

COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES

**OVERVIEW AND COMPILATION OF
U.S. TRADE STATUTES**

2003 EDITION



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Prepared for the use of Members of the Committee on Ways and Means by members of its staff. This document has not been officially approved by the Committee and may not reflect the views of its Members.

Departments of Agriculture and Commerce are required to work with the USTR on agricultural and non-agricultural issues respectively and to establish technical offices to fulfill a number of functions, particularly supplying notices to interested parties of proposed foreign government standards and receiving and transmitting private sector comments. The Department of Commerce maintains the National Center for Standards and Certification within the National Bureau of Standards as the national inquiry point required under the Code.

Title IV contains provisions concerning administrative and judicial proceedings regarding standards-related activities. No private rights of action are created by title IV; private parties can petition the U.S. government to invoke provisions of the Agreement against practices of other signatories.

Subtitle E sets forth governing standards and measures under the NAFTA. Subtitle F contains provisions concerning U.S. participation in international standardsetting activities.

Government Procurement

U.S. policy on government purchases of foreign goods and services is based on the Buy American Act of 1933⁵⁹ the multilateral Agreement on Government Procurement under the 1994 WTO and General Agreement on Tariffs and Trade (GATT), and its implementing legislation under title III of the Trade Agreements Act of 1979,⁶⁰ as amended by the Uruguay Round Agreements Act. The "Buy American Act of 1988" (title VII of the Omnibus Trade and Competitiveness Act of 1988)⁶¹ established standards and procedures to prohibit procurement from foreign countries whose governments discriminate against U.S. products or services in awarding contracts. In addition, separate provisions in appropriation acts and other legislation apply more restrictive Buy American-type provisions on particular types of purchases.

Governments are among the world's largest purchasers of non-strategic goods. Most of this vast market has traditionally been closed to foreign producers by means of formal and informal administrative systems of national discrimination in favor of domestic producers. Although U.S. preferences for domestic suppliers are clearly set out by law and regulation, other countries usually have achieved their discrimination by highly invisible administrative practices and procedures.

BUY AMERICAN ACT

The Buy American Act of 1933, as implemented by Executive Orders 10582 and 11051, requires the U.S. government to purchase domestic goods and services unless the head of the agency or department involved determines the prices of the domestic supplies are "unreasonable" or their purchase would be inconsistent with

⁵⁹ Act of March 3, 1933, ch. 212, title III, 47 Stat. 1520, 41 U.S.C. 10a-10d.

⁶⁰ Public Law 96-39, title III, approved July 26, 1979, 19 U.S.C. 2511-2518.

⁶¹ Public Law 100-418, title VII, approved August 23, 1988, 41 U.S.C. 10a note.

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the U.S. public interest. Executive Order 10582, issued in 1954, states that if the domestic price of a good or service is 6 percent or more above the foreign price, then it is to be considered unreasonable and the foreign product may be purchased. The order also permits agencies to use a differential above 6 percent if it would serve the national interest. The Department of Defense has been using a 50 percent differential since 1962 for its procurement, except this differential is waived on military purchases under reciprocal Memoranda of Understanding (MOUs) with NATO countries. The order also indicated that a differential could be applied in cases where a domestic bid generated employment in a labor surplus area as designated by the Secretary of Labor. No specific percentage was stated, but generally a 12 percent differential has been allowed for bids which benefit economically distressed areas. These price differentials may be waived under section 301(a) of the Trade Agreements Act of 1979 for articles covered by the GATT Agreement on Government Procurement from signatory countries.

U.S.-made products are defined by law as those manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States. By regulations, "substantially all" has been defined to mean that more than 50 percent of the component costs of a product has been incurred in the United States.

1979 GATT AGREEMENT ON GOVERNMENT PROCUREMENT

The first Agreement on Government Procurement, also known as the Government Procurement Code,⁶² was concluded as one of the agreements on non-tariff measures during the 1975-1979 Tokyo Round of GATT multilateral trade negotiations. The Code went into effect on January 1, 1981 and remained in force until the 1994 WTO Agreement on Government Procurement went into effect on January 1, 1996.

