6] of foreign goods by federal agencies by providing that

> [o]nly 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 purchased for public use.[7]

[1] Act of March 3, 1933, 47 Stat. 1520 (codified, as amended, at 41 U.S.C. §§8301-8305).

[2] *See generally* Dana Frank, *Buy American: The Untold Story of Economic Nationalism* 56-57 (1998).

[3] *See, e.g.*, Ike Skelton National Defense Authorization Act for FY2011, P.L. 111-383, Div. A, title VIII, §846, 124 Stat. 4285 (Jan. 7, 2011) (requiring that, when contracts could result in the Department of Defense owning photovoltaic devices purchased by third parties, these contracts must comply with the Buy American Act); American Recovery and Reinvestment Act, P.L. 111-5, §1605, 123 Stat. 303 (Feb. 17, 2009) (providing that none of the funds appropriated or made available by the act may be used for the construction, alteration, maintenance, or repair of a public building or public work unless the iron, steel, and manufactured goods are produced in the United States).

[4] *See, e.g.*, Consolidated Appropriations Act, 2004, P.L. 108-199, §535, 118 Stat. 345 (Jan. 23, 2004) ("In order to promote Government access to commercial information technology, the restriction on purchasing nondomestic articles, materials, and supplies set forth in the Buy American Act ... shall not apply to the acquisition by the Federal Government of information technology ... that is a commercial item.").

[5] *See* U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, P.L. 110-28, title VIII, §8306, 121 Stat. 211 (May 25, 2007) (reporting requirements); National Defense Authorization Act for Fiscal Year 1997, P.L. 104-201, §827, 110 Stat. 2611 (Sept. 23, 1996) (reporting requirements); Federal Acquisition Streamlining Act, P.L. 103-355, §4301, 108 Stat. 3346-47 (Oct. 13, 1994) (micro-purchases); Omnibus Trade and Competitiveness Act, P.L. 100-418, §§7004-7005, 102 Stat. 1552 (Aug. 23, 1988) (temporary prohibition on contracting with countries that discriminate against the United States in their procurement practices).

[6] Although the Buy American Act sometimes uses the word "purchase," the act has been found to apply to leases of goods on the grounds that "it would be unreasonable to presume that Congress intended to narrow the protection afforded to American manufacturers by allowing the lease of foreign-made products where the purchase of such products is prohibited." Postmaster General, B-156082 (May 1, 1967).

[7] 41 U.S.C. §8302(a)(1). *See also* 41 U.S.C. §8303(a)(1)-(2) ("Every contract for the construction, alteration, or repair of any public building or public work in the United States shall contain a provision that in the performance of the work the contractor, subcontractors, material men, or suppliers shall use only (1) unmanufactured articles, materials, and supplies that have been mined or produced in the United States.... ").

As implemented, however, the act is better understood as generally establishing a price preference for domestic end products and construction materials.[8] Specifically, the provisions of the Federal Acquisition Regulation (FAR) implementing the Buy American Act require that, when a domestic offer (i.e., an offer of a domestic end product) is not the low offer, the procuring agency must add a certain percentage of the low offer's price (inclusive of duty) to that offer before determining which offer is the lowest priced or "best value" for the government.[9] This percentage typically ranges from 6%, in cases where the lowest domestic offer is from a large business;[10] to 12%, when the lowest domestic offer is from a small business;[11] to 50%, for Department of Defense procurements,[12] although agencies may adopt higher percentages by regulation.[13] If the domestic offer is the lowest, or tied for lowest, after the application of this price preference, the agency must award the contract to the domestic offeror. However, if the foreign offer still has the lowest price, the agency generally awards the contract to the foreign offeror pursuant to provisions of the Buy American Act permitting the purchase of foreign end products (and the use of foreign construction materials) when the costs of domestic ones are "unreasonable."[14]

Application of Buy American Act Price Differentials

Imagine that a foreign bid of $500,000 is the low offer. The lowest domestic offer is $550,000, and is from a large business. Here, the foreign bid would still win since $500,000 + $30,000 (i.e., 6% of $500,000) is $530,000, and $530,000 is less than $550,000. However, if the bids had been the same, and lowest the domestic offer had come from a small business offering the products of small businesses, the domestic offeror would win because $550,000 is less than $560,000 (i.e., $500,000 + (.12 x $500,000)).

