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Domestic Content Legislation: The Buy American Act and Complementary Little Buy American Provisions

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Domestic Content Legislation: The Buy American Act and Complementary Little Buy American Provisions

Abstract
[Excerpt] Congress has broad authority to place conditions on the purchases made by the federal government or with federal dollars. One of many conditions that it has placed on direct government purchases is a requirement that they be produced in the United States. The most familiar of these requirements is known as the Buy American Act, which is the major domestic preference statute governing procurement by the federal government. The Buy American Act applies to direct purchases by the federal government of more than $3,000, providing the purchase is consistent with the public interest, the items or services are reasonable in cost, and they are for use in the United States. The act requires that "substantially all" of the acquisition be attributable to American-made components. Regulations have interpreted this requirement to mean that at least 50% of the cost must be attributable to American content.

While the act has only been substantively amended four times since its enactment in 1933, every Congress in the intervening years has seen fit to enact some form of additional domestic preference legislation. This legislation has been generally directed at purchases that for some reason were not governed by the Buy American Act and often took the form of temporary law that was enacted Congress after Congress, often as an appropriations rider to deny the use of funds to purchase goods that were not of domestic origin. While this approach has not been abandoned, the current trend appears to be to codify these "Little Buy American Acts" as permanent law.

This report summarizes (1) the Buy American Act, what it does and does not cover; (2) the Little Buy American Acts found in permanent law, emphasizing what they govern, major exceptions, and why Congress felt them necessary in light of the requirements of the Buy American Act; and (3) the temporary Little Buy American provision found in the American Recovery and Reinvestment Act.

Keywords
Buy American Act, Congress, domestic content, Little Buy American Acts, legislation

Comments

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Congressional Research Service

Domestic Content Legislation: The Buy American Act and Complementary Little Buy American Provisions

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Summary

Congress has broad authority to place conditions on the purchases made by the federal government or with federal dollars. One of many conditions that it has placed on direct government purchases is a requirement that they be produced in the United States. The most well known of these requirements is the Buy American Act, which is the major domestic preference statute governing procurement by the federal government. The Buy American Act applies to direct purchases by the federal government of more than $3,000, providing their purchase is consistent with the public interest, the items are reasonable in cost, and they are for use in the United States. The act requires that "substantially all" of the acquisition be attributable to American-made components. Regulations have interpreted this requirement to mean that at least 50% of the cost must be attributable to American content. While the act has only been substantively amended four times since its enactment in 1933, every Congress in the intervening years has seen fit to enact some form of additional domestic preference legislation.

Other domestic preference statutes, known as "Little Buy American Acts," either impose a higher domestic content requirement on procurements that are covered by the Buy American Act or apply to indirect purchases (i.e., purchases not made by a federal entity, but which are made with federal funds). The Buy America Act and the Berry Amendment, the most commonly recognized of the Little Buy American Acts, are representative of the two most prominent categories of Little Buy American Acts. The majority of Little Buy American Acts govern purchases not directly made by a federal entity, but which use federal funds. The Buy America Act, which attaches a domestic content requirement to purchases made with federal transportation funds, is illustrative of this type of legislation. Unless the definitions of the Buy American Act are referenced, these provisions generally require the purchase of 100% American-made products.

The second most common category of Little Buy American Act affects certain direct purchases of the federal government (i.e., ones that are governed by the Buy American Act), for which Congress has decided a greater percentage of American content should be required, as opposed to the standard 50%. The Berry Amendment is probably the most recognized legislation in this category. The Berry Amendment is a "super percentage" statute which limits the Department of Defense when purchasing certain goods to such goods that are 100% American in origin.

This report summarizes (1) the Buy American Act, what it does and does not cover; (2) the Little Buy American Acts found in permanent law, emphasizing what they govern, major exceptions and why Congress felt them necessary in light of the requirements of the Buy American Act; and (3) the temporary Little Buy American provision found in the American Recovery and Reinvestment Act.

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Introduction

Congress has broad authority to place conditions on the purchases made by the federal government or with federal dollars. One of many conditions that it has placed on direct government purchases is a requirement that they be produced in the United States. The most familiar of these requirements is known as the Buy American Act,[1] which is the major domestic preference statute governing procurement by the federal government. The Buy American Act applies to direct purchases by the federal government of more than $3,000, providing the purchase is consistent with the public interest, the items or services are reasonable in cost, and they are for use in the United States. The act requires that "substantially all" of the acquisition be attributable to American-made components. Regulations have interpreted this requirement to mean that at least 50% of the cost must be attributable to American content.

While the act has only been substantively amended four times[2] since its enactment in 1933,[3] every Congress in the intervening years has seen fit to enact some form of additional domestic preference legislation. This legislation has been generally directed at purchases that for some reason were not governed by the Buy American Act and often took the form of temporary law that was enacted Congress after Congress, often as an appropriations rider to deny the use of funds to purchase goods that were not of domestic origin. While this approach has not been abandoned, the current trend appears to be to codify these "Little Buy American Acts" as permanent law.[4]

This report summarizes (1) the Buy American Act, what it does and does not cover; (2) the Little Buy American Acts found in permanent law, emphasizing what they govern, major exceptions, and why Congress felt them necessary in light of the requirements of the Buy American Act; and (3) the temporary Little Buy American provision found in the American Recovery and Reinvestment Act.[5]

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[1] 41 U.S.C. §§ 8301 through 8305.

[2] See, P.L. 100-418, Title VII; 102 Stat. 1545, 100th Congress, 2nd Session (1988), P.L. 103-355, 108 Stat. 3346-7, 103rd Congress, 2nd Session (1994), P.L. 104-201, § 827, 110 Stat. 2611 104th Congress, 2nd Session (1996), and P.L. 110-28, Title VIII, § 8306, 121 Stat. 112, 211, 110th Congress, 1st Session (2007).