Because not all objectives were achieved in the original Code and revisions might be necessary in light of actual experience, the signatories agreed to renegotiations beginning at the end of 1984 to broaden the coverage and improve the operation of the Code. The GATT Committee on Government Procurement completed the first phase of these renegotiations in November 1986 with agreement (1) on a Protocol of Amendments to improve the functioning of the Code, effective January 1, 1988; (2) to continue negotiations on increasing the number of entities (government agencies) and procurements covered by the Code, particularly in the sectors of telecommunications, heavy electrical and transportation equipment; and (3) to continue to work towards the coverage of service contracts under the Code. The second phase of Code renegotiations began in February 1987 and continued in the context of the Uruguay Round of GATT multilateral trade negotiations.

The 1979 Code is designed to discourage discrimination against foreign suppliers at all stages of the procurement process, from the determination of the characteristic of the product to be purchased to tendering procedures, to contract performance.

⁶² MTN/NTM/W/211/Rev. 2, reprinted in House Doc. No. 96-153, pt. I, at 69.

The Code prescribes specific rules on the drafting of the specifications for goods to be purchased, advertising of prospective purchases, time allocated for the submission of the bids, qualification of suppliers, opening and evaluation of bids, awards of contracts, and on hearing and reviewing protests.

Signatories must publish their procurement laws and regulations and make them consistent with the Code rules. Purchasing entities have discretion in their choice of purchasing procedures, provided they extend equitable treatment to all suppliers and allow the maximum degree of competition possible.

Each government agency covered by the Code is required to publish a notice of each proposed purchase in an appropriate publication available to the public, and to provide all suppliers with enough information to permit them to submit responsive tenders. Losing bidders must be informed of all awards and be provided upon request with pertinent information concerning the reasons they were not selected and the name and relative advantages of the winning bidder. Signatories must also provide data on their procurements on an annual basis.

The adoption or use of technical specifications which act to create unnecessary obstacles to international trade is prohibited. The Code mandates the use, where appropriate, of technical specifications based on performance rather than design, and of specifications based on recognized national or international standards.

While the Code does not prohibit the granting of an offset or the requirement that technology be licensed as a condition of award, signatories recognize that offsets and requirements for licensing of technology should be limited and used in a non-discriminatory way.

The Code is largely self-policing. Rules and procedures are structured to help provide solutions to problems between potential suppliers and procuring agencies. As a next step, the Code provides for bilateral consultations between the procuring government and the government of the aggrieved supplier. As a last resort, the Code dispute settlement mechanism under the Committee of Signatories provides for conciliation or establishment of a fact-finding panel.

Coverage of the agreement

The Code applies solely to those agencies listed by each signatory in an annex on contracts valued above a specific minimum contract value expressed in terms of Special Drawing Rights (SDR). The original Code established a threshold value of 150,000 SDR; the 1988 Protocol of Amendments to the Code lowered the minimum contract value to SDR 130,000.

The benefits of the Code apply to purchases of goods originating in the territory of signatory countries. As a result of the 1988 amendments, leasing contracts are also subject to the Code. It does not apply to government services except those incidental to the purchase of goods, construction contracts, purchases by Ministries of Agriculture for farm support programs or human feeding programs such as the U.S. school lunch program. Procurements by state and local governments, including those with Federal funds such as under the Surface Transportation Act, are not

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For the United States, the Code does not apply to the Department of Transportation, the Department of Energy, the Tennessee Valley Authority, the Corps of Engineers of the Department of Defense, the Bureau of Reclamation of the Department of the Interior, and the Automated Data and Telecommunications Service of the General Services Administration (GSA). In addition, government chartered corporations which are not bound by the Buy American Act, such as the U.S. Postal Service, COMSAT, AMTRAK, and CONRAIL, are not covered.

United States Code coverage also does not apply to set-aside programs reserving purchases for small and minority businesses, prison and blind-made goods, or to the requirements contained in Department of Defense and GSA Appropriations Acts that certain products (i.e., textiles, clothing, shoes, food, stainless steel flatware, certain specialty metals, buses, hand tools, ships, and major ship components) be purchased only from domestic sources.

On April 13, 1993, the United States and European Union reached an agreement in Marrakesh under the GATT Government Procurement Code to nearly double to \$200 billion the bidding opportunities available on a bilateral basis.