Determining the act's applicability to specific procurements—and, particularly, determining whether the act's requirements were violated in particular cases—can raise complicated legal and factual questions. Much depends upon how particular terms (e.g., end product, component) are defined and construed for purposes of the Buy American Act. However, the details of manufacturing processes are often also relevant. Acquisitions of services are generally not subject

[8] Executive Order 10582, implementing the Buy American Act, authorizes agencies to reject foreign offers that would have an "adverse effect" on the public interest. *See, e.g.*, Prescribing Uniform Procedures for Certain Determinations Under the Buy-American Act, 19 Fed. Reg. 8723 (Dec. 21, 1954) ("Nothing in this order shall affect the authority or responsibility of an executive agency ... [t]o reject any bid or offer for reasons of the national interest not described or referred to in this order ... "). However, other than as authorized by this order, agencies generally cannot reject what would otherwise be the low offer on the grounds that it is foreign. *See* Viking Supply Corp., B-150091 (Jan. 17, 1963).

[9] 48 C.F.R. §25.105. Which offer represents the "best value" for the government is determined based on various factors established by the government and incorporated into the solicitation for the contract. *See* 48 C.F.R. §15.101 (best value); 48 C.F.R. §15.304 (evaluation factors). Cost or price must be among these factors, but it need not be the primary factor or carry any specific weight in the overall award. 48 C.F.R. §15.304(c)(1). Other factors may include contractors' compliance with the solicitation requirements, technical excellence, management capability, personnel qualifications, prior experience, and small-business status. 48 C.F.R. §15.304(c)(2).

[10] 48 C.F.R. §25.105(b)(1).

[11] 48 C.F.R. §25.105(b)(2). *But see* Puget Sound Pipe & Supply Co., B-164396 (Aug. 5, 1968) (finding that, although the lowest domestic offer was from a small business, the 6% factor applied because the small business did not offer the products of small businesses).

[12] 48 C.F.R. §225.105 ("Use an evaluation factor of 50 percent instead of the factors specified in FAR 25.105(b).").

[13] *See* 48 C.F.R. §25.105(a)(1). *See also* Concrete Tech., Inc., B-202407 (Oct. 27, 1981) (agencies may adopt higher percentages by regulation); General Elec. Co., B-152470 (Feb. 14, 1964) (same).

[14] *See, e.g.*, Yohar Supply Co., B-225480 (Feb. 11, 1987) ("[T]he Buy American Act ... does not prohibit the purchase of foreign source end items."); Paulsen-Webber Cordage Corp., B-140904 (Dec. 11, 1959) (upholding the purchase of foreign end products where the price of the domestic products was 36% higher than the price of the foreign ones).

to the Buy American Act.[15] Nor does the act restrict purchases from foreign persons so long as their products are mined, produced, or manufactured in the United States, as required by the act.[16]

Purchases of Supplies

Under the act, federal agencies procuring goods for use in the United States under a contract valued in excess of the micro-purchase threshold (typically $3,500) may generally purchase foreign (i.e., non-domestic) end products only in exceptional circumstances.[17] The FAR's definition of *end product* appears straightforward on its face: "*End product* means those articles, materials, and supplies to be acquired for public use."[18] However, determining whether an item is an end product, or a component of an end product, can be complicated, particularly when the agency seeks to acquire some sort of "system,"[19] and judicial and other tribunals often look to the purpose of the procurement in making such determinations.[20]

End Product, Or Component?

Determining whether an item is an end product or a component can be crucial to the outcome in a Buy American Act case. End products must be manufactured in the United States. Individual components, however, could potentially be manufactured outside the United States so long as at least 50% of the costs of all components are manufactured in the United States (or the item is a commercially available off-the-shelf item). Competing views on whether something is an end product or a component are possible, though, as is illustrated by one procurement where the Government Accountability Office (GAO) and a federal court reached differing conclusions as to whether a particular item was its own end product, or a component of another end product. GAO viewed the item as its own end product, because it was not directly incorporated into the "system" of which it was allegedly a part. *See* Bell Helicopter Textron, B-195268 (Apr. 24, 1980). A federal court, on the other hand, found that the contracting officer had reasonably determined that the item was a component of a system, in part, because the Buy American certificates (discussed below) submitted by the winning bidder characterized it this way. *See* Textron, Inc., Bell Helicopter Textron Div. v. Adams, 493 F. Supp. 824 (D.D.C. 1980).

The term *domestic end product*, in turn, includes unmanufactured end products mined or produced in the United States. The term also encompasses end products manufactured in the United States, provided that (1) the cost of the components mined, produced, or manufactured in the United States exceeds 50% of the cost of all components, or (2) the end product is a commercially available off-the-shelf (COTS) item.[21]

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[15] *See, e.g.*, Bell Helicopter Textron, B-195268 (Dec. 21, 1979); Blodgett Keypunching Co., B-153751 (Oct. 14, 1976). However, any "supply" portions of a service contract could potentially be subject to the Buy American Act.

