

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is a darker shade of blue. The hourglass is centered on the page.

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*The Buy American Act: Requiring Government  
Procurements to Come from Domestic Sources*

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August 29, 2008

**Abstract.** In the 110th Congress a new reporting requirement was added to the Buy American Act. Under P.L. 110-28, the head of each federal agency is required to annually report to Congress concerning procurements from non-domestic sources. While there are several bills that have been introduced in the 110th Congress which contain domestic content provisions, S. 581, The Buy American Improvement Act of 2007, is the only one which would directly amend the Buy American Act. This bill would make statutory the definition of "American made," increase the domestic content requirement from 50% to 75%, and place limits upon the "inconsistent with the public interest" and "use outside of the United States" exceptions to the act.

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# The Buy American Act: Requiring Government Procurements to Come from Domestic Sources

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**CRS Report for Congress**

*Prepared for Members and Committees of Congress*

## Summary

The Buy American Act is the major domestic preference statute governing procurement by the federal government. Essentially it attempts to protect domestic labor by providing a preference for American goods in government purchases. It was enacted in 1933 and has only been substantively amended four times in the succeeding years. In determining what are American goods, the place of mining, production, or manufacture is controlling. The nationality of the contractor is not considered when determining if a product is of domestic origin.

In the 110<sup>th</sup> Congress a new reporting requirement was added to the Buy American Act. Under P.L. 110-28, the head of each federal agency is required to annually report to Congress concerning procurements from non-domestic sources. While there are several bills that have been introduced in the 110<sup>th</sup> Congress which contain domestic content provisions, S. 581, The Buy American Improvement Act of 2007, is the only one which would directly amend the Buy American Act. This bill would make statutory the definition of “American made,” increase the domestic content requirement from 50% to 75%, and place limits upon the “inconsistent with the public interest” and “use outside of the United States” exceptions to the act.

The Buy American Act<sup>1</sup> is the major domestic preference statute governing procurement by the federal government.<sup>2</sup> Essentially, it attempts to protect domestic labor by providing a preference for American goods in government purchases. It was enacted in 1933<sup>3</sup> and has only been substantively amended four times in the succeeding years.<sup>4</sup> In determining what are American goods, the place of mining, production, or manufacture is controlling. The nationality of the contractor is not considered when determining if a product is of domestic origin.<sup>5</sup>

While the act appears to control most procurements of the federal government, it should be noted, when considering a particular procurement, that the application of the act may be controlled by other legislation or international agreement. For example, the Trade Agreements Act of 1979<sup>6</sup> authorizes the President to waive any otherwise applicable “law, regulation or procedure regarding Government procurement” that would accord foreign products less favorable treatment than that given to domestic products.<sup>7</sup> Article 1004 of The North American Free Trade Agreement (between the United States, Mexico, and Canada) disallows domestic protection legislation, such as the Buy-American Act, in government procurement. Other treaties and agreements also place limitations on the application of the act and must be considered when looking at any Buy American question.

## Coverage of the Buy American Act

The domestic preference requirement of the act is quite broad in its scope. The federal government is required to buy domestic “articles, materials, and supplies” when they are acquired for public use unless a specific exemption<sup>8</sup> applies.<sup>9</sup>

The act applies to all federal procurements, but has separate provisions for supply contracts<sup>10</sup> and construction contracts.<sup>11</sup> Most of the rules and definitions used in applying the act are found in the Federal Acquisition Regulation part 25, not in the act itself. The rules for determining whether

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<sup>1</sup> 41 U.S.C. §§ 10a through 10d.

<sup>2</sup> There are numerous “little Buy American” provisions which generally govern specific types of procurements that are for some reason exempt from the Buy American Act, usually because the procurement is for articles for use outside of the United States. These provisions are beyond the scope of this paper, but should be considered when researching whether or not a domestic preference affects a particular procurement. These provisions are often attached to the appropriations acts for the agencies making the procurement in question. The most well known of these Acts is commonly referred to as the “Berry Amendment” and applies to certain procurements of the Department of Defense, see, CRS Report RL31236, *The Berry Amendment: Requiring Defense Procurement to Come from Domestic Sources*, by Valerie Bailey Grasso. There have been several such proposals introduced in the 110<sup>th</sup> Congress.