[3] Ch. 212, 47 Stat. 1520, 72nd Congress, 2nd Session (1933).

[4] A good example of this process and current trend is legislation commonly referred to as the "Berry Amendment." This legislation requires the Department of Defense to purchase certain items that must be 100% American made. From the 77th Congress, *see*, P.L. 29, ch. 41, 55 Stat. 123, 125, 77th Congress, 1st Sess. (1941), through the 102nd Congress, *see*, P.L. 102-396, 106 State 1876, 1900, 102nd Con., 2nd Sess. (1992), every Congress passed a Berry Amendment appropriations rider. In the 103rd Congress, the Berry Amendment was made permanent law, *see,* P.L. 103-139, Title VIII, § 8005, 107 Stat.1438, 103rd Cong., 1st Sess. (1993), and codified in 10 U.S.C. § 2533a in P.L. 107-107, Div, A, Title VIII, § 832, 115 Stat.1189, 107th Cong. 1st Sess. (2001). For a discussion of the Berry amendment, *see*, CRS Report RL31236, *The Berry Amendment: Requiring Defense Procurement to Come from Domestic Sources*, by Valerie Bailey Grasso.

[5] P.L. 111-5, § 1605, 123 Stat.115, 303, 111th Cong. 1st Sess. (2009).

The Buy American Act

Essentially, the Buy American Act[6] attempts to protect domestic labor by providing a required preference for American goods in direct government purchases. 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.[7] 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.[8] The term "substantially all" is defined in the regulations to mean that the cost of foreign components does not exceed 50% of the cost of all components.[9]

There are five primary exceptions to the Buy American Act. The act does not apply to procurements when its application would be inconsistent with the public interest[10] or unreasonable in cost.[11] 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.[12] Lastly, the act does not apply to procurements under $3,000.[13] Also, the Trade Agreements Act of 1979[14] 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.[15] In summary, the Buy American Act applies to direct purchases by the federal government of more than $3,000, which are consistent with the public interest, reasonable in cost, and for use in the United States.

Little Buy American Acts in Permanent Law

Over the years, Congress has enacted "Little Buy American Acts" to restrict procurements that do not fall under the application of the Buy American Act or to adjust the percentage content standard. The Buy America Act,[16] which attaches a domestic content requirement to purchases

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[6] For a more detailed discussion of the Buy American Act, *see*, CRS Report 97-765, The Buy American Act: Requiring Government Procurements to Come from Domestic Sources, by John R. Luckey.

[7] See, E-Systems, Inc., 61 Comp. Gen. 431 (1982); and Patterson Pump Co., B-200165, 80-2 CPD ¶ 453 (1980).

[8] 41 U.S.C. §§ 8302 & 8303. 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).

[9] 48 C.F.R. § 25.101.

[10] 41 U.S.C. § 8302. Generally referred to as a "public interest" exception or waiver.

[11] *Id.* Generally referred to as an "unreasonable cost" exemption or waiver and is implemented through the use of price differentials.

[12] *Id*. Generally referred to as an "non-availability" exception or waiver.

[13] 41 U.S.C. § 8302(a)(2)(C) which incorporates the definition of 41 U.S.C. § 1902.

[14] 19 U.S.C. §§ 2501 et seq.

[15] 19 U.S.C. § 2511. A waiver under this authority is generally referred to as a "trade agreements waiver." This provision was implemented by E.O. 12260, 46 *Fed. Reg*. 1653 (1981). *See*, also, 48 C.F.R. § 25.4.

[16] The Buy America Act is the popular name for a group of domestic content restrictions which have been attached to funds administered by the Department of Transportation. *See*, 49 U.S.C. § 5323(j), Federal Transit Administration funds, 23 U.S.C. § 313, Federal Highway Administration funds, 49 U.S.C. § 24305, AMTRAK funds, 49 U.S.C. § 24405, Federal Railroad Administration High Speed Rail Program, and 49 U.S.C. § 50101, Federal Aviation (continued...)

made with federal transportation funds, is illustrative of provisions that govern purchases not made directly by a federal entity, but which use federal funds. The majority of the Little Buy American Acts are this type of legislation. Unless the provisions specifically reference the definitions of the Buy American Act, they generally require the purchase of 100% American-made products.

The Berry Amendment[17] is a "super percentage" statute which requires that certain purchases of the Department of Defense be 100% American in origin. The Berry Amendment is an example of a provision where Congress has decided that a greater percentage of American content should be required in acquisitions that are subject to the "big" Buy American Act.

Domestic content provisions that have become permanent law may be divided into three categories: (1) domestic content requirements for non-direct purchases; (2) super percentage requirements for direct purchases; and (3) provisions which encourage the use of American-made goods. The following discussion identifies the specific fund or products governed by the provision, and the types of waiver or exemption available (i.e., public interest, non-availability, unreasonable cost, trade agreements, or other).

Domestic Content Requirements for Non-Direct Purchases

Buy America Act: Restrictions on Department of Transportation Funds

The Buy America Act is the popular name for a group of domestic content restrictions which have been attached to funds administered by the Department of Transportation to make grants to states, localities, and other non-federal government entities for various transportation projects. The Buy American Act does not apply to these funds because, while the source of the money is federal, purchases are not made directly by the federal government.

As noted above, unless otherwise stated, the Buy America Act provisions require 100% domestic content. Typically, the Secretary of Transportation may waive the requirements if they are "inconsistent with the public interest," the "goods produced in the United States are not produced in a sufficient and reasonably available amount or are not of a satisfactory quality," or when procuring certain items would increase the cost of the overall project by more than a certain amount.[18] Although waivers for goods produced in a foreign country may be made under certain trade agreements, the Secretary is prohibited from providing a waiver for a country that has violated the trade agreement by discriminating against similar American goods.[19]

(...continued)

Administration funds. *See*, also, the Department of Transportation's Buy America webpage, http://dot.gov/buyamerica/.

