



How Overreaching “Trade” Pact Rules Can Undermine Buy American and Other Domestic Preference Procurement Policies

SUMMARY: Today’s “trade” agreements expand far beyond traditional matters, such as cutting tariffs and limiting quotas. One set of “trade” agreement rules even constrain how the public can direct our democratically-elected federal and state governments to spend our tax dollars. These rules set limits on the government procurement policies signatory countries are allowed to implement domestically.

The rules require companies operating in a trade partner country to be treated like U.S. firms – and foreign goods to be treated as if they were made in America with respect to many types of U.S. government contracts over a certain dollar-value threshold. That means we cannot apply the Buy American, Buy [your state] or Buy Local policies that either give preferences for or require the purchase of American-made goods when the government buys vehicles, computers, office equipment, furniture and more and that require materials going into government infrastructure construction to be made-in-America. Currently, **companies and products from 60 countries with which the United States has trade agreements must be given the same access to U.S. government contracts as U.S. firms and products for all but the lowest-value government contracts. Effectively, these rules offshore our tax dollars rather than investing them to create jobs and innovation at home.**

The rules also limit environmental, labor and other conditions for procurement contracts, like requiring workers on infrastructure and construction contracts be paid ‘prevailing wages’ or requiring recycled content in goods or renewable energy. If the U.S. government—or a state—does not conform its policies to these constraints, then the other countries that are part of the agreement can challenge our policies in foreign tribunals that can impose trade sanctions against the United States until the laws are eliminated or changed.

Traditionally, trade pacts did not set rules on procurement. But such terms now are included in the World Trade Organization’s (WTO) Agreement on Government Procurement (GPA), which covers the United States and 45 other economies, and the North American Free Trade Agreement (NAFTA) and other free trade agreements (FTA) that cover 14 additional countries. Imposing constraints on domestic procurement policy via “trade” agreements effectively expropriates our tax dollars and transforms them into opportunities for private profit, while eliminating important policy tools for job creation, development of green economy capacity and the building of demand for preferred business practices such as payment of prevailing wages or use of recycled content or production of renewable-source energy.

Products from and Firms in These 60 Countries Get Treated as if They Were U.S. Goods and Firms

Armenia, Aruba, Australia, Austria, Bahrain, Belgium, Bulgaria, Canada, Chile, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, El Salvador, Estonia, Finland, France, Germany, Greece, Guatemala, Honduras, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxemburg, Mexico, Moldova, Malta, Montenegro, Morocco, Netherlands, New Zealand, Nicaragua, Norway, Oman, Panama, Peru, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, South Korea, Spain, Sweden, Switzerland, Taiwan, Ukraine, UK

Bold = WTO GPA; Italics = FTA

Even if the underlying notion of offshoring our tax dollars was a good one, the way it is done in trade pacts is a losing proposition for the United States. The U.S. procurement market is much larger than any but that of the European Union. And, U.S. negotiators bound almost all procurement activity to the trade pact rules, while other countries preserved their policy space to use procurement for job-creation and other goals and excluded significant aspects of their procurement activity from the rules. The result is, that in exchange for some individual U.S. firms getting some opportunities to bid on equal terms with domestic firms on contracts in other countries (most of which have much smaller amounts of government procurement), almost all U.S. government contracts are made available on terms equal to U.S. firms for all firms operating in 49 other countries. (The trade pact rules even apply to the subsidiaries of firms based in countries that have not signed on to the rules and provided reciprocal access as long as a subsidiary is operating in a country that has signed a deal with the United States.)

These limits on procurement policy apply to most U.S. federal purchases, with limits for U.S. defense agencies and some specific products listed in each trade deal. Wisely, some U.S. states have refused to commit to these terms at all. (See [here](#) for a chart of what states are bound to what trade-pact procurement rules.) Indeed, over time as state policymakers have realized what the trade-pact procurement restraints means fewer and fewer U.S. states have been willing to be bound to the terms.

The U.S. Procurement Policies that Are Forbidden by “Trade” Agreements

Since the Roosevelt administration, when the Buy American Act was passed, the U.S. government and many states have enacted policies that give domestic goods and domestic bidders preference for government contracts. There also have been initiatives to require that outsourced government work, such as call centers or engineering contracts, be awarded to firms employing U.S. workers.

Among the key federal procurement policies providing preferences or requirements for purchase of raw materials and goods produced domestically are: the Buy American rules Act of 1933 (41 USC 8301-8305); The Buy America rules originally included in the 1982 Surface Transportation Assistance Act¹ (23 U.S.C § 103 (3)(4) and 49 U.S.C. § 5323(j)); the Federal Public Transportation Act of 2015 (49 USC 5323(j)); the Passenger Rail Investment and Improvement Act of 2008 (49 USC 24305(f) and 24405(a)); the Federal Aviation Administration Authorization Act of 1994 (49 USC 50101); the Berry Amendment (10 USC 2533a); the Federal Water Pollution Control Act, as amended (33 USC 1388); and the Water Infrastructure Finance and Innovation Act of 2014 (33 USC 3914). At the end of this memo the difference between the “Buy American” Act and “Buy America” rules is explained. In sum, the Buy American Act covers all procurement done directly by the federal government. Buy America covers federal funds relating to transportation granted to states to build roads, bridges, subways etc. and to purchase rolling stock. The other pieces of legislation noted above provide domestic preferences for the specific additional areas of government procurement activity covered by the specific bills.