<sup>3</sup> Ch. 212, 47 Stat. 1520, 72<sup>nd</sup> Congress, 2<sup>nd</sup> Session. (1933).

<sup>4</sup> See, P.L. 100-418, Title VII; 102 Stat. 1545, 100<sup>th</sup> Congress, 2<sup>nd</sup> Session (1988), P.L. 103-355, 108 Stat. 3346-7, 103<sup>rd</sup> Congress, 2<sup>nd</sup> Session (1994), codified at 41 U.S.C. 10a., P.L. 104-201, § 827, 110 Stat. 2611 104<sup>th</sup> Congress, 2<sup>nd</sup> Session (1996), codified at 41 U.S.C. 10b-3, and P.L. 110-28, Title VIII, § 8306, 121 Stat. 112, 211, 110<sup>th</sup> Congress, 1<sup>st</sup> Session (2007), codified at 41 U.S.C. 10a(b).

<sup>5</sup> See, E-Systems, Inc., 61 Comp. Gen. 431 (1982); and Patterson Pump Co., B-200165, 80-2 CPD ¶ 453 (1980).

<sup>6</sup> 19 U.S.C. §§ 2501 et seq.

<sup>7</sup> 19 U.S.C. § 2511. This provision was implemented by E.O. 12260, 46 *Fed. Reg.* 1653 (1981). See, also, FAR § 25.4.

<sup>8</sup> See discussion below. “Exceptions to the Buy American Act”

<sup>9</sup> 41 U.S.C. §§ 10a & 10b. The act applies to leases as well as purchases. National Office Equipment Co., B-191003, 78-1 CPD ¶ 413 (1978).

<sup>10</sup> 41 U.S.C. § 10a and Federal Acquisition Regulation (FAR) § 25.1.

<sup>11</sup> 41 U.S.C. § 10b and FAR § 25.2.

products are of foreign or domestic origin are the same for both types of procurements, but different terminology is used and the step in the manufacturing or construction process at which the test is applied is different.<sup>12</sup> The test of origin is applied to supplies delivered to the government.<sup>13</sup> In contrast, under construction contracts, the test is applied to articles, materials, and supplies used by the contractor and subcontractors in constructing, altering, or repairing the building or work.<sup>14</sup> In the case of supply contracts the test is applied to “end products.”<sup>15</sup> Construction contracts are concerned with the origin of “construction materials.”<sup>16</sup>

The act differentiates between manufactured and un-manufactured articles. An un-manufactured article will be deemed a domestic end product or construction material if it has been mined or produced in the United States.<sup>17</sup> Manufactured articles are considered domestic if they have been manufactured in the United States from components, “substantially all” of which have been mined, produced, or manufactured in the United States.<sup>18</sup> “Substantially all” means that the cost of foreign components does not exceed 50% of the cost of all components.<sup>19</sup>

## Exceptions to the Buy American Act

There are five primary exceptions to the Buy American Act. The act does not apply to procurements to which application would be inconsistent with the public interest or unreasonable in cost.<sup>20</sup> The act does not apply to procurements of products for use outside the United States or of products not produced or manufactured in the United States in sufficient and reasonably available commercial quantities and of satisfactory quality.<sup>21</sup> Lastly, the act does not apply to procurements under \$2,500.<sup>22</sup>

### Inconsistent with the public interest

The head of the procuring agency may waive the requirements of the act if a determination is made that the application of the act would be inconsistent with the public interest. This public interest exception has often been used like a national security exception by the Department of Defense,<sup>23</sup> but is also available for non-defense purposes. This exception places considerable

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<sup>12</sup> See Cibinic and Nash, *Formation of Government Contracts*, 1449 (3<sup>rd</sup> ed.) (1998).

<sup>13</sup> FAR § 25.1.

<sup>14</sup> 41 U.S.C. § 10b and FAR § 25.2.

<sup>15</sup> FAR § 25.101.

<sup>16</sup> FAR § 25.201.

<sup>17</sup> 41 U.S.C. §§ 10a & 10b. The United States is defined to include “the United States and any place subject to the jurisdiction thereof.” 41 U.S.C. § 10c(a).

