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FR: Public Citizen's Global Trade Watch

RE: Buy American Data Highly Unreliable Because of Data Collection Problems and Waivers and Weak Rules of Origin that Promote Significant, but Uncounted, Embedded Foreign Value

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Since the Roosevelt administration, when the Buy American Act (BAA) was passed, the U.S. government and many states have enacted policies providing domestic goods preference for government contracts. The 1982 Buy America Act extended domestic procurement preferences to federal funds sent to states via the Surface Transportation Act. Some other federal funds that are delegated down to U.S. states also have domestic preference requirements, but many do not. (Expanding domestic procurement preference requirements to all federal programs that revolve funds to states would significantly strengthen this policy tool.) There also have been recent initiatives – unsuccessful to date – to require that outsourced government service-sector work, such as call centers or engineering contracts, be awarded to firms employing U.S. workers.

Domestic procurement preferences are an important industrial policy tool used here and in other nations to spur investment and innovation, reinvest tax dollars in domestic employment and help domestic businesses develop and compete in strategic sectors. Especially given the enormous value of U.S. government procurement – almost \$600 billion¹ at the federal level and \$1.7 trillion² including state-level spending – shaping the way in which U.S. government procurement is conducted is among the most powerful and potentially impactful policy tools for the U.S. government to address economic, racial and regional equity; rebuild supply chain resilience; and create U.S. capacity in the industries of the future, including to better compete against China's dominance in such sectors.

Yet to date, the intent and impact of domestic preferences in general and Buy American in specific have been and are being significantly undermined. The available data does not make this problem evident, in no small part because it reflects the underlying substantive problems in the current Buy American program. The standards used to determine where a good is made for purposes of applying domestic preferences allow billions of foreign content into the government procurement market to be designated as “made in America” and the foreign value never recorded in government data. Further, implementation of “trade” pact obligations not only require goods and bidders from more than 60 countries to be treated as American for government tenders and contracts, but waive even the weak 55% rule of origin with respect to government contracts of an amount higher than trade-pact thresholds, further flooding “made in America”-designated goods with billions in foreign content value. And agencies have yet more discretion to apply exceptions for categories of products and to particular bids.

The resulting losses have been obscured. Enormous foreign content value for components and inputs is simply not accounted for in the data while significant data collection and processing problems documented by GAO also greatly undermine the accuracy and legitimacy of Buy American Act compliance data. As a result, business interests that oppose domestic procurement preferences can use the unreliable data to attack proposals to strength domestic procurement preferences, such as recent claims that the foreign goods' share of U.S. government purchases represent only around 3.5% in fiscal year 2019. This absurdly small figure represents the problems with the current program and its data, not an accurate assessment of how U.S. federal dollars are being spent with respect to domestic and foreign goods.

¹ GAO, “A Snapshot: Government-Wide Contracting. A 2019 Update.” Extracted on June 11, 2021. Available at: <https://gaotest.files.wordpress.com/2020/05/contracting-graphic.png>

² GAO, “The United States and European Union Are the Two Largest Markets Covered by Key Procurement-Related Agreements.” July 2015. Available at: <https://www.gao.gov/assets/gao-15-717.pdf>

