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THE IMPACT OF THE BUY AMERICAN ACT ON PROGRAM MANAGERS

Lt Col Joseph S. Smyth, USAF

The Buy American Act adds another layer of complexity to the program manager's job, especially in the context of the acquisition reform era. Reviewing the background and implementation of the Act will give both industry and government managers guidance on how to proceed under its restrictions.

The Buy American Act has been a staple of federal acquisition since its codification on March 3, 1933. Its express purpose is to provide a preferential treatment for domestic sources of unmanufactured articles, manufactured goods, and construction materials. The Act is of concern to the program manager because of its complicated nature, the requirement for certification of compliance by defense contractors, and its continued existence in an era of acquisition reform.

This article provides a brief background and analysis of the Act, discusses its use as a protectionist policy tool, and considers the impact of acquisition reform. The paper will then discuss the limits on actions for defense managers by reviewing the implementation of the Act in the Federal Acquisition Regulations (FARs) and Defense Federal Acquisition Regulations

(DFARs), and provide some guidance for both government and industry defense managers.

BACKGROUND AND ANALYSIS

The Buy American Act (1933) superseded an earlier 1875 statute that "related to preferential treatment of American material in contracts for public improvements" (1933, Sect. 10). The Act is a complicated, somewhat contradictory law that requires careful reading. It begins with a strong requirement for acquiring only American materials for public use (Sect. 10a), and using only American materials for construction of public works (Sect. 10b). Here is an excerpt from Section 10a (emphasis added):

Notwithstanding any other provision of law, *and unless the head of the Federal agency concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable*, 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, as the case may be, in the United States, shall be acquired for public use. *This section shall not apply with respect to...for use outside the United States, or if...are not mined, produced, or manufactured...in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. This section shall not apply to ...under any contract...less than or equal to the micro-purchase threshold...*

This excerpt is the original 1933 Act, modified twice since its inception. In 1988, the phrase "federal agency" replaced the phrase "department or independent establishment." The second modification came as a result of the Federal Acquisition Streamlining Act (FASA) of 1994, which inserted the last provision regarding the exemption of the Act from applying to micro-purchases (purchases that are \$2500 or less). The Act continues with a series of clarifications and exemptions, detailed below.

10b-1. Prohibition on procurement contracts; exemptions. This section adds the requirement that federal agencies not award contracts for articles, materials, or supplies mined, produced, or manufactured in a foreign country whose government maintains, in government procurements, a significant and persistent pattern of discrimination against U.S. products or services. However, the President or head of a federal agency can authorize a contract award if they determine such action is necessary and Congress is notified. In the case of the Department of Defense (DoD) and contracts subject to memorandums of agreement (MoAs) with a foreign country, only the President or his delegate (the Secretary of Defense or service secretaries) can make the determination of necessity. This section also describes what constitutes foreign control of a contractor.

10b-2. Limitation on authority to waive Buy American Act requirement. This section allows the Secretary of Defense to rescind blanket waiver of the Buy American Act if a foreign country discriminates against U.S. defense products covered under existing reciprocal agreements.

10d. Clarification of Congressional intent regarding sections 10a and 10b(a). This section clarifies (and repeats) the requirement to purchase American made goods and materials "in sufficient and reasonably available commercial quantities and of a satisfactory quality" unless the head of a federal agency determines that it is not in the public interest or the cost is unreasonable.

The annotated version of Section 10 concludes with an excerpt from Executive Order No. 10582 (1954). This order defines

materials as "of foreign origin" if the cost of the foreign products used in such materials constitutes 50 percent or more of the cost of all products used in the materials.

This order also quantifies the term "unreasonable costs" as a domestic bid or offered price that exceeds the bid or offered price of materials of foreign origin by a set price differential. This differential is 6 percent when the foreign bid includes applicable U.S. duty and costs incurred after arrival in the United States, or 10 percent if applicable duty and all costs incurred after arrival in the United States are excluded from the offered price.

THE ACT AS A PROTECTIONIST POLICY TOOL

Arguably, the Act remains a Depression-era reminder of the protectionist policies of the United States prior to World War II and has had a deleterious effect on the DoD's ability to forge multilateral development projects. The Act was cited under several challenges against federal procurement decisions in the 1980s. These challenges coincided with the recession of the mid-eighties, the rise of an anti-Japanese import sentiment, and several rhetorical calls for protectionism in the media and Congress.

European members of the North Atlantic Treaty Organization (NATO) were particularly vocal in 1982 when the Reagan administration failed to oppose amendments to the defense appropriation bill, which eliminated waiving of Buy American legislation for NATO military programs while still maintaining preferences for Canadian products ("Buy American Actions Concern Allies," 1982).