[17] 10 U.S.C. §§ 2533a and 2533b.

[18] See, e.g., 49 U.S.C. § 5323(j)(2).

[19] See, e.g., 49 U.S.C. § 5323(j)(5).

Federal Transit Administration Funds: 49 U.S.C. § 5323(j)

The steel, iron, and manufactured goods used in all Federal Transit Administration funded[20] projects must be produced in the United States.[21] Public-interest[22] and non-availability waivers by the Secretary of Transportation are authorized.[23] A variant of the unreasonable cost waiver is provided.[24] A trade agreements waiver may not be made for goods from a country found to be in violation of such agreement.[25] The Secretary of Transportation may not prohibit a state from imposing more stringent domestic content requirements.[26]

Federal Highway Administration Funds: 23 U.S.C. § 313

The steel, iron, and manufactured goods used in all Federal Highway Administration funded projects must be produced in the United States.[27] The Secretary of Transportation may issue public-interest, non-availability, or unreasonable-cost waivers.[28] A trade agreements waiver may not be made for goods from a country found to be in violation of such agreement.[29] The Secretary of Transportation may not prohibit a state from imposing more stringent domestic content requirements.[30]

AMTRAK Funds: 49 U.S.C. § 24305

Since AMTRAK is explicitly not a department, agency, or instrumentality of the United States government,[31] its purchases are not direct purchases of the federal government and are not governed by the Buy American Act. However, U.S.C. § 24305 requires that Amtrak buy raw materials mined or produced in the United States; or manufactured articles, material, and supplies manufactured in the United States substantially[32] from articles, material, and supplies mined,

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[20] All funds authorized under 49 U.S.C. §§ 5301 et seq., for example, urbanized area formula grants (§ 5307), clean fuel grants (§ 5308), or capital investment grants (§ 5309).

[21] 49 U.S.C. § 5323(j)(1).

[22] 49 U.S.C. § 5323(j)(2)(A). When issuing a waiver based on a public interest determination, the Secretary shall issue a detailed written justification as to why the waiver is in the public interest. The Secretary shall publish such justification in the Federal Register and provide the public with a reasonable period of time for notice and comment. 49 U.S.C. § 5323(j)(3).

[23] 49 U.S.C. § 5323(j)(2)(B).

[24] 49 U.S.C. § 5323(j)(2). It may be waived when procuring rolling stock (including train control, communication, and traction power equipment), if the cost of components and subcomponents produced in the United States is more than 60 percent of the cost of all components of the rolling stock, and final assembly of the rolling stock has occurred in the United States, or including domestic material will increase the cost of the overall project by more than 25 percent. Labor costs involved in final assembly are not included in calculating the cost of components. 49 U.S.C. § 5323(j)(4).

[25] 49 U.S.C. § 5323(j)(5).

[26] 49 U.S.C. § 5323(j)(7).

[27] 23 U.S.C. § 313(a).

[28] 23 U.S.C. § 313(b). The unreasonable cost waiver may be invoked if including domestic material will increase the cost of the overall project by more than 25 percent. Labor costs involved in final assembly are not included in calculating the cost of components. 23 U.S.C. § 313(c).

[29] 23 U.S.C. § 313(f).

[30] 23 U.S.C. § 313(d).

[31] 49 U.S.C. § 24301(a)(3).

[32] The use of the word "substantially" indicates that 100% domestic content is not required and that the Buy American Act definition is to be utilized.

produced, or manufactured in the United States.[33] This restriction applies only when the cost of those articles, material, or supplies bought is at least $1,000,000.[34] On application of Amtrak, the Secretary of Transportation may exempt Amtrak from this requirement if the Secretary decides that for particular articles, material, or supplies the requirement is inconsistent with the public interest, unreasonable in cost, non-available, or rolling stock or power train equipment cannot be bought and delivered in the United States within a reasonable time.[35]

Federal Railroad Administration High Speed Rail Program Funds: 49 U.S.C. § 24405

Grants under this program must contain the condition that the financed projects use only steel, iron, and manufactured goods produced in the United States.[36] This condition is only applied to projects for which the costs exceed $100,000.[37] The Secretary of Transportation may waive[38] this requirement using the public-interest, non-availability, or unreasonable-cost waivers.[39] A trade-agreements waiver may not be made for goods from a country found to be in violation of a trade agreement.[40] The Secretary of Transportation may not prohibit a state from imposing more stringent domestic content requirements.[41]

Federal Aviation Administration Funds: 49 U.S.C. §§ 50101 & 50103

Certain funds[42] administered by the Federal Aviation Administration may only be used for a project if steel and manufactured goods used in the project are produced in the United States.[43] The facility or equipment qualifies as domestic if the cost of components and subcomponents produced in the United States is more than 60% of the cost of all components of the facility or equipment and final assembly of the facility or equipment has occurred in the United States. The Secretary of Transportation may waive this requirement for reasons of the public interest, non-availability, or unreasonable cost. A 25% price differential is used to measure the reasonableness of the cost.[44]

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[33] 49 U.S.C. § 24305(f)(2).

[34] 49 U.S.C. § 24305(f)(3).

[35] 49 U.S.C. § 24305(f)(4).

[36] 49 U.S.C. § 24405(a)(1).

[37] 49 U.S.C. § 24405(a)(11).

[38] When issuing a waiver determination, the Secretary shall issue a detailed written justification as to why the waiver is needed. The Secretary shall publish such justification in the Federal Register and provide the public with a reasonable period of time for notice and comment. 49 U.S.C. § 24405(a)(4). Not later than December 31, 2012, the Secretary shall submit to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a report on any waivers granted. 49 U.S.C. § 24405(a)(5).

[39] 49 U.S.C. § 24405(a)(2). The unreasonable cost waiver may be invoked if including domestic material will increase the cost of the overall project by more than 25 percent. Labor costs involved in final assembly are not included in calculating the cost of components. 49 U.S.C. § 24405(a)(3).