Summary

- Significant foreign value is included in BAA-compliant procurement because the general BAA Rule of Origin (ROO) lets 55% U.S. value qualify, meaning almost half of goods' value can be foreign-made. Yet, in the procurement data, 100% of the value of BAA-qualifying goods are recorded as domestic-sourced.
- A commercially available off-the-shelf (COTS) waiver of BAA's domestic content test allows firms to import tens of billions in components and parts, perform basic assembly operations and sell goods to the federal government as "domestic end products" with BAA preferences. The inclusion of the COTS goods as domestic products greatly compounds the data distortions that occur from including the significant foreign value embedded in the already-low 55% rule of origin for non-COTS goods.
- A Trade Agreements Act (TAA) BAA waiver allows all procurements above a set threshold, which today is \$182,000 for goods under the WTO rules, to evade compliance with value-based domestic content rules. Instead, a "substantial transformation" rule of origin is applied, which effectively means some assembly or other processing must occur in a TAA-waiver country that transforms a good. (One measure being if there is a change in the tariff line that applies.) This means that for goods valued above a threshold price set in each trade pact firms can source inputs from anywhere, including China and other countries not on the TAA waiver list, assemble in U.S. territory or in another of the 60 nations and compete on equal terms with high U.S.-content goods. Stunningly, U.S. end products also are excluded from meeting the 55% domestic content component test. That means for procurements above the threshold set in trade pacts, which current is \$182,000 for goods for the WTO's GPA, a product assembled in the United States of 100% foreign content is considered a U.S. end product. Given many, many contracts are above \$182,000 and even the weak 55% domestic content rule does not apply to such procurements, this adds yet another enormous distortion to what is included in the data recorded as procurement of U.S. goods.
- Government data on how much is spent on domestic vs. foreign goods purchased by federal agencies is not accurate and unreliable not only because of significant embedded foreign value, but also because of major, well-documented data collection problems that include online forms that do not allow agencies to report both domestic and foreign goods, but require a choice of one or the other in reporting and more.

The president has existing authority to modify the COTS rule and the various ROOs, to withdraw from the WTO's Agreement on Government Procurement (GPA) by simply providing 60 days written notice and to modify the scope of or to end the TAA waiver, which is the basis for waiving domestic content rules for a vast amount of procurement covered by contracts above the trade-pact thresholds. The president can also order improvements of the U.S. government procurement data collection and tabulation. None of these important improvements require action by the U.S. Congress.

1. Buy American Act Rules of Origin and the COTS Exception

Under the Buy American Act, an agency must give a preference to "domestic end products". This preference is in the form of an upward adjustment to the price of any non-domestic item. The adjustment can be as much as 50% for DOD procurements.³ According to the Federal Acquisition Regulation (FAR) 25.003, in order to qualify as a "domestic end product," a good must have a 55% domestic content and be mined produced or manufactured in the United States.⁴ This means that the cost of a qualifying goods' components mined, produced, or manufactured in the United States must exceed 55% of the cost of all its components.

³ The Executive Order 13881 issued on July 15, 2019 and a implementing ruling by the Federal Acquisition Regulation Council increased the price preference from 6 percent to 20 percent for large businesses, and from 12 percent to 30 percent for small businesses. See: <https://www.federalregister.gov/documents/2021/01/19/2021-00710/federal-acquisition-regulation-maximizing-use-of-american-made-goods-products-and-materials>

⁴ Products made out of steel or iron have special requirements.

(A recent change to this rule is a 95% domestic ferrous content for products predominantly of iron or steel, although this standard includes no domestic content requirement at all for other metal and non-metal inputs.)

Notably, this rule of origin allows almost half the value of inputs and components to be foreign while the total value of the good would count as domestic in U.S. government procurement data. And, this rule of origin allows components and inputs that are manufactured domestically from imported subcomponents or inputs to be counted as all U.S. value towards the 55%, meaning the 55% domestic content may signify the cost of a good manufactured here while excluding that the good has significant foreign value embedded in it.

These factors would undermine the intent of domestic preference in their own right, but this statutory standard has been further significantly undermined by a 2009 COTS regulation (41 U.S.C. § 1907). The COTS regulation waived the BAA domestic content test for “commercially available off-the-shelf” items. Under FAR 2.101, COTS are commercial items sold in substantial quantities in the commercial marketplace that are offered to the government in the same form as they are sold in the marketplace. Millions of goods, including those of high value, could be subject to this description. A COTS item that is manufactured in the United States is simply deemed domestic end product without regard to the provenance of its components. Waiving the TAA domestic content test for COTS products opens the door for innumerable super high-value components, potentially worth tens of billions of dollars, that can be imported to the United States, assembled in U.S. territory and be treated as domestic end products, benefiting from the BAA preferences. None of this foreign value is captured in the BAA data, as COTS goods with enormous foreign value are simply recorded as BAA compliant.

The administration should reverse the COTS rule and raise the domestic value to a higher standard so as to build demand for U.S. supply chains in components and inputs.