[16] *See, e.g.*, Military Optics, Inc., B-245010.3; B-245010.4 (Jan. 16., 1992) ("The fact that the manufacturer of a domestically manufactured end product may be foreign owned is not a factor to be considered in determining whether to apply the Buy American Act differential.").

[17] 41 U.S.C. §8302(a)(1); 48 C.F.R. §25.101(a).

[18] 48 C.F.R. §25.003.

[19] *See, e.g.*, MRI Sys., Corp., B-184785 (Nov. 19, 1976) (computer software system); Thomas J. Valentino, Inc., B-156768 (Aug. 17, 1965) (music background library); Data Transformation Corp., GSBCA 89082-P, 87-3 B.C.A. ¶20,017 (1987) (automatic data processing system).

[20] *See, e.g.*, Ampex Corp., B-203021 (Feb. 24, 1982) (finding that two videotape recorder/reproducer systems were not end products because the solicitation for each system contained 15 line items, each of which could be viewed as an end product).

[21] 48 C.F.R. §25.003. The Buy American Act itself refers items being manufactured "substantially all" from articles, materials, or supplies produced in the United States. *See* 41 U.S.C. §8302(a). However, the executive branch has long construed "substantially all" to mean at least 50%, and this interpretation has been upheld as within the executive (continued...)

Manufacture is not defined by the Buy American Act, the executive orders implementing the act,[22] or the FAR, and determining whether particular activities constitute "manufacturing"—such that a product can be said to be manufactured in the United States—can be complicated.[23] In answering this question, judicial and other tribunals have, at various times, considered whether there were "substantial changes in physical character";[24] whether separate manufacturing stages were involved, or whether there was one continuous process;[25] and whether the article is completed in the form required by the government.[26] Operations performed after the item has been completed (e.g., packaging, testing) generally are not viewed as manufacturing.[27]

What Constitutes Manufacture In the United States?

The act generally requires that the end product and at least 50% of the costs of all components be manufactured in the United States, but "manufacturing" in the United States would not necessarily preclude all processing overseas. In one case, GAO distinguished between two fax machines offered by the same vendor. Both fax machines incorporated commercial Japanese fax machines. However, GAO found that one machine (and at least 50% of the cost of its components) was manufactured in the United States because the vendor performed a number of assembly operations in the United States in the course of transforming the Japanese machine into the form required for government use. In the other case, the fax machine was found not to be compliant with the Buy American Act because all the vendor did in the United States was to replace one circuit on the Japanese fax machine. *See* General Kinetics, Inc., Cryptek Div., B-242052.2 (May 7, 1991).

A *component* is any "article, material, or supply incorporated directly into an end product or construction material."[28] However, distinguishing between components and end products can be difficult, as previously noted. In addition, it is important to note that components could potentially be deemed to be mined, produced, or manufactured in the United States, regardless of their actual place of origin, if (1) the end product in which they are incorporated is manufactured in the United States, and (2) the components are of a class or kind determined by the government not to be mined, produced, or manufactured in the United States in "sufficient and reasonably available commercial quantities of a satisfactory quality," as discussed below.[29]

(...continued)

branch's discretion. *See, e.g.*, Allis-Chalmers Mfg. Co., B-147210 (Nov. 27, 1961).

[22] *See especially* Executive Order 10582, 19 Fed. Reg. 8723 (Dec. 21, 1954).

[23] *See, e.g.*, A. Hirsch, Inc., B-237466 (Feb. 28, 1990) ("The concept of what precisely constitutes 'manufacturing' for the purpose of the Act remains largely undefined; accordingly we have noted in our decisions in this area that each involves a peculiar factual situation and at best only provides conceptual guidance in determining whether a given set of operations constitutes manufacturing.").

[24] *Id*. *But see* A&D Machinery Co., B-242546; B-242547 (May 16, 1991) (stating that the test is not whether a foreign product has been significantly altered in the United States, but whether the item being procured is made suitable for its intended use, and its identity is established, in the United States).

[25] *See, e.g.*, Cincinnati Elec. Corp., B-185842 (Sept. 27, 1976).

[26] *See, e.g.*, Valentec Wells, Inc., ASBCA 41659, 91-3 B.C.A. ¶24,168 (1991); DynAmerica, Inc., B-248237 (Sept. 28, 1992).

[27] *See, e.g.*, Marbex, Inc., B-225799 (May 4, 1987).

[28] 48 C.F.R. §25.003. *See also* Patterson Pump Co., B-200165 (Dec. 31, 1980) (model testing and plans and instructions are not components because they are not incorporated physically and directly into the end products); Hawaiian Dredging & Constr. Co., a Dillingham Co., B-195101 (Apr. 8, 1980) (feasibility study not a component).