[40] 49 U.S.C. § 24405(a)(6).

[41] 49 U.S.C. § 24405(a)(8).

[42] The referenced funds may be found in: 49 U.S.C. §§ 106(k), 44502(a)(2), or 44509; 49 U.S.C. §§ 47101 et seq., except § 47127; 49 U.S.C. §§ 48101 et seq., except §§ 48102(e), 48106, 48107, and 48110.

[43] 49 U.S.C. § 50101(a).

[44] 49 U.S.C. § 50101(b). Labor costs involved in final assembly are not included in calculating the cost of components. (continued...)

Section 50103 appears to have been a provision directed at a specific contract or group of contracts.[45] It is a fairly unusual provision because, in addition to considering the place of manufacture, the place of incorporation also matters. "Domestic firm" is defined as a business entity **incorporated, and conducting business, in the United States**.[46] At least 51% of the final product of the domestic firm must be produced in the United States.[47] This provision is applicable to contracts related to aviation research grants,[48] catastrophic-failure prevention research grants,[49] and grants to establish and operate regional centers of air transportation excellence.[50] The Administrator of the Federal Aviation Administration may give preference to a domestic firm, even if a foreign firm would have been awarded the contract under competitive procedures, when the Secretary of Commerce and the United States Trade Representative concur that the public interest requires making the contract with the domestic firm, considering United States international obligations and trade relations, and the difference between the bids submitted by the foreign firm and the domestic firm is not more than 6%.[51] However, if compelling national security considerations require, or the Trade Representative decides that making the contract would violate a multilateral trade agreement or an international agreement, then the special preference for a domestic firm would not apply.[52]

Other Restricted Funds and/or Entities

Procurement of Photovoltaic Devices: 10 U.S.C. § 2534 note

The Department of Defense sometimes is the beneficial owner of a product even when DOD does not purchase it directly. When photovoltaic devices are purchased by third parties for the benefit of DOD, such as in energy savings performance contracts, utility service contracts, land leases, and private housing contracts, to the extent that such contracts result in ownership of photovoltaic devices by DOD, such contracts must comply with the Buy American Act.[53]

Workforce Investment Act and Other Funds: 20 U.S.C. §§ 9275

(...continued)

49 U.S.C. § 50101(c).

[45] 49 U.S.C. § 50103(d) ("This section applies only to a contract related to a grant … for which … an amount is … to be made available for the fiscal years ending September 30, 1991, and September 30, 1992 … and a solicitation for bid is issued after November 5, 1990." Id.)

[46] 49 U.S.C. § 50103(a)(1), emphasis added.

[47] 49 U.S.C. § 50103(b).

[48] 49 U.S.C. § 44511.

[49] 49 U.S.C. § 44512.

[50] 49 U.S.C. § 44513.

[51] 49 U.S.C. § 50103(b).

[52] 49 U.S.C. § 50103(c).

[53] 10 U.S.C. § 2534 note. For the purposes of this section, the Department of Defense is deemed to own a photovoltaic device if the device is installed on Department of Defense property or in a facility owned by the Department of Defense, and reserved for the exclusive use of the Department of Defense for the full economic life of the device. P.L. 111-383, Div. A, title VIII, § 846, 124 Stat. 4137, 4285, 111th Cong., 1st Sess. (2011).

A provision prohibiting an entity receiving funds made available by the Workforce Investment Act of 1998, P.L. 105-220, Title V, § 505, from spending those funds "unless the entity agrees that in expending the funds the entity will comply with the Buy American Act" is codified at 20 U.S.C. § 9275(a).[54] This prohibition applies to a number of programs, including certain employment and training activities (such as Job Corps programs; programs for dislocated workers; and programs for migrant and seasonal workers, veterans, Native Americans, and youth) and adult education and literacy funds. In addition, there is a sense of the Congress provision that the recipients of financial assistance should, in expending the assistance, purchase only American-made equipment and products.[55] The head of each agency is to provide each recipient of assistance a notice that the assistance should be used in accordance with the sense of Congress.[56]

District of Columbia Mental Health Services Funds: 24 U.S.C §§ 225 et seq.

The mayor of the District of Columbia shall insure that the requirements of the Buy American Act are applied to all procurements made under the Saint Elizabeth's Hospital and District of Columbia Mental Health Services Act.[57] A trade agreements waiver may not be made for goods from a country found to be in violation of such agreement.[58]

Indian Health Care Facilities: 25 U.S.C. §§ 1631 et seq.

The Secretary of Health and Human Services shall insure that the requirements of the Buy American Act apply to all procurements made with funds made available under 25 U.S.C. §§ 1631 et seq.[59]

Water Pollution Prevention and Control Grants for Construction of Treatment Works: 33 U.S.C. § §§ 1281 et seq.

Grants made under 33 U.S.C. §§ 1281 et seq. for any treatment works are to impose Buy American-like provisions on purchases made with grant funds.[60] The Administrator of the Environmental Protection Agency may waive this requirement using the public-interest, non-availability, or unreasonable-cost waivers.[61]

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[54] 20 U.S.C. § 9275(a).

[55] 20 U.S.C. § 9275(b)(1).

[56] 20 U.S.C. § 9275(b)(2).

[57] 24 U.S.C. § 225h(a).

[58] 24 U.S.C. § 225h(b).

[59] 25 U.S.C. § 1638b.

[60] 33 U.S.C. § 1295 ("… no grant … shall be made under this subchapter for any treatment works unless only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States, substantially all from articles, materials, or supplies mined, produced, or manufactured … in the United States will be used in such treatment works." *Id.* The use of the word "substantially" indicates that 100% domestic content is not required.)

[61] 33 U.S.C. § 1295.

Disaster Relief Funds: 42 U.S.C. § 5206

Entities spending funds authorized under the Disaster Mitigation Act of 2000,[62] or any provisions amended by it, must comply with the Buy American Act.[63]

Local Public Works Grants: 42 U.S.C. § 6705(f)(1).

