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### *Backgrounder:*

## **How Overreaching “Trade Pact” Rules Can Undermine Buy American Procurement Policies**

**The Buy America Act (23 U.S.C § 103 (3)(4) and 49 U.S.C. § 5323(j)) was adopted as part of the 1982 Surface Transportation Assistance Act,<sup>1</sup> and applies to transit-related procurements valued at more than \$100,000, for which funding includes grants administered by the Federal Transit Authority (FTA) or Federal Highway Administration (FHWA). Buy America provisions are a condition of U.S. federal government grants to state, municipal or other organizations including transit authorities.<sup>2</sup> Buy America requires 100 percent U.S. content for iron/steel and manufactured products, although “manufactured” products have been narrowly defined to limit many goods.** (The law also used to cover cement.) The FHWA requires all projects it funds to use 100 percent U.S.-manufactured iron and steel products and coatings. The FTA requires all projects it funds to use 100 percent U.S.-manufactured steel and to use manufactured products with 100 percent U.S. content. **Rolling stock (trains, buses, ferries, trolley cars, etc.) components must have 60 percent U.S. content, with final assembly occurring in the United States.** Similar conditions are required for contracts for airport projects that receive funds from the Federal Aviation Administration as authorized by the Airport and Airways Facilities Improvement Act. Such projects require that all steel and manufactured products have 60 percent U.S. content and that final assembly occur in the United States.

**The Buy American Act (41 U.S.C. § 10a–10d) was passed in 1933 by the U.S Congress. It applies to all U.S. federal agency purchases of goods valued over the micro-purchase threshold (including construction materials), but does not apply to services. Under the act, all goods for public use (articles, materials or supplies) must be produced in the U.S., and manufactured items must be manufactured in the U.S. from U.S. materials unless an exception applies.** Many states and municipalities include similar geographic production requirements in their procurements. The law applies to goods purchased by the government for its use (vehicles, office supplies, etc.), and to contracts for the construction materials used in the alteration or repair of any public building or work in the United States. Domestic construction materials are defined as: an unmanufactured construction material mined or produced in the U.S., or a manufactured product (when the cost of domestic components exceeds 50 percent of the cost of all of components).

The Buy American law has three exceptions that allow procurement from countries other than the United States or designated (for instance trade agreement partner) countries: the public-interest exception; the non-availability exception (which applies only if articles, materials or supplies of the class or kind to be acquired are not mined, produced or manufactured here in sufficient and reasonably available commercial quantities, as determined by a contracting officer); and the unreasonable cost exception (which requires a finding by a contracting office that the price differential between the

domestic product and an identical foreign-sourced product exceeds a certain percentage of the price offered by the foreign supplier).

In the World Trade Organization's (WTO) Agreement on Government Procurement (AGP), which covers the U.S. and 39 other countries, and in free trade agreements (FTA) that the U.S. has with 15 countries, countries are forbidden from giving preference to domestic goods and services or domestic firms in awarding procurement contracts over a certain threshold for covered sectors. This requirement that the goods, services and all firms located in a trade pact signatory country be given "national treatment" in procurement activity is enforced through a waiver of the Buy American policy published in the Federal Register. Each time a new trade pact is passed that includes the ban on Buy American preferences, the involved countries are added to the waiver list. The U.S. commitments to the WTO AGP include an exception for construction grade steel covered by the Buy America Act. The U.S. Appendix I to the WTO AGP lists this exception and some limited others. It also lists which U.S. federal agencies and states are and are not covered by the rules, and sets monetary thresholds for each category of procurement.<sup>3</sup> Projects below these funding thresholds for goods, services and construction are exempt from WTO rules. U.S. FTAs have similar Annexes.

