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## “Buy American” and the Federal Response to the COVID-19 Pandemic

By Ted Posner

It has been reported (see, for example, [here](#)) that among the steps the White House is considering as part of its response to the COVID-19 pandemic is an executive order requiring that federal agencies follow a “buy American” rule when purchasing medicines and medical supplies to deal with the crisis. Details, including the authority on which the White House would rely, are not yet known. Nor is it a certainty that the White House will issue such an order at all. But given that an order may be in the offing, potentially affected companies, including in the pharmaceutical and medical supply sectors, should be aware of the applicable legal framework.

Although there are in fact multiple different statutes that require one or more federal agencies to adhere to a “buy American” principle in some or all of their procurement, when people refer to the “Buy American Act” they ordinarily mean the statute enacted in 1933 (and amended several times since) codified at chapter 83 of title 41 of the U.S. Code. Subject to several important exceptions, that statute establishes the following rule:

“Only unmanufactured articles, materials, and supplies that have been mined or produced in the United States, and only manufactured articles, materials, and supplies that have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States, shall be acquired for public use unless the head of the department or independent establishment concerned determines their acquisition to be inconsistent with the public interest or their cost to be unreasonable.”<sup>1</sup>

That rule, including applicable definitions and exceptions, is elaborated in part 25 of the Federal Acquisition Regulation (the “FAR”).<sup>2</sup> Similar rules apply under other “buy American” statutes including, notably, the provisions known as the “Berry Amendment” (pertaining to certain Defense Department procurement)<sup>3</sup> and the “Kissell Amendment” (pertaining to certain Department of Homeland Security procurement).<sup>4</sup>

However, all of these buy American rules are subject to an additional set of provisions governing procurement from suppliers of countries that are parties to certain trade agreements with the United States. Those provisions are set forth in Title III of the Trade Agreements Act of 1979 (the “TAA”).<sup>5</sup> The TAA

codified changes to U.S. law necessary to implement the agreements concluded in the Tokyo Round of multilateral trade negotiations conducted under the auspices of the General Agreement on Tariffs and Trade (“GATT”). One of those agreements was a Government Procurement Code, the core principle of which was the extension of non-discriminatory treatment in government procurement to goods and suppliers of other Parties to the Code. In other words, to the extent that a given procurement was covered by the Code, a Code Party would have to treat goods and suppliers of other Code Parties the same way it treated its own goods and suppliers; it no longer would be allowed to give a preference to its own goods and suppliers.

Since the Buy American Act (and other similar legislation) did precisely what the Tokyo Round Government Procurement Code prohibited, legislation was needed to reconcile the difference. The result was TAA Title III, the first section of which provides that, subject to exceptions for small- and minority-owned business preferences,

“the President may waive, in whole or in part, with respect to eligible products of any foreign country or instrumentality designated under subsection (b), and suppliers of such products, the application of any law, regulation, procedure, or practice regarding Government procurement that would, if applied to such products and suppliers, result in treatment less favorable than that accorded—

“(1) to United States products and suppliers of such products; or

“(2) to eligible products of another foreign country or instrumentality which is a party to the [World Trade Organization Government Procurement] Agreement<sup>6</sup> and suppliers of such products.”<sup>7</sup>

Foreign countries and instrumentalities<sup>8</sup> designated under subsection (b) are primarily countries and instrumentalities that are Parties to the World Trade Organization Agreement on Government

Procurement (the “GPA,” which is the successor to the Tokyo Round Procurement Code) or the North American Free Trade Agreement (“NAFTA”), countries/instrumentalities that have agreed to take on procurement-related obligations comparable to those in the GPA and NAFTA, and least developed countries.

By executive order, the President’s authority to waive application of the Buy American Act and similar provisions has been delegated to the U.S. Trade Representative.<sup>9</sup>

The list of countries and instrumentalities currently receiving a waiver is set forth in section 25.003 of the FAR (defining the term “Designated country”). That list includes all of the Parties to the GPA (47 countries and instrumentalities in addition to the United States, including, among others, the EU and each of its member States), parties to free trade agreements with the United States, least developed countries, and Caribbean Basin countries.

Not all federal government procurement is subject to the TAA waiver of Buy American Act and similar restrictions. To be subject to the waiver, a procurement ordinarily must be “covered” under the GPA or other relevant agreement. Subject to exceptions, coverage is a function of the entity doing the procurement and the size of the procurement. The federal agencies whose procurement is covered by the GPA, for example, are set forth in a United States schedule to the GPA. The value threshold for GPA coverage currently is \$182,000 for supply contracts, \$182,000 for services contracts, and \$7,008,000 for construction contracts.<sup>10</sup> For the TAA waiver to apply to a supplier of a GPA country, the procurement in question must be by one of the scheduled agencies (including subsidiary agencies unless expressly excluded) and above the relevant threshold. If those conditions are met (and absent one of several other exceptions), then the supplier should be able to bid for the contract on the same basis as a U.S. supplier.