1994 WTO AGREEMENT ON GOVERNMENT PROCUREMENT

The 1994 Government Procurement Agreement negotiated in the Uruguay Round makes important improvements in the Tokyo Round Code, which required central government agencies in member countries to observe non-discriminatory, fair, and transparent procedures in the purchase of certain goods. The new Agreement covers the procurement of both goods and services, including construction services, and applies to purchases by subcentral governments and government-owned enterprises, as well as central governments.

In addition to improvements in coverage, the Agreement also requires members to follow significantly improved procurement procedures. It prohibits the use of offsets unless a country specifically negotiates an exception to the Agreement in its schedule. The Agreement requires the establishment of a domestic bid challenge system and introduces added flexibility to accommodate advances in procurement techniques.

The Agreement allows each signatory to negotiate coverage on a reciprocal, bilateral basis with the other signatories. The United States concluded comprehensive coverage packages with several countries. The United States will apply the new Agreement to specified U.S. subcentral governments and government-owned entities only for those countries that opened their government procurement markets in sectors of high priority to the United States, although it may expand coverage with other signatories in the future.

The Agreement applies to purchases by government entities above certain special drawing right (SDR) thresholds:

Central government purchases

Goods and services: 130,000 SDRs (\$182,000)

- Construction services: 5 million SDRs (\$7 million)
- Subcentral government purchases
 - Goods and services, U.S. and Canada: 355,000 SDRs (\$500,000)
 - Goods and services, other: 200,000 SDRs (\$280,000)
 - Construction services, Japan and Korea: 15 million SDRs (\$21 million)
 - Construction services, other: 5 million SDRs (\$7 million)
- Government-owned enterprise purchases
 - Goods and services, U.S. federally-funded utilities: \$250,000
 - Goods and services, other: 400,000 SDRs (\$560,000)
 - Construction services, Japan and Korea: 15 million SDRs (\$21 million)
 - Construction services, other: 5 million SDRs (\$7 million)

During the negotiations, each signatory negotiated the exclusion of certain procurement from the obligations imposed by the new Agreement. In the case of the United States, these exclusions carry forward those in the U.S. schedule to the 1979 Code. In addition, certain states excluded specified procurement, and set-asides on behalf of small and minority businesses are also excluded. The 1994 Agreement applies to all U.S. executive branch agencies with certain exceptions, including the Federal Aviation Administration.

Signatories to the 1996 Code include the following members of the 1979 Code—Austria, Belgium, Canada, Denmark, European Communities, Finland, France, Germany, Greece, Hong Kong, Iceland, Ireland, Israel, Italy, Japan, Korea, Liechtenstein, Luxembourg, Netherlands, Netherlands with respect to Aruba, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, United Kingdom, and the United States. The United States terminated its participation in the 1979 Code on the entry into force of the 1996 Code.

THE NORTH AMERICAN FREE TRADE AGREEMENT

The NAFTA signatories agreed to eliminate buy national restrictions on the majority of non-defense related purchases by their Federal governments of goods and services provided by firms in North America. The Agreement marked the first time that Mexico had committed to eliminate discriminatory government procurement practices.

The Agreement applies only to purchases above a specified threshold:

- (1) Purchases of goods over \$25,000 by U.S. Federal agencies from Canadian suppliers and vice versa;
- (2) For other Federal Government procurement in the three countries, purchases of goods and services over \$50,000 and purchases of construction services over \$6.5 million; and
- (3) For Federal Government-owned enterprises, purchases of goods and services over \$250,000 and purchases of construction services over \$8 million.

The Agreement does not apply to certain kinds of purchases by the U.S. government including purchases under small or minority business set-aside programs, certain national security, agriculture, and Agency for International

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TITLE III OF THE TRADE AGREEMENTS ACT OF 1979, AS AMENDED

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Congress approved the first Agreement on Government Procurement under section 2 of the Trade Agreements Act of 1979 and amended that statute in the Uruguay Round and NAFTA implementing bills to reflect U.S. obligations under those agreements. Title III of that Act implements the obligations of the Code in U.S. law with respect to purchases by covered government entities.⁶³

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Executive Order 12260, issued on December 31, 1980, requires all U.S. government agencies covered by the Code to observe its provisions. Section 301 of the 1979 Act authorizes the President to waive the application of discriminatory government procurement law, such as the Buy American Act, and labor surplus set-asides that are not for a small business. The waiver authority applies only to purchases covered by the Code and only to foreign countries designated by the President that meet one of four statutory conditions basically requiring the country to provide appropriate reciprocal, competitive government procurement opportunities to U.S. products and suppliers, unless the country is a least developed country.