[29] *See, e.g.*, 48 C.F.R. §25.003 ("Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic."); Octagon Process, Inc., B-186850 (Dec. 22, 1976).

Is It a Component? Or a Constituent Material of a Component?

Whether something is viewed as a component or—essentially—a subcomponent can also significantly affect the outcome in a Buy American Act case, since the act is expressly concerned with the components of end products. For example, in one case, GAO rejected the protester's argument that steel processed in Korea remained a domestic component in a procurement of lock sets. The protester had purchased the steel in the United States and shipped it to Korea for fabrication. The fabricated steel was then returned to the United States where it was manufactured into lock sets. The protester argued that the Korean-fabricated steel was a domestic component because it was steel, and the steel had originally been manufactured in the United States. GAO disagreed, because it viewed the Korean-fabricated steel, not the American-produced steel, as the relevant component of the lock sets. *See* Yohar Supply Co., B-225480 (Feb. 11, 1987).

The *costs of components* are generally determined based upon certain costs incurred by the contractor in purchasing or manufacturing the components. Specifically,

- for components purchased by the contractor, the cost of components includes the acquisition costs (including transportation costs to the place of incorporation into the end product or construction material), and any applicable duty (regardless of whether a duty-free certificate of entry is issued);[30] and
- for components manufactured by the contractor, the cost of components includes all costs associated with the manufacture of the component (including transportation, as discussed above), and allocable overhead costs,[31] but excluding profits and any costs associated with the manufacture of the end product.[32]

Commercially available off-the-shelf (COTS) items generally include any item of supply (including construction material) that is (1) a "commercial item," as discussed below; (2) sold in substantial quantities in the commercial marketplace; and (3) offered to the government without modification, in the same form in which it is sold in the commercial marketplace.[33]

Purchases of Construction Materials

The Buy American Act similarly bars agencies from using nondomestic construction materials absent exceptional circumstances.[34] *Construction material* generally encompasses any "article, material, or supply brought to the construction site by a contractor or subcontractor for incorporation into [a] building or work," including items brought to the site preassembled from articles, materials, or supplies.[35] However, materials purchased directly by the government are supplies, not construction materials.[36]

[30] 48 C.F.R. §25.003. This includes any "mark-ups" by middlemen. *See* Lyntronics, Inc., B-195268 (Dec. 21, 1979).

[31] Costs are generally *allocable* to a government contract if they (1) are incurred specifically for the contract; (2) benefit both the contract and other work, and can be distributed to each in reasonable proportion to the benefits; or (3) are necessary to the overall operation of the business, even if a direct relationship to any particular cost objective cannot be shown. *See generally* 48 C.F.R. §31.201-4.

[32] 48 C.F.R. §25.003.

[33] 48 C.F.R. §2.101. However, "bulk cargo," such as agricultural and petroleum products, is expressly excluded. *Id.*

[34] 41 U.S.C. §8303(a)(1)-(2); 48 C.F.R. §25.201.

[35] 48 C.F.R. §25.003.

[36] *Id.*

Construction Materials, or Supplies?

Whether items are viewed as construction materials, or as supplies, can have significant implications in Buy American Act cases, since the price differentials for supplies are not identical to those for construction materials. In particular, the 12% differential applied to domestic offers by small businesses has been found to apply only in acquisitions of supplies, not construction. In construction contracts, a 6% differential is generally used, unless defense agencies are involved or the procuring agency has established a higher differential by regulation. *See, e.g.*, Concrete Tech., Inc., B-202407 (Oct. 27, 1981) (rejecting the protester's argument that the contract in question was a supply contract subject to a 12% price differential).

Domestic construction material, in turn, includes unmanufactured construction materials mined or produced in the United States, as well as construction material manufactured in the United States, provided that (1) the cost of the components mined, produced, or manufactured in the United States exceeds 50% of the cost of all components, or (2) the construction material is a COTS item.[37]

Other key terms, including *manufacture*, *components*, and *COTS*, are defined in the same way for construction materials as for end products. The costs of construction materials are also generally calculated in the same way as the costs of end products.