Grants made under the Public Works Employment Act of 1976[64] for any local public works project are to impose Buy American-like conditions on the project.[65] This requirement may be waived by the Secretary of Commerce acting through the Economic Development Administration on grounds of the public interest, non-availability of domestic materials, or unreasonable cost. [66]

Super Percentage Requirements

The Berry Amendment: 10 U.S.C. §§ 2533a and 2533b

As noted above,[67] the Berry Amendment has been around in some form since the beginning of World War II. Over the years, the amendment has consistently required the Department of Defense, when it purchased listed items, to buy items that are 100% domestic in origin. The list has varied over the years, but generally has included products made of textiles or specialty metals. The current version of the amendment is found in Sections 2533a and 2533b of Title 10 of the United States Code. Section 2533b contains the rules governing specialty metals. Section 2533a governs all other listed products.

Under Section 2533a, the Department of Defense may not use appropriated or otherwise available funds to purchase certain items if they are not grown, reprocessed, reused, or produced in the United States. The covered items include food; clothing and the materials and components thereof, other than sensors, electronics, or other items added to, and not normally associated with, clothing (and the materials and components thereof); tents (and the structural components thereof), tarpaulins, or covers; cotton and other natural fiber products, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric (including all textile fibers and yarns that are for use in such fabrics), canvas products, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles); any item of individual equipment manufactured from or containing such fibers, yarns, fabrics, or materials; or hand or measuring tools.[68]

Section 2533b prohibits the acquisition of a specialty metal that is not melted or produced in the United States and that is to be purchased directly by the Department of Defense or a prime contractor of the department, or end items, or components thereof, containing a specialty metal

[62] Disaster Mitigation Act of 2000, P.L. 106-390, 114 Stat. 1552, 106th Cong., 2nd Sess. (2000).

[63] 42 U.S.C. § 5206(a).

[64] P.L. 94-369, 90 Stat. 999, 94th Cong. 2nd Sess. (1976), codified at 42 U.S.C. §§ 6701 et seq.

[65] 42 U.S.C. § 6705(f)(1)(A).

[66] 42 U.S.C. § 6705(f)(1)(B).

[67] *Supra* note 4.

[68] 10 U.S.C. § 2533a(a) & (b).

not melted or produced in the United States, including aircraft, missile and space systems, ships, tank and automotive items, weapon systems, or ammunition.[69] For purposes of the section specialty metal includes certain steel alloys; certain metal alloys consisting of nickel, iron-nickel, and cobalt base alloys containing a total of other alloying metals (except iron) in excess of 10%; titanium and titanium alloys; zirconium and zirconium base alloys.[70]

These provisions do not apply if the Secretary of Defense or the Secretary of the relevant military department determines that the items are not available in satisfactory quality, sufficient quantity, or as and when needed at a market price.[71] Procurements made outside the United States in support of combat operations or contingency operations,[72] procurements where competitive procedures do not have to be used because of unusual and compelling urgency of need,[73] and purchases under $3,000[74] are not subject to these requirements. Items purchased for resale purposes in commissaries, exchanges, or nonappropriated fund instrumentalities operated by the Department of Defense are also exempt.[75] Each provision contains its own limited trade agreements exception.[76]

In addition to the common exemptions, Section 2533a exempts procurements by a vessel in foreign waters[77] and "[e]mergency procurements or procurements of perishable foods by, or for, an establishment located outside the United States for the personnel attached to such establishment."[78] This provision applies to contracts and subcontracts for the procurement of commercial items, including off-the-shelf items.[79]

Section 2533b has a national security waiver not contained in 2533a.[80] It also exempts purchases of electronic components unless the Secretary of Defense, upon the recommendation of the Strategic Materials Protection Board, determines that the domestic availability of a particular

[69] 10 U.S.C. § 2533b(a).

[70] 10 U.S.C. § 2533b(l).

[71] 10 U.S.C. § 2533a(c) provides exception to the extent that the Secretary of Defense or the Secretary of the military department concerned determines that satisfactory quality and sufficient quantity of any such item grown, reprocessed, reused, or produced in the United States cannot be procured as and when needed at United States market prices. 10 U.S.C. § 2533b(b) provides exception to the extent that the Secretary of Defense or the Secretary of the military department concerned determines that compliant specialty metal of satisfactory quality and sufficient quantity, and in the required form, cannot be procured as and when needed. This exemption applies to prime contracts and subcontracts at any tier under such contracts.

[72] 10 U.S.C. §§ 2533a(d) and 2533b(c).

[73] 10 U.S.C. §§ 2533a(d)(4) and 2533b(c)(2).

[74] 10 U.S.C. §§ 2533a(h) and 2533b(f).

[75] 10 U.S.C. §§ 2533a(g) and 2533b(e).

[76] 10 U.S.C. § 2533a(e) provides a trade agreements exception is granted for chemical warfare protective clothing. 10 U.S.C. § 2533b(d)(l) provides a trade agreements exception if the acquisition is necessary to comply with agreements with foreign governments requiring the United States to purchase supplies from foreign sources for the purposes of offsetting sales made by the United States Government or United States firms under approved programs serving defense requirements; or in furtherance of agreements with foreign governments in which both such governments agree to remove barriers to purchases of supplies produced in the other country or services performed by sources of the other country; and any such agreement with a foreign government complies, where applicable, with the requirements of section 36 of the Arms Export Control Act (22 U.S.C. § 2776) and with section 2457 of title 10.

[77] 10 U.S.C. § 2533a(d).

[78] 10 U.S.C. § 2533a(c) & (d).

[79] 10 U.S.C. § 2533a(i).

