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Background:

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,¹ 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.² 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 United States, and manufactured items must be manufactured in the United States 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 United States, or a manufactured product when the cost of domestic components exceeds 50 percent of the cost of all 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 (GPA), which covers the United States and 40 other economies, and in "free trade" agreements (FTAs) that the United States has with 18 countries, countries are forbidden from giving preference to domestic goods and services or domestic firms in awarding procurement contracts over a certain threshold. This requirement that the goods and services of 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 FTA is passed that includes the ban on Buy American preferences, the involved countries are added to the waiver list.

That regulation 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 United States or are otherwise "designated countries." Currently, this waiver requires that the 40 other signatories to the WTO GPA,³ the 15 additional non-GPA countries with U.S. FTAs,⁴ the 47 least developed countries (LDCs)⁵ and the 20 non-LDC Caribbean Basin countries⁶ 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.⁷)

China, Brazil, India, Vietnam and many other major developing-country industrial powers are outside these waiver categories. Thus, unless or until the United States signs an agreement requiring otherwise, there are no possible trade-agreement procurement violation issues regarding preferring U.S. goods to goods from these countries. Further, U.S. Appendix I to the WTO GPA lists various exceptions, notes which U.S. states are exempt from the rules, and sets monetary thresholds⁸ (i.e. projects below these funding thresholds are exempt from WTO rules).

The WTO GPA and bilateral FTAs 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. 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.

Imposing these constraints on domestic procurement policy via "trade" agreements effectively expropriates our tax dollars and transforms them into private profits for multinational corporations, while eliminating important policy tools for job creation, development of green economy capacity and the building of demand for preferred business practices.

ENDNOTES

¹ 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.

² Grant programs and state procurement are not covered by the procurement rules of the North American Free Trade Agreement (NAFTA) or the WTO’s Agreement on Government Procurement (GPA).

³ Signatories to the WTO GPA include Armenia, Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan and the United Kingdom. For the list of these and other eligible countries, see <http://www.gpo.gov/fdsys/pkg/CFR-2012-title48-vol2/pdf/CFR-2012-title48-vol2-sec52-225-5.pdf>.

⁴ These countries include Australia, Bahrain, Chile, Colombia, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua, Oman, Panama and Peru. Canada, Singapore and Korea are party to both the GPA and U.S. FTAs, so they are not double-counted. Panama was not listed in the 2012 Federal Register, since its implementation date (Oct. 31) came after the Federal Register’s publication date (Oct. 1). See <http://www.gpo.gov/fdsys/pkg/CFR-2012-title48-vol2/pdf/CFR-2012-title48-vol2-sec52-225-5.pdf>.

⁵ 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.

⁶ These include: Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sint Eustatius, Sint Maarten and Trinidad and Tobago. Haiti is an LDC and a Caribbean Basin country, so is not double counted.

⁷ 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>.

⁸ The U.S. WTO commitment covers procurement above these levels for all federal agencies except the Federal Aviation Administration (with many exceptions for the Department of Defense and some limited exceptions relating to the U.S. Agency for International Development and the Department of Agriculture): Goods and services: \$194,000; Construction: \$7,443,000. The U.S. commitment for state governments binds 37 states (with some states covering all procurement and others limiting their commitments): Goods and services: \$528,000; Construction: \$7,443,000. The U.S. commitment for other entities (the Tennessee Valley Authority, port authorities, etc.) is: Goods and services: \$98,000; Construction: \$6,481,000.