As relevant to the COVID-19 pandemic, the agencies that one would expect to be the principal buyers of medicines and medical supplies – including the Departments of Health and Human Services,

Homeland Security, and Veterans Affairs<sup>11</sup> – all are on the U.S. GPA schedule. Therefore, if any of them undertakes a procurement in excess of \$182,000, the procurement ordinarily must be open to suppliers of GPA countries on the same basis as U.S. suppliers. A buy American executive order of the kind the White House is reported to be contemplating could well be contrary to that obligation. Would it be legal?

As a matter of U.S. statutory law, the answer likely is “Yes.” As quoted above, the TAA authorizes the President to waive buy American requirements in specified circumstances. It does not require him to do so. There is nothing in the TAA that prevents the President from rescinding the waiver. Indeed the TAA states that “[t]he President may modify or withdraw” a previously granted waiver.<sup>12</sup>

What would withdrawal of the waiver mean for U.S. compliance with its obligations under the GPA and other international agreements containing procurement provisions? At first blush, it may appear that withdrawal of the TAA waiver, by causing the Buy American Act and similar provisions to apply to particular procurements, would force the United States to act contrary to those obligations. But the agreements do contain exceptions, and the United States could well rely on one or more of those exceptions in defending its actions. For example, Article III.1 of the GPA recognizes a Party’s right to take “any action . . . that it considers necessary for the protection of its essential security interests relating . . . to procurement indispensable for national security or national defence purposes.” The White House might argue that it considers imposing a buy American rule on procurement of medicines and medical supplies to be necessary for the protection of national security. Since that justification for conduct that ordinarily would breach GPA obligations is governed by an arguably subjective standard (“any action that it considers necessary”), it might be difficult for another GPA Party to prevail if it were to challenge a buy American executive order.

Additionally, the United States might find justification for its actions in GPA Article III.2(b), which allows a Party to take certain action otherwise contrary to GPA obligations when such action is “necessary to protect

human, animal or plant life or health.” The life or health exception does not contain the same subjective language as the essential security exception, but under the circumstances might be persuasive to an eventual dispute settlement panel hearing a challenge to a buy American order.

As a matter of public health policy, it may be difficult to explain how the imposition of a buy American rule – in effect, restricting supply – advances the interest of either national security or the life and health of the American public. One might expect that the crisis calls for a broadening rather than a narrowing of supply. Indeed, that is the argument pharmaceutical companies reportedly have made in pushing back against the contemplated executive order.<sup>13</sup> Nevertheless, one can anticipate supporters of an executive order arguing that responding to the crisis requires less dependence on foreign supplies of medicines and other items.

On March 25, Senate Finance Committee Chairman Chuck Grassley (R-Iowa) and 11 other Republican members of the Committee sent a letter to the President (available [here](#)) urging him to refrain from issuing a buy American order. Weil’s International Trade group will continue to monitor this and other international trade responses to the COVID-19 pandemic and provide updates as they become available.

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This International Trade Current does not constitute legal advice. For any questions relating to this alert, please contact the author.

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<sup>1</sup> 41 U.S.C. § 8302(a)(1).

<sup>2</sup> The FAR is issued by the principal federal procuring agencies (*i.e.*, the General Services Administration, Department of Defense, and National Aeronautics and Space Administration) and governs most federal procurement. It is available at <https://www.acquisition.gov/sites/default/files/current/far/pdf/FAR.pdf>.

<sup>3</sup> 10 U.S.C. § 2533a.

<sup>4</sup> 6 U.S.C. § 453b.

<sup>5</sup> 19 U.S.C. §§ 2511-2518.

<sup>6</sup> Prior to conclusion of the Government Procurement Agreement, the reference here was to that Agreement's predecessor, the Tokyo Round Government Procurement Code.

<sup>7</sup> 19 U.S.C. § 2511(b).

<sup>8</sup> The term "instrumentality" as used in the statute is meant to cover an entity such as the European Union. See 19 U.S.C. § 2518(5).

<sup>9</sup> Executive Order 12260, 46 Fed. Reg. 1653 (Dec. 31, 1980).

<sup>10</sup> See FAR § 25.402(b). The U.S. Trade Representative adjusts these amounts for inflation every two years.

<sup>11</sup> A note to the U.S. GPA schedule states, "Unless otherwise specified in this Annex, this Agreement covers procurement by all agencies subordinate to the entities listed in this Annex." Thus, for example, listing of the Department of Homeland Security encompasses the Federal Emergency Management Agency, and listing of the Department of Health and Human Services encompasses the NIH, CDC, and other public health agencies.

<sup>12</sup> 19 U.S.C. § 2511(c).

<sup>13</sup> See, e.g., <https://www.nytimes.com/2020/03/11/business/economy/coronavirus-china-trump-drugs.html>.

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**Editor and Author:**

Ted Posner (DC)

[View Bio](#)

[ted.posner@weil.com](mailto:ted.posner@weil.com)

+1 202 682 7064

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