<sup>18</sup> 41 U.S.C. §§ 10a & 10b. This two part test is only applied to end products or construction materials. A component is of domestic origin if it was manufactured in the United States, regardless of where its components were manufactured. *Hamilton Watch Co.*, B-179939, 74-1 CPD ¶ 306 (1974).

<sup>19</sup> FAR § 25.101; and E.O. 10582, 19 *Fed. Reg.* 8723 (1954).

<sup>20</sup> 41 U.S.C. § 10a.

<sup>21</sup> *Id.*

<sup>22</sup> P.L. 103-355, 108 Stat. 3346-7, 103<sup>rd</sup> Cong., 2<sup>nd</sup> Sess. (1994), codified at 41 U.S.C. 10a.

<sup>23</sup> See *Self-Powered Lighting, Ltd.*, 492 F.Supp. 1267 (S.D.N.Y. 1980); and *American Hospital Supply*, B-221357, 86-1 CPD ¶ 70 (1986).

discretion in the head of the agency. For example, this exception has been invoked after bids have been opened.<sup>24</sup>

### **Unreasonable in cost**

A federal agency is permitted to use a foreign product if the head of the agency determines that the cost of the lowest domestic product is “unreasonable.”<sup>25</sup> A system of price differentials has been established for use in making this determination.<sup>26</sup> The general differential, applicable to most federal contracts, is 6%. A 12% differential is used if the contract involves a small business or labor surplus area. A 50% differential is applied to Department of Defense procurements.<sup>27</sup>

The differential is added to the lowest acceptable foreign offer and then compared to the domestic offer. The differential is applied only to the bid price for material to be delivered under the contract, not the total contract price.<sup>28</sup> Generally the differential is applied on an item by item basis, but a solicitation may provide that, for purposes of the act, certain items will be lumped together.<sup>29</sup>

### **Use outside of the United States**

The act exempts articles purchased “for use outside of the United States.”<sup>30</sup> This exception is not limited to only the country of use, but to products of any origin.<sup>31</sup> For example, the exemption has been applied to Canadian steel towers for use in West German communications system procured by the military<sup>32</sup> and military bases leased from foreign governments.<sup>33</sup>

### **Not produced or manufactured in the United States in sufficient and reasonably available commercial quantities and of satisfactory quality**

The act exempts articles not produced or manufactured in the United States in sufficient and reasonably available commercial quantities and of satisfactory quality.<sup>34</sup> The FAR provides a list

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<sup>24</sup> E-Systems, Inc., 61 Comp. Gen. 431 (1982).

<sup>25</sup> 41 U.S.C. §§ 10a & 10b.

<sup>26</sup> E.O. 10582, 19 Fed. Reg. 8723 (1954). These differentials have been codified in the FAR at FAR §§ 25.105 and 25.204.

<sup>27</sup> Id.

<sup>28</sup> See *Allis-Chalmers Corp. v. Freidkin*, 635 F.2<sup>nd</sup> 248 (3<sup>rd</sup> Cir. 1980).

<sup>29</sup> FAR § 25.105(b).

<sup>30</sup> 41 U.S.C. § 10a. As noted above, this exception is often the reason for enactment of “Little Buy American Acts.”

<sup>31</sup> B-166137, 49 Comp. Gen. 176 (1969).

<sup>32</sup> Id.

<sup>33</sup> B-122519, 34 Comp. Gen. 448 (1955); see also B-221211, 85-2 Comp. Gen. Proc. Dec. P653 (1985).

<sup>34</sup> 41 U.S.C. § 10a; and FAR § 25.104. The provision of the act which covers construction contracts includes an additional exception for situations where the head of an agency determines that use of a domestic article would be impractical. See 41 U.S.C. § 10b. See also 48 C.F.R. § 25.202(a)(1). Neither the act or the regulations give any guidance as to the definition of this term. The regulations do require that if any of the exceptions are used, the excepted materials must be listed in the contract and a written finding must be produced and be available for public inspection. See FAR. § 25.202(b). We were unable to find any case which discussed this term in the context of the Buy American Act. It should be noted that this is a separate exception from the one provided for situations where the material is unavailable. Therefore, one might conclude that impractical is different from unavailable.