[80] 10 U.S.C. § 2533b(k).

electronic component is critical to national security.[81] This provision applies to contracts and subcontracts for the procurement of commercial items, subject to a limited commercially available off-the-shelf exception.[82] An item (not including high performance magnets) may be purchased containing specialty metals that were not melted in the United States if the total amount of noncompliant specialty metals in the item does not exceed 2% of the total weight of specialty metals in the item.[83]

Other Department of Defense Buy American Requirements: 10 U.S.C. § 2534

The Department of Defense has a super percentage domestic content standard for procurements of buses, chemical weapons antidotes, and certain components of naval vessels including air circuit breakers, anchor and mooring chain, and components of vessels, to the extent they are unique to marine applications (gyrocompasses, electronic navigation chart systems, steering controls, pumps, propulsion and machinery control systems, and totally enclosed lifeboats).[84] There is an exemption for purchases under $3,000.[85]

The Secretary of Defense may waive this requirement[86] under several circumstances. Generally waivers may be based on unreasonable costs or delays or if the procurement is for an amount less than the simplified acquisition threshold and simplified purchase procedures are being used. Also, the limitation may be waived if satisfactory quality items manufactured by an entity that is part of the national technology and industrial base (includes Canadian companies) are not available, application of the limitation would result in the existence of only one source for the item, application of the limitation is not in the national security interests of the United States, or application of the limitation would adversely affect a U.S. company. In the area of foreign relations, a waiver may be granted in three circumstances. Waivers maybe granted if (1) U.S. producers of the item would not be jeopardized by competition from a foreign country, and that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country; (2) application of the limitation would impede cooperative programs entered into between the Department of Defense and a foreign country; or (3) application of the limitation would impede the reciprocal procurement of defense items under a memorandum of understanding providing for

[81] 10 U.S.C. § 2533b(g).

[82] 10 U.S.C. § 2533b(h). The section does not apply to contracts or subcontracts for the acquisition of commercially available off-the-shelf items, other than contracts or subcontracts for the acquisition of specialty metals, including mill products, such as bar, billet, slab, wire, plate and sheet, that have not been incorporated into end items, subsystems, assemblies, or components; contracts or subcontracts for the acquisition of forgings or castings of specialty metals, unless such forgings or castings are incorporated into commercially available off-the-shelf end items, subsystems, or assemblies; contracts or subcontracts for commercially available high performance magnets unless such high performance magnets are incorporated into commercially available off-the-shelf-end items or subsystems; and contracts or subcontracts for commercially available off-the-shelf fasteners, unless such fasteners are incorporated into commercially available off-the-shelf end items, subsystems, assemblies, or components; or purchased under a contract or subcontract with a manufacturer of such fasteners, if the manufacturer has certified that it will purchase, during the relevant calendar year, an amount of domestically melted specialty metal, in the required form, for use in the production of such fasteners for sale to the Department of Defense and other customers, that is not less than 50 percent of the total amount of the specialty metal that it will purchase to carry out the production of such fasteners.

[83] 10 U.S.C. § 2533b(i).

[84] 10 U.S.C. § 2534(a).

[85] 10 U.S.C. § 2534(g).

[86] The Secretary of Defense may exercise the waiver authority only if the waiver is made for a particular item listed in § 2534(a) and for a particular foreign country. 10 U.S.C. § 2534(i).

reciprocal procurement of defense items and the country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country.[87]

6 U.S.C. § 453b: Department of Homeland Security

This section provides a Berry Amendment-type of restriction on certain purchases of the Department of Homeland Security. DHS may not use funds appropriated or otherwise available for the procurement of certain non-domestic items, if the item is directly related to the national security interests of the United States.[88] The item may not be purchased if the item is not grown, reprocessed, reused, or produced in the United States. Covered items include clothing and the materials and components thereof, other than sensors, electronics, or other items added to, and not normally associated with, clothing (and the materials and components thereof); tents, tarpaulins, covers, textile belts, bags, protective equipment (including but not limited to body armor), sleep systems, load carrying equipment (including but not limited to fieldpacks), textile marine equipment, parachutes, or bandages; cotton and other natural fiber products, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric (including all textile fibers and yarns that are for use in such fabrics), canvas products, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles); or any item of individual equipment manufactured from or containing such fibers, yarns, fabrics, or materials.[89]

Exception is made for non-available items,[90] items with de minimis content of non-compliant fibers,[91] procurements outside of the United States by vessels in foreign waters or in an emergency,[92] and purchases below $3,000.[93]

The provision is applicable to contracts and subcontracts for procurement of commercial items.[94] It is required to be applied in a manner consistent with U.S. obligations under international agreements.[95]

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[87] 10 U.S.C. § 2534(d).

[88] 6 U.S.C. § 453b.

[89] 6 U .S.C. § 453b(b).

[90] 6 U.S.C. § 453b(c) which exempts articles to the extent that the Secretary of Homeland Security determines that satisfactory quality and sufficient quantity of any such article or item grown, reprocessed, reused, or produced in the United States cannot be procured as and when needed at United States market prices. This section is not applicable to covered items that are, or include, materials determined to be non-available in accordance with Federal Acquisition Regulation 25.104 Nonavailable Articles. If the Secretary make a determination under this exception, he must post a notification that the exception has been applied on the Internet site maintained by the General Services Administration known as FedBizOps.gov (or any successor site), 6 U .S.C. § 453b(i).

[91] 6 U .S.C. § 453b(d) which authorizes the Secretary of Homeland Security to accept delivery of a covered items that contains non-compliant fibers if the total value of non-compliant fibers contained in the end item does not exceed 10 percent of the total purchase price of the end item.

[92] 6 U.S.C. § 453b(e).

[93] 6 U.S.C. § 453b(f).

[94] 6 U.S.C. § 453b(g).

[95] 6 U.S.C. § 453b(k).