2. Trade Agreements Act Waivers and Rules of Origin Allow Billions of Foreign Goods and Components into the U.S. Procurement Market

U.S. manufacturers that wanted to keep lucrative U.S. government contracts and also offshore production to low-wage nations pushed to insert terms into trade agreements that require government procurement policies to treat goods, services and suppliers from trade-pact partner countries the same as U.S. counterparts. Effectively, these interests pushed to apply a concept to the government procurement context known as national treatment that relates to private-sector trade. National treatment requires government policies to treat imported goods the same as like domestic goods with respect to regulatory standards and the like. Applying this concept to procurement means foreign-made goods must be treated the same for government purchase contracts. Under this concept, which only was added to trade pacts in past decades, presidents have granted trade-pact exceptions to Buy American and other domestic procurement preferences for 46 nations covered by the World Trade Organization Agreement (WTO) Government Procurement Agreement (GPA) and 14 U.S. Free Trade Agreement partners.⁵ This exception is sometimes called the 1979 Trade Agreements Act (TAA) waiver or TAA exception and applies for contracts that surpass a monetary threshold. The current threshold for goods purchases in the WTO’s GPA is \$182,000 and above.

With respect to the BAA data issues, the most important aspect of the Trade Agreements Act BAA waiver is not that it allows 60 other nations’ goods to be treated as American. TAA waivers are supposed to be recorded in the data, although GAO found sometimes they are not. More important than those problems

⁵ The 60 countries: **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 Rep., Slovenia, Korea, Spain, Sweden, Switzerland, Taiwan, Ukraine, UK.** (Bold = WTO AGP and italics = FTA). See: <https://www.citizen.org/article/how-overreaching-trade-pact-rules-can-undermine-buy-american-and-other-domestic-preference-procurement-policies/>

with respect to data concerns is that *all* procurements made under the TAA are excluded from having to meet the value-based domestic content rules!

That means the rule of origin standard to determine whether a product is originating in a designated country or is a “U.S.-made end product” is the same: Instead of requiring any specific amount of U.S. or TAA-nation value, the applicable rule of origin is what is called a “substantial transformation” rule. It effectively means that some assembly or other processing must occur in the United States or in a TAA-waiver country that transforms a good. According to FAR 25.0003, a product has been “substantially transformed” when a producer uses parts and components, that might have been manufactured in other countries, and transforms them into a new and different article of commerce with a distinct name, character or use. One measure of a transformation is whether there is a change in the tariff line that applies.

Many people are unaware that products categorized as “U.S.-made end product” in procurement contracts above the TAA threshold value are excluded from meeting the 55% domestic content component test. Effectively, when the TAA threshold dollar amount for a contract is met, the TAA waiver *totally waives* the BAA – both the domestic content requirement and the preference given. That means for procurements above the threshold set in trade pacts, a product assembled in the United States of 100% foreign content, including from China and other countries not on the 60-nation TAA waiver list, is considered a U.S.-made end product and recorded as such in the data. Thus for *all contracts* for goods valued above the trade-pact threshold price, firms can source inputs from anywhere, assemble in U.S. territory or in another of the 60 nations and compete on equal terms with high U.S.-content goods.

Given many, many contracts are above \$182,000 and even the weak 55% domestic content rule does not apply to such procurements, this adds yet another enormous distortion to what is included in the data recorded as procurement of U.S. goods. To put this in perspective, federal agencies cannot purchase goods from non-TAA countries *at all* unless doing so can be justified by a waiver. (These waivers are on the basis of goods not being available in needed quantities here or in the 60 other TAA countries or because buying domestically or from the 60 other countries is significantly more expensive, for instance.) But thanks to the TAA waiver substantial transformation rule, a firm could buy components from China that represent 90% of the value of a good to be assembled in the United States, the finished good would be eligible to be purchased by federal agencies and that purchase would not be listed as having required a waiver for non-TAA foreign countries, a TAA waiver for the 60 TAA-qualifying countries or show any foreign content. Rather, the value would be represented in the procurement database as a U.S.-made end product, despite the Chinese content.