Exceptions to the Buy American Act

The FAR lists five "exceptions" to the Buy American Act, or five circumstances in which an agency may purchase foreign end products or use foreign construction materials without violating the act. These exceptions apply when (1) the procurement of domestic goods or the use of domestic construction materials would be inconsistent with the public interest; (2) domestic end products or construction materials are unavailable; (3) the contracting officer determines that the costs of domestic end products or construction materials would be unreasonable; (4) the agency is procuring information technology that is a commercial item; or (5) the goods are acquired specifically for commissary resale.[38] However, some commentators also view the requirements that purchases be above the micro-purchase threshold, and for use in the United States, as exceptions to the Buy American Act.[39]

The procuring agency may determine, on its own initiative, whether one of these exceptions applies. Alternatively, particularly in the case of construction contracts, vendors may request that the contracting officer make a determination regarding the applicability of an exception prior to or after contract award.[40] Contractors are, however, generally not entitled to a determination that an exception applies.[41]

[37] *Id.*

[38] 48 C.F.R. §25.103 (exceptions for supply contracts); 48 C.F.R. §25.202 (exceptions for construction contracts).

[39] *See, e.g.*, 9-50 *Gov't Conts.: Law, Admin. & Proc.* §50.60[1] (listing "products ... to be used outside the United States" and "goods ... procured under an award with a value less than the 'micro-purchase threshold'" as exceptions to the Buy American Act).

[40] 48 C.F.R. §§25.203, 25.205.

[41] *See, e.g.*, Two State Constr. Co., DOTCAB 78-31 (1981).

Impracticable or Inconsistent with the Public Interest

The Buy American Act and its implementing regulations expressly authorize agencies to purchase foreign end products and use foreign construction materials if the head of the contracting agency determines that application of the act's restrictions would be "impracticable" or "inconsistent with the public interest."[42] The "public interest" prong of this exception encompasses agency agreements with foreign governments that provide for the purchase of foreign end products or construction materials,[43] as well as *ad hoc* determinations that application of the act's restrictions would not be in the public interest. Such determinations are typically seen as entrusted to agency discretion, and generally will not be reviewed by judicial or other tribunals.[44]

Nonavailability

The act and its implementing regulations also permit agencies to purchase foreign end products and use foreign construction materials when the relevant articles, materials, or supplies are not mined, produced, or manufactured in the United States "in sufficient and reasonably available commercial quantities and of a satisfactory quality."[45] In some cases, the government has made a determination that particular classes of products are nonavailable.[46] However, such "class determinations" mean only that domestic sources can meet 50% or less of the total U.S. government and nongovernment demand,[47] and procuring agencies must generally conduct market research "appropriate to the circumstances," including seeking domestic sources, before acquiring an article listed as belonging to a nonavailable class.[48] In other cases, the head of the contracting agency may determine in writing that individual goods which are not subject to class determinations are nonavailable.[49] However, written determinations of nonavailability are not required if the acquisition was conducted using "full and open competition";[50] was synopsized as required in Subpart 5.201 of the FAR;[51] and resulted in no offer of a domestic end product.[52]

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[42] 41 U.S.C. §8302(a) (supplies); 41 U.S.C. §8303(b)(2) (construction); 48 C.F.R. §25.103(a).

[43] *See, e.g.*, Israel Military Indus., B-211761 (Nov. 21, 1983) ("The Buy American Act clearly vests within the agency head's discretion the decision whether to waive the act's requirements."); General Motors Canada Ltd., B-212884 (Oct. 7, 1983) (similar).

[44] *See, e.g.*, Lear Siegler, Inc., B-218188 (Apr. 8, 1985) ("We have recognized that a determination of whether a particular purchase from a domestic source under the Buy American Act is inconsistent with the public interest is a matter of discretion vested in the head of the department or agency concerned."); Israel Military Indus., B-211761 (Nov. 21, 1983) ("Since the discretion to waive the Buy American Act is vested in the agency heads by statute, our Office will not review the [agency's] determination [regarding] whether to waive the act's provisions in this procurement.").

[45] 48 C.F.R. §25.103(b). *See also* 41 U.S.C. §8302(a)(2)(B) (supplies); 41 U.S.C. §8303(b)(1)(B) (construction).

[46] *See generally* 48 C.F.R. §25.104(a). This listing is to be published in the *Federal Register* for public comment "no less frequently" than once every five years. 48 C.F.R. §25.104(b).

[47] 48 C.F.R. §25.103(b)(1)(i).

[48] 48 C.F.R. §25.103(b)(1)(ii). If the contracting officer learns, at any time before the time designated for the receipt of bids or offers, that an article that has been determined to be unavailable on a class basis is available domestically in sufficient and reasonably available commercial quantities of a satisfactory quality to meet the agency's requirements, the contracting officer must conduct the procurement in accordance with the Buy American Act. 48 C.F.R. §25.103(b)(1)(iii).

[49] 48 C.F.R. §25.103(b)(2). *See also* Hispano Am. Corp., B-200268 (Mar. 17, 1987) (domestic end products may generally be presumed to be nonavailable if no domestic offers are received).