Veterans' Burial Flags: 38 U.S.C. § 2301

Under the Buy American Act, flags purchased by the Department of Veterans Affairs would be required to be at least 50% American made. This provision prohibits the Secretary of Veterans Affairs from procuring burial flags that are not wholly produced in the United States.[96] A flag is considered to be "wholly produced in the United States" only if the materials and components of the flag are entirely grown, manufactured, or created in the United States; the processing (including spinning, weaving, dyeing, and finishing) of such materials and components is entirely performed in the United States; and the manufacture and assembling of such materials and components into the flag are entirely performed in the United States.[97] The Secretary may waive this requirement if the Secretary determines that the requirement cannot be reasonably met or that compliance with the requirement would not be in the national interest of the United States.[98]

Provisions Which Encourage the Use of American Made Goods

Federal Crop Insurance Corporation: 7 U.S.C. § 1506(p)

The Federal Crop Insurance Corporation (FCIC) is a government-owned corporation.[99] As such, its purchases are not direct purchases of the federal government and thus not subject to the Buy American Act. In the general powers of the FCIC, Congress placed a sense of Congress that, to the greatest extent practicable, all equipment and products purchased by the corporation using funds made available to the corporation should be American-made and the corporation should include similar language in its contacts and loan agreements.[100]

Other Department of Agriculture Related Entities: 7 U.S.C. Ch. 98

There are several Department of Agriculture related entities,[101] similar in organization to the FCIC, that are governed by chapter 98 of Title 7 of the United States Code, which contains a sense of Congress that, to the greatest extent practicable, all equipment and products purchased by these entities using funds made available to them under chapter 98 should be American made.[102]

Housing Assistance Programs: 12 U.S.C § 1735e-1

This provision states that in the administration of housing assistance programs, the Secretary of Housing and Urban Development "shall encourage the use of materials and products mined and produced in the United States."[103]

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[96] 38 U.S.C. § 2301(h)(1).

[97] 38 U.S.C. § 2301(h)(3).

[98] 38 U.S.C. § 2301(h)(2). The Secretary shall submit to Congress in writing notice of such a determination not later than 30 days after the date on which such determination is made.

[99] 7 U.S.C. § 1503.

[100] 7 U.S.C. § 1506(p).

[101] For example, Consolidated Farm Service Agency (§ 6932), the Rural Utilities Service (§ 6942), the Rural Business and Cooperative Development Service (§ 6944), and Rural Development Disaster Assistance Fund (§ 6945).

[102] 7 U.S.C. § 7012.

[103] 12 U.S.C. § 1735e-1.

Small Business Financial Assistance Under the Small Business Act: 15 U.S.C. § 661

In this section, Congress sets out its intent that in the award of financial assistance under the Small Business Act, when practicable, priority be accorded to small business concerns which lease or purchase equipment and supplies which are produced in the United States and that small business concerns receiving such assistance be encouraged to continue to lease or purchase such equipment and supplies.[104]

Arson Prevention Grants: 15 U.S.C. § 2221

This section contains a sense of Congress that any recipient of an arson prevention grant should purchase, when available and cost-effective, American-made equipment and products when expending grant monies.[105]

Educate America Act: 20 U.S.C §§ 5801 et seq.

Under the sense of the Congress found in this act, no funds appropriated pursuant to the Educate America Act should be expended by an entity unless the entity agrees that in expending the assistance the entity will comply with the Buy American Act, and in the case of any equipment or products that may be authorized to be purchased with financial assistance provided under the act, entities receiving such assistance should, in expending the assistance, purchase only American-made equipment and products.[106]

School Lunch Program Funds: 42 U.S.C. § 1760

For school lunch programs, the Secretary of Agriculture is to require that a school food authority purchase, **to the maximum extent practicable**, domestic commodities or products.[107] The term "domestic commodity or product" means an agricultural commodity that is produced in the United States and a food product that is processed in the United States substantially using agricultural commodities that are produced in the United States.[108] This requirement is applicable only to a school food authority located in the contiguous United States and for a purchase of a domestic commodity or product for the school lunch program[109] or the school breakfast program under Section 4 of the Child Nutrition Act of 1966.[110]

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[104] 15 U.S.C. § 661.

[105] 15 U.S.C § 2221(l).

[106] 20 U.S.C. § 6067.

[107] 42 U.S.C. § 1760(n)(2)(A) emphasis added. The effect of the emphasized words is to make this provision a goal rather than a requirement.

[108] 42 U.S.C. § 1760(n)(1).

[109] 42 U.S.C. §§ 1751 et seq.

[110] 42 U.S.C. § 1773. Hawaii and Puerto Rico, while not covered by the general Buy American provision, are permitted, and encouraged, to buy Hawaiian and buy Puerto Rican. 42 U.S.C. § 1760(n)(2)-(4).

Domestic Content Requirements in Procurements of Products for Use Outside the United States

Foreign Assistance Act of 1961: 22 U.S.C. § 2381

The Foreign Assistance Act of 1961 provided authority to the President to implement rules for the United States Agency for International Development (USAID).[111] Under this authority regulations essentially creating a Little Buy American Act were made applicable to USAID for the source and nationality of commodities and services financed by USAID programs. These rules were needed because many USAID contracts take place outside of the United States. These special rules are set out at 22 C.F.R. part 228 and apply to goods and services financed directly with program funds under the act.[112] Detailed rules restrict contracts and subcontracts by categories of countries classified according to certain foreign policy considerations.[113] Also, special rules require U.S. procurement of agricultural commodities (with some exceptions), motor vehicles designed for normal road speeds, and pharmaceutical products.[114] Other rules set forth U.S.-flag requirements for transporting procured goods,[115] and yet other provisions set forth preference requirements for placing marine insurance.[116]

Engraving and Printing Currency , Postage Stamps, and Security Documents for Foreign Governments: 31 U.S.C. § 5114