The president has authority to rectify the Trade Agreements Act waiver problems, support U.S. producers and rebuild supply chains. The need to close the trade-pact loophole was flagged in the Build Back Better plan: “[Update the trade rules for Buy American](#): Biden will work with allies to modernize international trade rules and associated domestic regulations regarding government procurement to make sure that the U.S. and allies can use their own taxpayer dollars to spur investment in their own countries.”⁶ Congress delegated presidents authority to grant trade-pact exceptions to Buy American and also to “modify or withdraw any waiver granted pursuant to” that authority (19 U.S.C. §2511). In early 2021, seven House committee chairs and a dozen Senators wrote to President Biden requesting that he exercise this authority, which is not conditioned on changes in trade-pact terms or other factors. (How such a notice would relate to trade-pact obligation is addressed in the note at the end of this memo.)

3. Data Issues Undermine the Accuracy and Legitimacy of U.S. Procurement Data

Businesses associations and certain research groups have relied on official U.S. government BAA compliance and exception data to argue that the overwhelming majority of goods purchased by federal agencies are now

⁶ Biden-Harris Campaign Website, “The Biden Plan to Ensure the Future Is “Made in All of America” by All of America’s Workers.” Extracted on June 11, 2021. Available at: <https://joebiden.com/made-in-america/>.

made in America. However, the government data upon which they rely is woefully inadequate. Because of problems in how the data is collected and tabulated, the data do not provide an accurate picture of what value of U.S. government procurement is produced domestically versus offshore. These data problems are amplified by the exceptions and waivers that not only rig the federal procurement framework, but help ensure that enormous foreign content value is embedded in goods that are now deemed as domestic under BAA and thus such foreign value is altogether missed by the data.

A 2018 GAO report audited the actual origin of goods procured relative to the way the procurements were reported by federal agencies and found that six **out of 38 contracts reviewed were misreported in favor of excluding foreign goods**. One common problem was that agency data systems did not allow for separate reporting if both foreign and domestic qualifying products were included in a procurement contract. The report, entitled *Buy American Act: Actions Needed to Improve Exception and Waiver Reporting and Selected Agency Guidance* (GAO-19-17), concluded that, due to reporting errors and systems limitations, the amount of foreign end products purchased by federal agencies could be greater than reported in the Federal Procurement Data System-Next Generation (FPDS-NG), a statistical system administered by the General Service Administration (GSA). GAO found that: *“6 of the 38 contracts reviewed from the Departments of Defense (DOD), Health and Human Services (HHS), Homeland Security (DHS), and Veterans Affairs (VA) inaccurately recorded waiver or exception information. FPDS-NG system limitations compound these errors because it does not fully capture Buy American Act data. Among other things, the database does not always enable agencies to report the use of exceptions or waivers on contracts for both foreign and domestic products, reducing data accuracy.”*

The GAO also noted that when a contract was awarded, the awarding agency is responsible for entering certain information into FPDS-NG, including data regarding the “Place of Manufacture” of the goods procured. Stunningly, agencies were given total discretion to decide how to categorize goods. They could indicate *“that the product is made in the United States, or that it is made outside the United States and qualifies under one of the Buy American Act exceptions, or that it is subject to the requirements of a trade agreement instead of the Buy American Act requirements.”* That is to say that **the information gathered by GSA regarding “BAA compliance” was not based on the actual statutory criteria to determine whether a good qualifies as “domestic end product” or “U.S.-made end product,” but on a subjective determination made by the official inputting the information into the system.** Finally, the GAO raised concerns about **agencies’ reliance on contractors to certify the origin of goods** when contractors’ interests in meeting BAA standards could incentivize misrepresentations despite penalties for such conduct.