[50] *Full and open competition* generally means that "all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement." 41 U.S.C. §107.

[51] Subpart 5.2 of the FAR generally requires that agencies post information about prospective contract awards.

Examples of Nonavailable Items Subject to Class Determinations

anise; bamboo shoots; bananas; canned corned beef; books and other publications not printed in the United States and for which domestic editions are unavailable; cashew nuts; chestnuts; goat and kidskins; canned grapefruit sections; handsewing needles; hemp yarn; olive oil; canned pineapple; quartz crystals; rabbit fur felt; shellac; raw and unmanufactured silk; spare and replacement parts for equipment of foreign manufacture for which domestic parts are not available; raw sugars; tea in bulk; tungsten; vanilla beans; cobra venom; wire glass; active dry yeast

Unreasonable Cost

The Buy American Act and its implementing regulations also authorize the purchase of foreign end products and construction materials if the cost of domestic end products or construction materials would be "unreasonable."[53] In practice, this exception is generally implemented through the price preferences granted to U.S. products in procurements where foreign bids or offers are the lowest priced or offer "best value," as discussed above.

Resale

The FAR expressly authorizes contracting officers to purchase foreign end products (there is no similar exception for construction materials) when the products are specifically for commissary resale.[54] This exception can be seen as consistent with the Buy American Act's requirement that domestic goods be "acquired for public use."[55] Products for resale in commissaries are arguably not for public use, since they are intended for resale to third parties.[56]

Information Technology that Is a Commercial Item

For acquisitions conducted using FY2004 or subsequent fiscal year funds, agencies are exempt from the Buy American Act when acquiring information technology that is a commercial item.[57] For purposes of this exception, *information technology* means "any equipment, or interconnected system(s) or subsystem(s) of equipment," used by the agency in acquiring, storing, managing, or transmitting data or information, while a *commercial item* is

> [a]ny item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and (i) [h]as been sold, leased, or licensed to the general public; or (ii) [h]as been offered for sale, lease, or license to the general public ...[58]

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[52] 48 C.F.R. §25.103(b)(3)(i)-(iii).

[53] 41 U.S.C. §8302(a)(1) (supplies); 41 U.S.C. §8303(b)(3) (construction); 48 C.F.R. §25.103(c).

[54] 48 C.F.R. §25.103(d).

[55] 41 U.S.C. §8302(a). *See also* 48 C.F.R. §25.003 (defining "end product" to mean articles, materials, and supplies to be acquired "for public use").

[56] The Buy American Act has been found not to apply when supplies are purchased by a federal agency for use by an entity other than the federal government. *See, e.g.*, Dep't of the Treasury—Request for an Advance Decision, B-193603 (Mar. 14, 1979) (finding that a procurement of nickel to be made into coins for the Dominican Republic was not subject to the Buy American Act because they were not for public use).

[57] 48 C.F.R. §25.103(e).

[58] 48 C.F.R. §2.101.

Use Outside the United States

The Buy American Act expressly provides that agencies are not required to purchase domestic end products or construction materials "for use outside of the United States."[59] As used here, the "United States" includes the 50 states, the District of Columbia, and "outlying areas" (e.g., Puerto Rico),[60] but excludes areas over which the United States lacks "complete sovereign jurisdiction," such as military bases leased from foreign governments.[61] (Note, however, that certain international agreements, which are outside the scope of this report, may call for the use of U.S. products in procurements conducted outside the United States.)[62]

Purchases Below the Micro-Purchase Threshold

The act only applies to contracts whose value exceeds the micro-purchase threshold (generally, $3,500).[63]

Waiver Pursuant to the Trade Agreements Act

Although not an exception to the Buy American Act, per se, the Trade Agreements Act (TAA) of 1979, as amended, can result in certain "foreign" products being treated the same as "domestic" ones in specific procurements. The TAA generally authorizes the waiver of "any law, regulation, procedure, or practice regarding Government procurement" that would result in "eligible products" from countries with which the United States has a trade agreement, or that meet certain other criteria (e.g., "least developed countries")[64], being treated "less favorably" than domestic products and suppliers.[65] The Buy American Act has been so waived.[66] This means that products that are wholly grown, produced, or manufactured in certain foreign jurisdictions, or "substantially transformed" into new and different articles within these jurisdictions, may be treated the same as "domestic" ones in particular procurements.

However, such nondiscriminatory treatment only applies when (1) the procuring agency is one covered by the agreement;[67] (2) the goods or services being procured are covered by the

[59] 41 U.S.C. §8302(a)(2)(A). *See also* 41 U.S.C. §8303(b)(1)(A) (construction materials for use outside the United States).