The Secretary of the Treasury is authorized to produce currency, postage stamps, and other security documents for foreign governments if the Secretary of the Treasury determines that such production will not interfere with engraving and printing needs of the United States, and the Secretary of State determines that such production would be consistent with the foreign policy of the United States.[117] All articles, material, and supplies procured for use in the production of currency, postage stamps, and other security documents for foreign governments pursuant to this authority shall be treated in the same manner as articles, material, and supplies procured for public use within the United States for purposes of the Buy American Act. This program might not otherwise be governed by the Buy American Act for two reasons: it does not involve direct purchases and the contracts might be considered to be carried on outside the United States.[118]

Renewable Energy Technology Transfer Program: 42 U.S.C. § 13316

This program is not governed by the Buy American Act for two reasons: (1) it does not involve direct purchases; and (2) the contracts are carried on outside the United States. The Secretary of Energy, through the Agency for International Development, and after consultation with the

[111] P.L. 87-195, § 621, 75 Stat. 445, 494, 87th Cong.1st sess. (1961), codified at 22 U.S.C. § 2381.

[112] 22 C.F.R. § 228.02.

[113] 22 C.F.R. § 228.03.

[114] 22 C.F.R. § 228.13.

[115] 22 C.F.R. §§ 228.21 & .22.

[116] 22 C.F.R. § 228.23.

[117] 31 U.S.C. § 5114(a)(2).

[118] 31 U.S.C. § 5114(a)(3).

interagency working group, U.S. firms, and representatives from foreign countries, shall develop mechanisms to identify potential energy projects in host countries. The authorized financial assistance may be provided in combination with other forms of financial assistance, including non-U.S. funding that is available to the project, and utilized to assist U.S. firms in the development of innovative financing packages for renewable energy technology projects that utilize other financial assistance programs available through the federal government.[119] In implementing this section, the Secretary, through the Agency for International Development, shall ensure the maximum percentage, but in no case less than 50%, of the cost of any equipment furnished in connection with a project authorized under this section shall be attributable to the manufactured U.S. components of such equipment and the maximum participation of U.S. firms.[120]

Clean Coal Technology Transfer Program: 42 U.S.C. § 13362

Like the Renewable Energy Technology Transfer Program, this program is not governed by the Buy American Act for two reasons: (1) it does not involve direct purchases; and (2) the contracts are conducted outside the United States. The Secretary of Energy, through the Agency for International Development, and after consultation with the Clean Coal Technology working group, U.S. firms, and representatives from foreign countries, shall develop mechanisms to identify potential energy projects in host countries. The authorized financial assistance may be provided in combination with other forms of financial assistance, including non-U.S. funding that is available to the project, and utilized to assist U.S. firms in the development of innovative financing packages for renewable energy technology projects that utilize other financial assistance programs available through the federal government.[121] In carrying out this section, the Secretary, through the Agency for International Development, shall ensure the maximum percentage, but in no case less than 50%, of the cost of any equipment furnished in connection with a project authorized under this section shall be attributable to the manufactured U.S. components of such equipment and the maximum participation of U.S. firms.[122]

Environmental Technology Transfer Program: 42 U.S.C. § 13387

This is another technology transfer program not governed by the Buy American Act for two reasons: (1) it does not involve direct purchases; and (2) the contracts are performed outside the United States. The Secretary of Energy, through the Agency for International Development, and after consultation with the interagency working group, U.S. firms, and representatives from foreign countries, shall develop mechanisms to identify potential energy projects in host countries that substantially reduce environmental pollutants, including greenhouse gases. The authorized financial assistance may be provided in combination with other forms of financial assistance, including non-U.S. funding that is available to the project, and utilized in conjunction with

[119] 42 U.S.C. § 13316(c) & (d).

[120] 42 U.S.C. § 13316(j). In determining whether the cost of United States components equals or exceeds 50 percent, the cost of assembly of such United States components in the host country shall not be considered a part of the cost of such United States component.

[121] 42 U.S.C. § 13362(c) & (d).

[122] 42 U.S.C. § 13362(j). In determining whether the cost of United States components equals or exceeds 50 percent, the cost of assembly of such United States components in the host country shall not be considered a part of the cost of such United States component.

financial assistance programs available through other federal agencies.[123] In carrying out this section, the Secretary, through the Agency for International Development, shall ensure the maximum percentage, but in no case less than 50%, of the cost of any equipment furnished in connection with a project authorized under this section shall be attributable to the manufactured U.S. components of such equipment and the maximum participation of United States firms.[124]

The American Recovery and Reinvestment Act: P.L. 111-5

Section 1605 of the American Recovery and Reinvestment Act[125] (ARRA) is the most well known of the recent appropriation rider (temporary law) Little Buy American Acts. With this enactment, Congress attached to all ARRA funds a Buy American requirement. It applies a super percentage requirement to direct government purchases and to indirect purchases by non-federal entities receiving these funds.

Section 1605 of ARRA provided that none of the funds appropriated or otherwise made available by the act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.[126] The requirement could be waived for public interest, non-availability, or unreasonable cost (a 25% differential was used). If the head of a federal department or agency determines that it is necessary to issue a waiver based on one of these exceptions, the head of the department or agency was to publish in the *Federal Register* a detailed written justification as to why the provision was being waived.[127] The requirement is to be applied in a manner consistent with U.S. obligations under international agreements.[128]

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[123] 42 U.S.C. § 13387(c) & (d).

[124] 42 U.S.C. § 13387(k). In determining whether the cost of United States components equals or exceeds 50 percent, the cost of assembly of such United States components in the host country shall not be considered a part of the cost of such United States component.

[125] P.L. 111-5, § 1605, 123 Stat.115, 303, 111th Cong. 1st Sess. (2009). Because of the wide applicability of this provision, a subpart, 25.6, was added to the Federal Acquisition Regulation (title 48 of the Code of Federal Regulations). This new subpart applies to construction projects that use funds appropriated or otherwise provided by ARRA.

[126] *Id*. at (a).

[127] *Id*. at (c).

[128] *Id*. at (d).