of articles which come under this exemption.<sup>35</sup> If an agency makes a determination that an article not on the list is eligible for this exception, the agency must document this determination and submit the documentation to the appropriate FAR Council.<sup>36</sup>

## **Micro Purchase Threshold**

The Buy American Act is not applicable to procurements under \$2,500 according to the Federal Acquisitions Act of 1994.<sup>37</sup>

## **Amendments to the Buy American Act**

There have been four substantive amendments to the Buy American Act in its long history. The first such amendment was the Buy American Act of 1988, enacted as part of the Trade and Competitiveness Act of 1988.<sup>38</sup> The act's general purpose was to prohibit federal procurement from countries that discriminate against the United States in their procurement practices.<sup>39</sup> The 1988 Act, by its terms, was to expire if not specifically extended by Congress. Congress did not extend this act, and it expired on April 30, 1996.

The 1988 Act did contain one general amendment which applied to the Buy American Act as a whole (i.e., it was not just limited to the prohibition on procurement from discriminating countries). This amendment provided a definition for the Buy American Act of the term "federal agency."<sup>40</sup> Because Congress placed this definition in the 1988 Act after the expiration provision, one could argue that Congress did not intend for this provision to expire with the rest of the amendments. However, due to the unequivocal nature of the expiration language of the statute, the stronger argument appears to be that the definition lapsed as well, and that there is no definition of "federal agency" in the current Buy American Act.

The second substantive amendment to the Buy American Act added the micro purchase threshold exception to the act.<sup>41</sup> Under this exception the act does not apply to purchases under \$2,500.

The third amendment to the Buy American Act was contained in the National Defense Authorization Act for Fiscal Year 1997.<sup>42</sup> It requires the Secretary of Defense to submit a report to Congress detailing the amount of purchases from foreign entities each year. The report must contain the dollar value of items for which the act was waived in that year.

The 110<sup>th</sup> Congress extended, for FY2007 to FY2011, the requirement of annual reporting of purchases from foreign sources to all federal agencies.<sup>43</sup> These reports must include the total dollar value of procured non-domestic articles, an itemized list of all waivers of the Buy

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<sup>35</sup> FAR § 25.104.

<sup>36</sup> FAR § 25.103(b)(2).

<sup>37</sup> P.L. 103-355, 108 Stat. 3346-7, 103<sup>rd</sup> Congress, 2<sup>nd</sup> Session (1994), codified at 41 U.S.C. 10a.

<sup>38</sup> P.L. 100-418, 102 Stat. 1107, 100<sup>th</sup> Congress, 2<sup>nd</sup> Session (1988), codified at 41 U.S.C. 10b-1.

<sup>39</sup> P.L. 100-418, § 7004, 102 Stat. 1552.

<sup>40</sup> P.L. 100-418, § 7005, 102 Stat. 1552, codified at 41 U.S.C. § 10c.

<sup>41</sup> P.L. 103-355, 108 Stat. 3346-7, 103<sup>rd</sup> Congress, 2<sup>nd</sup> Session (1994), codified at 41 U.S.C. 10a.

<sup>42</sup> P.L. 104-201, § 827, 110 Stat. 2611 104<sup>th</sup> Congress, 2<sup>nd</sup> Session (1996), codified at 41 U.S.C. 10b-3.

<sup>43</sup> P.L. 110-28, Title VIII, § 8306, 121 Stat. 112, 211, 110<sup>th</sup> Congress, 1<sup>st</sup> Session (2007), codified at 41 U.S.C. 10a(b).

American Act with a citation to the authority for the waiver, citation of the specific exemption utilized, and a summary of all the agency's procurements.

## **Current Legislation**

Still pending in the 110<sup>th</sup> Congress is S. 581, The Buy American Improvement Act of 2007.<sup>44</sup> This bill would make statutory the definition of "American made," increasing the domestic content requirement from fifty percent to seventy-five percent, and place limits upon the "inconsistent with the public interest" and "use outside of the United States" exceptions to the act.

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<sup>44</sup> Introduced by Mr. Feingold, 153 Cong. Rec. S1963 (daily ed. Feb.14, 2007).

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