[60] 41 U.S.C. §8302(a)(2)(C) (supplies); 41 U.S.C. §8303(b)(1)(C) (construction); 48 C.F.R. §25.003.

[61] *See, e.g.*, Anderson Columbia Co., B-249475.3 (Feb. 5, 1993); Secretary of the Navy, B-122519 (Mar. 16, 1955).

[62] *See generally* 48 C.F.R. Subpart 225.75 (providing policies and procedures for implementing the Balance of Payments Program, which generally establishes a preference for the acquisition of U.S. end products and construction materials outside the United States).

[63] 41 U.S.C. §8302(a)(2)(C); 41 U.S.C. §8303(b)(1)(C). For more on the micro-purchase threshold, see generally 48 C.F.R. §2.101 (defining *micro-purchase threshold*).

[64] The term *least developed countries* includes "any country on the United Nations (UN) General Assembly list of least developed countries." 19 U.S.C. §2518(6). Initially, the UN applied this designation to countries with low per capita gross domestic product (GDP) and structural impediments to growth. However, since 2011, the designation has been used to describe countries that "suffer[]from the most severe structural impediments to sustainable development." *See* UN Dev. Policy and Analysis Division, LDC Information: The Criteria for Identifying Least Developed Countries: Overview, Aug. 2013, *available at* http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_criteria.shtml.

[65] 19 U.S.C. §2511(a)-(b). There are other statutory provisions that also permit waiver of the Buy American Act or domestic preferences. *See, e.g.*, 10 U.S.C. §2350b (permitting waiver in the context of the acquisition of defense equipment for cooperative projects under the Arms Export Control Act).

[66] 48 C.F.R. §25.402(a)(1).

[67] The World Trade Organization (WTO) Government Procurement Agreement (GPA), for example, generally applies (continued...)

agreement;[68] (3) the value of the goods or services meets or exceeds certain monetary thresholds specified in the agreement;[69] and (4) the circumstances of the procurement are not such that it is otherwise exempt from the TAA's waiver of the Buy American Act (e.g., procurements set-aside for small businesses).[70]

Enforcement and Reporting

When the procurement is for the acquisition of supplies, prospective vendors are required to provide a Buy American certificate, wherein the vendor attests

> that each end product, except [any] listed [below] ... is a domestic end product and that, for other than COTS items, the offeror has considered components of unknown origin to have been mined, produced, or manufactured outside the United States.[71]

Similar certificates are not required with construction contracts, although construction contractors are to request any "waivers" of the act at the time when they submit their offer, and must also submit data adequate for the government to evaluate their requests.[72] Agency officials are generally entitled to rely upon the representations made by vendors regarding their products, and need not inquire further into the origins of particular products or components unless they have reason to believe that the contractor might have misrepresented whether its products are mined, produced, or manufactured in the United States, as required by the act.[73]

Vendors could potentially challenge an agency's implementation of the Buy American Act, or another vendor's compliance with it, prior to contract award as part of a bid protest.[74] However,

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to the procurements of federal agencies listed in Appendix I, Annex I, to the Agreement, including the Department of Defense, General Services Administration, and National Aeronautics and Space Administration. However, the procurements of certain agencies are expressly excluded (e.g., those of the Federal Aviation Administration), as are specified procurements of listed agencies (e.g., procurements conducted by the U.S. Agency for International Development "for the direct purpose of providing foreign assistance").

[68] Appendix I, Annex I, to the WTO GPA also lists the categories of supplies and services subject to the Agreement (e.g., furniture, agricultural supplies, live animals, construction and building materials, instruments and laboratory equipment). However, certain supplies or services are expressly excluded from its coverage (e.g., public utilities services, research and development, procurements of "specialty metals" by the Department of Defense).

[69] For example, the WTO GPA specifies that it applies to procurements whose value exceeds certain monetary thresholds, which are to be adjusted every two years for inflation. Currently, those thresholds are $191,000 for supplies and services (other than construction), and $7.36 million for construction. *See* 48 C.F.R. §25.402(b).

[70] *See* 48 C.F.R. §25.401(a) (excluding the following procurements from the application of the TAA: (1) acquisitions set aside for small businesses; (2) acquisitions of arms, ammunition, or war materials, or purchases "indispensable" for national security or national defense purposes; (3) acquisitions of end products for resale; (4) acquisitions from Federal Prison Industries, Inc., under Subpart 8.6 of the FAR, or from nonprofit agencies employing persons who are "blind or severely disabled" (commonly known as AbilityOne), under Subpart 8.7 of the FAR; and (4) other acquisitions not using full and open competition, authorized under Subparts 6.2 or 6.3 of the FAR, when the limitation of competition would preclude the use of the procedures of Subpart 25.4; or sole-source acquisitions justified in accordance with Subpart 13.501.).