In 1982, a bill circulated in the House of Representatives to require auto makers that sell in the United States to use minimum percentages of American parts. Although defeated, the bill attempted to halt a trend of American auto makers buying parts abroad and force foreign car companies to build more plants in the United States or cut their exports to the United States. By 1986, cars sold here would have to contain up to 90 percent domestic content (Malone, 1982).

In 1984, the anthracite coal industry, supported by Rep. Joseph M. McDade of Pennsylvania, was responsible for legislation that forced the Pentagon to buy American coal to heat U.S. military bases in Europe, costing the federal government about \$15 million a year. The chief lobbyist, Michael Clark, was honest regarding his intentions (Isikoff, 1984):

"It's a support for the industry, for sure," said Clark, another native of Pennsylvania's anthracite region. But he added that here are many other so-called Buy American provisions passed by the Congress that, in terms of cost to the government, "make us seem like a little squeak in the night, if you know what I mean." "I don't like being pictured as the only U.S. industry being protected by legislation."

This invocation of Buy American is particularly interesting, since the law itself states that the provisions do not apply to material meant for overseas consumption.

The National Council for Industrial Defense filed suit in 1988 alleging that "the Pentagon routinely violates the Buy

American Act and other federal regulations that require the military to make a concerted effort to purchase U.S.-made goods and services" (Pullen, 1988).

In 1987 and 1988, the bearing industry was singled out for protection from foreign competition when a Pentagon working group recommended that DoD and its contractors initiate Buy American regula-

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tions for all defense bearings purchases for at least three years (Sfiligoj, 1987). Unfortunately, the industry objected that the proposed recommendations still provided only limited gains in their battle against

imports (Fusaro, 1988).

Curiously, there have been few references in the literature in the 1990s. Given the strength of the American economy during this period, it seems safe to conclude that the Buy American Act is invoked by industry when protectionist feelings run high and the economy is weak.

THE BUY AMERICAN ACT AND ACQUISITION REFORM

As the acquisition reforms became invigorated by the Secretary of Defense in 1993, several aspects of "business as usual" came under question. These included over-reliance on complicated military specifications, government-industry mistrust, and the more egregious

aspects of the FARs. One positive outcome of this reform was the FASA of 1994, mentioned earlier. FASA legislation grew out of a panel study, known as the Section 800 panel, to recommend changes to the acquisition system and recommend any legislative changes. Regarding the Buy American Act, they said:

The Panel recommends that the rule of origin for Buy American purposes be amended from a "50 percent components test" to a test of "substantial transformation" and that Congressionally imposed domestic source restrictions be repealed.

Their reasoning was cogent (Pilot Program, 1998):

Commercial sellers should be able to utilize their established facilities, technology, supplier networks, processes, employees and other standard commercial practices in performing Government contracts. The reality that global markets exist and that global markets can be responsive to mobilization needs must be recognized. Waiver is not always possible under current regulations. It is to our strategic and economic advantage to maintain vital foreign sources during peacetime as well as domestic sources or at least have the option to do so when market conditions and the international situation so dictates.

Just prior to the final FASA legislation passage in 1994, there was still doubt that the Buy American Act would be repealed in the final bill. In an article in *Government Executive* (Gregory, April 1994), the Act was targeted as a future area for reform:

Both DoD and industry groups also want authority for waivers from the Buy American Act, a statute that's increasingly difficult to implement given the multinational origins of many complex products. But [Colleen] Preston [Deputy Under Secretary for Acquisition Reform] predicts that Congress won't approve such waivers in this year's legislation...Preston says DoD may yet seek relief from the socioeconomic requirements. "Our going-in premise," she says, "is that we don't know what specific law it is that breaks the camel's back or inhibits a company from doing business with the government."

Ultimately, FASA failed to implement all the Section 800 panel's recommendations with respect to the Buy American Act, but did modify the Act to allow micropurchases to be excluded as mentioned earlier. Still, some industry officials were cynical about the scope of acquisition reform and the impact of FASA (Gregory, June 1994).

Government acquisition managers get some streamlining, concedes Peter C. Scrivner of the American Defense Preparedness Association, but the reforms do

nothing for industry, he argues. "Acquisition reform? Clearly it is not," he says. Rather, its passage would allow the administration and Congress to check off the action-completed box, whether or not reform was real.

Regardless of initial cynicism, FASA has provided a starting point for acquisition reform. Unfortunately, the momentum of legislative activity has cooled and there appears to be no legislative follow-on to FASA to address future acquisition reform. Five years after FASA, the Buy American Act still remains a prime candidate for future legislative action to streamline acquisition even further.