The regulation implementing the waiver to Buy American preferences for FTA countries (and other countries noted below) is contained in various provisions in the Federal Acquisition Regulation 52.225. This implements the provisions of the Trade Agreements Act (19 U.S.C. 2501, *et seq.*) that waive the "Buy American Act" for eligible products that a) cost above a set threshold, and b) which are purchased from countries that have signed an international trade agreement with the U.S. or are otherwise "designated countries." Currently, this waiver requires that the 39 signatories to the WTO AGP,<sup>4</sup> the 14 additional trade pact non-AGP countries (the FTAs passed in 2011 are not yet listed because they are not implemented),<sup>5</sup> the 47 least developed countries (LDCs)<sup>6</sup> and the 16 non-LDC Caribbean Basin countries<sup>7</sup> be treated as if they were American firms for procurement occurring in amounts over thresholds set in the agreements and/or by regulation. (The thresholds are inflation adjusted by U.S. regulation.<sup>8</sup>)

China, Brazil, India, Vietnam and many other major developing-country industrial powers are outside these categories. Thus, unless or until the U.S. signs an agreement requiring otherwise, there are no possible trade-agreement procurement violation issues regarding preferring U.S. goods to goods from these countries.

The WTO AGP and bilateral trade deals also place other limits on how procuring entities may set standards for the goods or services to be purchased, and what conditions may be imposed on bidding companies. Only descriptions of desired goods and services related to end use are permitted. Thus, a government entity can call for a million sheets of A4 paper of a weight that works in copying machines, but cannot require that it have recycled content or be produced in a manner that does not use chlorine. A government can request X amount of electricity but cannot require that electricity come from renewable sources. A government can order 5,000 extra-long uniforms, but cannot require that they meet sweat-free standards could be forbidden. Bidder qualifications are also limited to only those related to the financial, legal and technical capacity to perform the contract. Thus, our trade pact partners could challenge rules excluding firms that refuse to meet prevailing wage requirements or that are based in countries with terrible human or labor rights records.

Effectively, imposing these constraints on domestic procurement policy via trade agreement expropriate our tax dollars and transfer them into new private units for corporate profit, while

eliminating important policy tools for job creation, development of green economy capacity and the building of demand for preferred business practices.

## ENDNOTES

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<sup>1</sup> The original “Buy America” legislation was a component of the Surface Transportation Assistance Act of 1982, which adapted requirements from the Surface Transportation Assistance Act of 1978, and was amended in 1987, 1991, 1998 and 2005.

<sup>2</sup> Grant programs and state procurement are not covered by the procurement rules of NAFTA or the WTO’s Agreement on Government Procurement (AGP).

<sup>3</sup> **For central government** (WTO commitment covers procurement above these levels of all federal agencies except FAA, with many DOD exceptions, some limited others relating to USAID and Dept. of Agriculture.) **Goods and services:** \$194,000. **Construction:** \$7,443,000; **For states** (37 states are bound to WTO, fewer to other agreements per chart below with some states covering all procurement and other limiting their commitments.) **Goods and services:** \$528,000. **Construction:** \$7,443,000. For other entities (TVA, port authorities, etc.) **Goods and services:** \$98,000. **Construction:** \$6,481,000.

<sup>4</sup> Signatories to the WTO AGP include Aruba, Austria, Belgium, Bulgaria, Canada, China, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Liechtenstein, Lithuania, Luxemburg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, the United Kingdom and the United States. For the list of these and other eligible countries, see page 199 of <http://www.gpo.gov/fdsys/pkg/CFR-2011-title48-vol2/pdf/CFR-2011-title48-vol2-part52-subpart52-2.pdf>

<sup>5</sup> These countries include Australia, Bahrain, Chile, Costa Rica, El Salvador, Guatemala, Honduras, Jordan, Mexico, Morocco, Nicaragua, Oman, and Peru. Canada is a party to both the AGP and NAFTA, so is not double-counted.

<sup>6</sup> These include: Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, and Zambia.

<sup>7</sup> These include: Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, British Virgin Islands, Dominica, Grenada, Guyana, Jamaica, Montserrat, Netherlands Antilles, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago. Haiti is an LDC and a Caribbean Basin country, so is not double counted.

<sup>8</sup> For the current thresholds, see page 25.4-3 of the Federal Acquisition Regulation, available at: <https://www.acquisition.gov/far/current/pdf/FAR.pdf>