Trade Agreement Rules that Forbid Certain Procurement Policies and Expose Others To Challenge as “Illegal Trade Barriers”

Over the past few decades, rules limiting signatory countries procurement policies have been added to “trade” agreements. These rules forbid preferences for domestic goods and firms and limit the criteria governments can use to describe the goods and services they seek and what conditions may be imposed on bidding companies. Effectively, 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.

The “Non-Discrimination” Rule Prohibits Anti-Offshoring Laws and Buy American Policies:

These rules require the same or more favorable treatment be given to goods and service and firms operating in countries that have signed “trade” agreements relative to what is provided to domestic firms, goods and services. (This applies to firms merely operating in a trade-pact country, so for instance a Chinese state-owned enterprise operating in Panama would obtain these rights.) Such preferences are explicitly banned. The non-discrimination rule also forbids anti-offshoring policies that require outsourced government work to be performed by U.S. workers.

“Technical Specification” Rules Strictly Limit Criteria that Can Be Used to Describe Desired Goods and Services:

The WTO procurement policy constraints, for instance, requires that *“technical specifications laying down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labeling...shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade...and that technical specifications prescribed by procuring entities shall, where appropriate, be in terms of performance rather than design or descriptive characteristics.”* This rule means that specifications describing goods or services sought based on how a good is made (“sweat-free clothing, sustainably-harvested wood, or recycled content requirements, for instance) or how a service is provided (renewable-source energy) is subject to challenge by the other countries signing the agreement. These challenges are heard by tribunals of trade officials. If they rule against a domestic policy, they can order trade sanctions by imposed against a country until and unless the policy is eliminated.

“Supplier Qualification” Rules Prohibit Consideration of Contractors’ Labor or Environmental Track Records or Their Willingness to Do Business with Human-Rights-Violating Countries:

These rules restrict what sorts of qualifications and criteria states may employ to choose suppliers of goods and services. For instance, under WTO rules, procuring entities must limit supplier-participation conditions in procurement *“to those which are essential to ensure the firm’s capability to fulfill the contract in question.”* Policies that bar contractors based on past environmental, labor rights or worker-safety violations or require companies to pay prevailing wages, be green-certified or provide preferences for suppliers with a unionized workforce are thus subject to challenge. This rule also forbids state procurement policies that exclude businesses operating in countries with human rights offenses. (And indeed, there was a WTO challenge of Massachusetts’s laws that excluded firms doing business in Burma from state procurement contract bidding.)

Each trade agreement lists what government agencies are covered. For instance, U.S. Appendix I to the WTO GPA lists various exceptions, notes which U.S. states are exempt from the rules, and sets monetary thresholds. (i.e. projects below these funding thresholds are exempt from WTO rules).

How Are These Constraints Enacted?

The requirement that the goods and services of all firms located in a trade-pact signatory country be treated the same as American goods and services for government contracts is enacted through a waiver of Buy American and other domestic procurement preference policies. That waiver is achieved through regulation, not by statute. The waiver rules are contained in the Federal Acquisition Regulation 52.225.

These regulations implement a provision of the Trade Agreements Act (19 U.S.C. 2501, *et seq.*) that provides authority for the president (Section 2511) to waive the Buy American Act and other domestic procurement preferences a) that are above a set threshold, and b) that involve countries that have signed an international trade agreement with the United States or are otherwise “designated countries.”

The Trade Agreements Act gives the president discretionary authority to waive domestic procurement preferences, *but does not require a waiver*. This waiver authority has been delegated to the U.S. Trade Representative (USTR). USTR’s practice is to add new trade agreement countries or countries joining the WTO procurement agreement to a list found at 48 CFR 25.400. Currently, this waiver requires that the 45 other signatories to the WTO GPA, 14 non-GPA-signatory countries with U.S. Free Trade Agreements, 47 least developed countries (LDCs)² and 20 Caribbean Basin countries³ 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.⁴)

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, U.S. goods can be given preference over purchase of goods from these countries.

“Buy American” and “Buy America” Acts

The **Buy American Act** was passed in 1933 and applies to all U.S. federal agency purchases of goods valued over the micro-purchase threshold that is currently \$3,000 (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. 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 a foreign supplier).

Buy America conditions for U.S. federal government grants to state, municipal or other organizations including transit authorities. It 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 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 Airway 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.

ENDNOTES

¹ The original “Buy America” legislation was part 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 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 & Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen and Zambia.

³ 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 & the Grenadines, Saint Eustatius, Saint Maarten and Trinidad & Tobago. Haiti is an LDC and a Caribbean Basin country, so is not double counted.

⁴ 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>.