LIMITS ON ACTIONS FOR DEFENSE MANAGERS

The immediate impact of the Buy American Act on defense managers, both industry and government, is to determine whether a proposed acquisition is in compliance with the provisions of the Act. Since certification of compliance with the Act is a standard certification in Section K of the uniform contract format (FAR, 1998, Part 14), it is imperative to understand the implications of the Act. Penalties for contractors who violate the provisions of the Act can include debarment from bidding on contracts (FAR, 1998, Part 9; DFARs, 1998, Part 209). The

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impact on government program managers can include the necessity to issue stop-work orders on contested contracts while contractor protests are adjudicated.

IMPLEMENTATION IN THE FARs AND DFARs

The Buy American Act is implemented in FAR Part 25 (Foreign Acquisition). Part 25 also includes implementation of the Balance of Payments Program (specifically for acquisitions for use outside the

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United States), purchases under the Trade Agreements Act of 1979, and other laws and regulations that pertain to acquiring foreign supplies, services, and construction material.

FAR Part 25.4 describes the various trade agreements in effect that have bearing on Buy American and the Balance of Payments Program. These are the Trade Agreements Act of 1979 as amended by the Uruguay Round Agreements Act (1994), and other trade agreements including:

- countries designated under the Caribbean Basin Economic Recovery Act;
- the United States-Israel Free Trade Area Implementation Act of 1985;
- the North American Free Trade Agreement Implementation Act; and

- the Agreement on Civil Aircraft.

All of these have the effect of exempting a large number of countries (including the European Union) from the effects of Buy American. FAR Part 25.402 lays out the exemption (emphasis added):

The current threshold is *\$190,000 for supply* and services contracts and \$7,311,000 for construction contracts...When the value of the proposed acquisition of an eligible product *is estimated to be at or over the dollar threshold*, agencies shall evaluate offers for an eligible product *without regard to the restrictions of the Buy American Act* (see Subpart 25.1) or the Balance of Payments Program (see Subpart 25.3).

FAR Part 25.403 also allows exemptions for "Purchases of arms, ammunition or war materials, or purchases indispensable for national security or for national defense purposes, by the Department of Defense, as provided in departmental regulations." This implements the Title 41, Section 10b-1 (c) authority of the President or federal agency head to authorize contracts that would otherwise be restricted under the Act.

The implementation of the Buy American Act in the DFARs appears to be much more restrictive than either Title 41 or the FAR 25. The "unreasonable price" differential of 6 percent that appears in Executive Order 10582 and FAR 25.105 jumps to 50 percent in DFAR 225.105. There appears to be no basis in statute or FAR for this large jump and its existence severely inhibits a program manager's

ability to choose from a globally competitive market for defense goods. However, there are waivers in the DFARs for the Buy American Act in the interests of national defense. DFAR 225.872-1 lays out these exemptions (emphasis added):

As a result of memoranda of understanding and other international agreements, the *DoD has determined it inconsistent with the public interest to apply restrictions of the Buy American Act/* Balance of Payments Program to the acquisition of defense equipment which is mined, produced, or manufactured in any of the following countries (referred to in this part as "qualifying countries")

- Australia, Belgium, Canada, Denmark, Egypt, Federal Republic of Germany, France, Greece, Israel, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Turkey, United Kingdom.

Individual acquisitions for products of the following qualifying countries may, on a purchase-by-purchase basis, be exempted from application of the Buy American Act and Balance of Payments Program as inconsistent with the public interest

- Austria, Finland, Sweden, Switzerland.

If a waiver is contemplated, DFAR 225.872-4 lays out the requirement to

submit a Justification and Approval. Since this must go to the Head of Agency for any procurements of more than \$2 million, this is a potential source of delay for awarding contracts to foreign sources.

CONSEQUENCES OF FAILURES TO CONSIDER THE ACT

The failure to consider the Buy American Act may be grounds for protest of a contract award to a foreign source by domestic sources that are unsuccessful. Fortunately, protests of contract awards that cite the Act have been denied when there is clear evidence that the acquisition was within the bounds of the FARs and DFARs. In one case, a U.S. firm, Fire-

Tec, protested the award of a contract for 15 fire-fighting trucks to any foreign firm, alleging that foreign firms have a competitive advantage over domestic firms because they are

not subject to laws and regulations with which domestic firms must comply. The protest was denied, with the following rationale (Defense Acquisition University, 1996):

"The failure to consider the Buy American Act may be grounds for protest of a contract award to a foreign source by domestic sources that are unsuccessful."