[71] 48 C.F.R. §52.225-2(a).

[72] 48 C.F.R. §52.225-9(c).

[73] *Compare* Spectrum Leasing Corp., B-218323.3 (July 11, 1986) (contracting officer had no reason to suspect the awardee would provide Japanese end products just because its international headquarters was in Japan) *with* Oliver Prods. Co., B-245762 (Jan. 7, 1992) (where contracting officer has reason to question a certificate, the contracting officer must take "reasonable measures" to ensure the bidder will deliver a domestic end product).

[74] Such challenges would have to meet other requirements for a bid protest, such as timeliness. *See generally* CRS Report R40228, *GAO Bid Protests: An Overview of Time Frames and Procedures*, by Kate M. Manuel and Moshe (continued...)

after the time for a post-award protest has passed, the vendor's compliance with the Buy American Act is generally viewed as a matter of contract administration. In other words, any noncompliance does not affect the validity of the contract, and cannot be protested by the vendor's competitors.[75] The procuring agency, however, has various contractual and administrative remedies for any noncompliance after contract award.[76] These remedies include monetary damages, termination for default, and debarment or suspension.[77] Prime contractors, in turn, are responsible for ensuring subcontractors' compliance with the Buy American Act.[78]

In addition, compliance with the Buy American Act's requirements is also subject to congressional and other oversight. For each of fiscal years 2009 through 2011, agencies were required by statute to submit a report to Congress each year "on the amount of the acquisitions made by the agency in that fiscal year of articles, materials, or supplies purchased from entities that manufacture the articles, materials, or supplies outside of the United States."[79] The information in these reports was based, in part, on contractors' certificates of compliance, discussed above.[80] However, the reports focused on the place of manufacture, per se, without regard to the origin of the components.[81] Thus, certain goods that would not count as domestic end products or construction materials for purposes of the Buy American Act could potentially have counted as made in the United States for purposes of these reports (e.g., goods made in the United States from 100% foreign components).

Separate from the annual reports to Congress, agencies are required to input data into the Federal Procurement Data System (FPDS) regarding whether the goods they procure are manufactured inside the United States "in accordance with the Buy American Act."[82] Agencies must also note any exceptions to or waivers of the act's requirements. These requirements are not tied to particular fiscal years, unlike the government-wide reports to Congress.

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[75] *See, e.g.*, Instrument Corp., B-239997 (Oct. 12, 1990) ("Whether the awardee will provide a domestic end product, as it certified in its offer, or comply with the jewel bearings requirement, are matters of contract administration and are not for consideration under the General Accounting Office's bid protest function."); Avantek, Inc., B-170498 (Mar. 30, 1971) ("Compliance with [the obligation to supply domestic end products] is a matter of contract administration which has no effect on the validity of the contract.").

[76] *See, e.g.*, TFI Corp., B-192879 (Apr. 23, 1980) (agency opted to retain the foreign products and adjust the contract price to reflect the difference in cost between the domestic products promised and the foreign products supplied).

[77] For more information on these and other remedies, see generally CRS Report R44202, *Selected Legal Mechanisms Whereby the Government Can Hold Contractors Accountable for Failure to Perform or Other Misconduct*, by Kate M. Manuel and Rodney M. Perry.

[78] *See, e.g.*, Appeal of Allen L. Bender, Inc., ASBCA 38068, 89-3 B.C.A. ¶22,092 (1989).

[79] 41 U.S.C. §8302(b)(1). The Department of Defense has a separate statutory requirement to submit annual reports to Congress on the "amount of purchases by the Department ... from foreign entities," which does not apply to specific fiscal years and remains in effect. 41 U.S.C. §8305.

[80] *See* 48 C.F.R. §25.004(b) (2012).

[81] 48 C.F.R. §25.001(c)(3) (2012) ("For the reporting requirement at 25.004, the only criterion is whether the place of manufacture of an end product is in the United States or outside the United States, without regard to the origin of the component.").

[82] GSA Federal Procurement Data System-Next Generation (FPDS-NG) Data Element Dictionary, Version 1.4.4, at 108-09 (May 21, 2013), *available at* https://www.fpds.gov/downloads/Version_1.4.4_specs/FPDSNG_DataDictionary_V1.4.4.pdf (requiring reporting on "place of manufacture"). FPDS is slated to be incorporated into the System for Award Management (SAM) at some point in the future. *See generally* CRS Report R43111, *Transforming Government Acquisition Systems: Overview and Selected Issues*, by Elaine Halchin.

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