In March 2020, GSA transitioned most of the databases and reports from FPDS-NG to a new platform, the System for Award Management (SAM).⁷ However, there is no indication that the data being displayed via the new platform is any more accurate than that of the old system, meaning the severe problems identified by the GAO in its 2018 report that make the data extremely unreliable remain. The new website displays a “Buy American Act Place of Manufacture report,” which includes a column entitled *“Mfg in the U.S.”* According to the explanatory notes of the report, this column counts awards and modifications to awards where the *“the action is predominantly for acquisition of manufactured end products that are manufactured predominantly in the United States.”* **This criterion is not the origin standard contemplated in Federal Acquisition Regulation for domestic end products.** It would be necessary to know what portion of goods labeled “manufactured in the United States,” actually comply with the domestic content requirements established in the FAR, are considered COTS items or fall into the category “U.S.-made end products,” according to FAR 52.225-5 to have a real understanding of the level of compliance with BAA domestic preferences. Additionally, by asking for the place where the goods are *predominantly* manufactured, agencies could bundle together foreign products and those made in the United States and label them as “manufactured in the United States.” Thus, there are grounds to believe that the new website not only inherited the issues of the old platform, but may have compounded them.

⁷ <https://sam.gov/content/home>

This raises serious doubts about the accuracy of its data regarding BAA compliance. Consequently, there is no reliable information with regard to the actual proportion of domestic products purchased by the federal government. And, as noted above, these significant data flaws are greatly compounded by the exclusion of foreign value embedded in goods that now qualify under COTS, the TAA ROO that waives the component test or the 55% ROO. The Biden administration could address the data problems by auditing the procurement collection programs of federal agencies to ensure that accurate reporting is supported by available systems and require improvements as needed.

CONCLUSION: The recent White House report on critical supply chains calls for use of procurement policy to create demand to strengthen U.S. supply chains. The report explicitly calls for establishment of a list of designated critical products that it recommends receive additional preferences under the Buy American Act and FAR Council regulations to ensure that the federal government procures U.S.-made critical products.⁸ However, if the Administration does not close the TAA waiver loophole and ensure that the origin standards of both BAA and TAA are strengthened, including by ending the COTS rules, the U.S. government will cede the effective use of government procurement as a tool to rebuild necessary supply chains and reshore production capacity for critical goods, such as pharmaceuticals, semiconductors and large capacity batteries. Moreover, at a minimum, the Biden Administration should withdraw the listed sectors from the U.S. WTO GPA schedule, if not exit the lopsided pact altogether. The GAO found that the United States currently offers twice as much procurement to foreign firms as the next five largest WTO GPA signatories combined – and that includes all European Union countries, Japan, South Korea, Norway, and Canada.⁹

NOTE: The President Can Remedy “Trade” Pact Constraints on Government Procurement Policy

A president has undeniable statutory authority to unilaterally modify the trade-pact waiver list. What would then happen to the United States international law obligations in pacts like the WTO’s Agreement on Government Procurement? Actually, the president also has the authority to withdraw from the WTO’s GPA by simply providing 60 days written notice to the WTO Director-General without incurring any liability at the WTO.¹⁰ The GPA text makes explicit that the only penalty that can be imposed against one WTO member by another for any dispute relating to the GPA is to suspend benefits under the GPA.¹¹ The standard WTO enforcement system that allows imposition of “cross sectoral” sanctions does not apply to the GPA. Exiting the GPA would support the recommendation of the recently-published White House report on critical supply chains, which called for using federal procurement policy to create demand to strengthen U.S. supply chains.

An additional benefit of withdrawing from the GPA would be to unshackle the federal government from the limits that “trade” agreements impose on the kind of conditions that agencies may establish when purchasing goods. The rules limiting procurement policies added to “trade” agreements not only forbid preferences for domestic goods and firms *but also 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.

⁸ The White House. “Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth.” June 2021, pg. 15. Available at: <https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chain-review-report.pdf>

⁹ GAO, “Government Procurement: United States Reported Opening More Opportunities to Foreign Firms Than Other Countries, but Better Data Are Needed,” GAO-17-168, Feb. 2017, Available at <https://www.gao.gov/products/gao-17-168>

¹⁰ See: WTO GPA Art. XXII – 12 Withdrawal.

¹¹ WTO GPA Art. XXII(2) — Consultations and Dispute Settlement.