In denying the protest, we pointed out that the possession of some economic advantage such as the inapplicability of minimum wage standards provides no basis for rejecting a foreign bid. Reflected

in our decision was the fact that there is no federal law which seeks to equalize the "competitive advantage" which a foreign firm may possess, other than the Buy American Act, 41 U.S.C. 10a-d (1976). If, after the requirements of the Buy American Act have been satisfied, the foreign bidder remains low, is found to be responsible, and its bid is responsive, then there is no further barrier to an award to that firm.

Even though a contract award may not have been protested, the Act can still have an impact when there are egregious examples of a contracting agency's failure to consider its application. When Rep. James Traficant of Ohio discovered that Chinese-made boots were purchased by the Air Force Reserve Facility in Vienna, OH, the Defense Logistics Agency (DLA) and the Air Force conducted an extensive investigation. DLA and the Air

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Force found that Chinese-made boots were, in fact, purchased and issued to U.S. military personnel, and that the Buy American Act was violated ([http://](http://www.house.gov/traficant/june19.htm)

www.house.gov/traficant/june19.htm, 1997). This prompted an amendment to the fiscal year 1998 Defense Authorization Bill, directing the Inspector General of the Department of Defense to conduct a random audit of U.S. military installations to determine the extent to which base

funds are being used to purchase foreign-made goods. Thus, the Act still provides a political mechanism to question DoD acquisition of foreign goods and remains a fixture in acquisition management, for better or worse.

CONCLUSIONS

The Buy American Act and its subsequent modifications represent one of the most visible and egregious remnants of U.S. protectionism. Its very existence refutes the U.S. desire to only "level the playing field" in international trade. It has been used in the past to justify congressional protection of specific industries with an associated burden to DoD. It has been cited as a justification for other countries to institute their own domestic content requirements.

The Act is implemented haphazardly in the acquisition regulations, where the FARs declare that domestic product prices are "unreasonable" if they exceed foreign product prices by more than 6 percent, while the DFARs use a 50 percent price differential. Acquisition reform groups have targeted its existence for repeal, but efforts to date have failed.

The irony is that the Act is largely ineffective in providing preferences for U.S. domestic content. The Act has numerous loopholes and waiver authority provisions to allow foreign goods to compete with U.S. goods on a reasonably competitive basis. In addition, U.S. defense industries have become very efficient and compete successfully with foreign firms on price and performance of military goods. Therefore, the Buy American Act should make defense

managers wary, but not discouraged, when pursuing foreign-made goods or teaming

arrangements with foreign sources to fulfill U.S. military requirements.



Lieutenant Colonel Joseph Smyth earned his Bachelor Degree in Electrical Engineering from Tulane University in 1980. As a 1981 Distinguished AFIT Graduate, he received a Masters Degree in Electrical Engineering. He graduated from Flight Test Engineering at the USAF Test Pilot School in 1986, and the Air Command and Staff College in Montgomery, AL, in 1995. As a Guidance and Control System Engineer at the Armament Division, Eglin AFB, FL in 1982, he performed extensive weapon simulations and analyses of all major weapon systems under development, including AMRAAM and GBU-24 LLLGB. In 1986 he became Flight Test Engineer, then Chief Engineer for the F-117 Stealth Fighter, performing weapons, avionics, aircraft performance and flying qualities testing, as well as testing the laser-guided GBU-27 on the F-117. In 1991, as Assistant Deputy for Engineering for Joint STARS Joint Test Force in Melbourne, FL, he integrated it into theater-level exercises (Operations CROSSBOLT and DESERT CAPTURE), demonstrating real-time data fusion, location and targeting. He developed the first operational evaluation of Joint STARS while in developmental test, which was subsequently adopted by AFOTEC for developing operational test plans. As Deputy for Engineering, he led the flight test planning and execution of the production E-8C aircraft. In 1995 as Combined Test IPT lead of the Joint Advanced Strike Technology Program (Joint Strike Fighter), he set up the first Combined Test Working Group, incorporated operational test and live fire test activities into the JSF Program, and authored the test portion of the Single Acquisition Management Plan that supported a Milestone I decision. In 1996 as Chief Engineer for the Boeing X-32 prototype aircraft, he was responsible for all technical aspects of the development of one of the two competing prototypes for JSF, and he conducted both the Initial Design Review and the Final Design Review. In July 1998 he reported to ICAF as a student. His next assignment is Deputy Division Chief, Airborne, C2 and Radar Systems, SAF/AQID.

(Email : smythjns@erols.com)

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