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Buy American Act preferences still apply to contracts below the SDR threshold, purchases by non-covered entities, and procurement from countries not eligible for a waiver regardless of contract size. Special Buy American-type restrictions under other laws (e.g., small business set asides, required domestic sourcing of particular goods) are also not affected.

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Section 302 of the 1979 Act, as amended, is designed to encourage other countries to participate in the Code and provide appropriate reciprocal competitive opportunities. For this purpose, the President is required, after the date on which any waiver first takes effect, to prohibit the procurement of products otherwise covered by the Code from non-designated countries. The President may, however, (1) waive the prohibition on procurement of products by a foreign country or instrumentality that has not yet become a party to the Agreement but has agreed to apply transparent and competitive procedures to its government procurement equivalent to those in the Agreement and to maintain and enforce effective prohibitions on bribery and other corrupt practices in connection with government procurement; (2) authorize agency heads to waive prohibitions on a case-by-case basis when in the national interest; and (3) authorize the Secretary of Defense to waive the prohibition for products of any country which enters into a reciprocal procurement agreement with the Department of Defense. All such waivers are subject to interagency review and general policy guidance.

Section 303 authorizes the President to waive as of January 1, 1980 the application of the Buy American Act for purchases by any government entity of civil aircraft and related articles irrespective of value from countries party to the GATT Agreement on Trade in Civil Aircraft.

⁶³ 19 U.S.C. 2511-2518.

Section 304 sets forth negotiating objectives in conjunction with the renegotiation of the Code within 3 years to improve its operation and broaden the coverage. This negotiation is ongoing. The President is directed to seek more open and equitable foreign market access and the harmonization, reduction, or elimination of devices distorting government procurement trade. The President must also seek equivalent competitive opportunities in developed countries for U.S. exports in appropriate product sectors as the United States affords their products, such as in the heavy electrical, telecommunications, and transport equipment sectors. The President must report to the committees of jurisdiction during the renegotiations if he determines they are not progressing satisfactorily and are not likely to result within 12 months in expanded agreement coverage of principal developed country purchasers in appropriate product sectors. The President is also directed to indicate appropriate actions to seek sector reciprocity with such countries in government procurement, and may recommend legislation to prohibit procurement by entities not covered by the Code from such countries.

Title III of the 1979 Act, as amended, also contains a number of reporting requirements to the Congress on various aspects of the Code and its economic impact and implementation.

TITLE VII OF THE OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988, AS
AMENDED

Background

Title VII of the Omnibus Trade and Competitiveness Act of 1988 ("Buy American Act of 1988")⁶⁴ as amended by the Uruguay Round Agreements Act, amended both the Buy American Act of 1933 and title III of the Trade Agreements Act of 1979 to address discrimination by foreign governments in the procurement of U.S. products or services. Title VII statutory authority ceased to be effective on April 30, 1996. On March 31, 1999, President Clinton issued Executive Order 13116, which reinstated Title VII procedures.

Title VII prohibits U.S. government procurement of products and services from certain parties, including (1) signatories "not in good standing" to the Agreement; (2) signatories in good standing that discriminate against U.S. firms in their government procurement of products or services not covered by the Agreement; and (3) non-signatories to the Agreement whose governments discriminate against U.S. products or services in their procurement.

In the case of countries that discriminate on procurement not covered by the Agreement, prohibitions are to be imposed when a foreign government maintains a significant and persistent pattern or practice of discrimination against procurement of U.S. products or services that results in identifiable harm to U.S. business. In cases of signatories to the Agreement, Federal agencies would be prohibited from procuring only non-Agreement covered products from these countries unless that

⁶⁴ 41 U.S.C. 10a note.

country has also been designated as a country "not in good standing."

Least developed countries are exempt from the procurement prohibition, as are products and services procured and used by the Federal Government outside the United States and its territories. A prohibition may also be waived, on a contract-by-contract or class of contracts basis, when in the public interest or to avoid the creation of a monopoly situation. The President or head of a Federal agency may also authorize the award of a contract or class of contracts, notwithstanding a prohibition, if insufficient competition exists to assure the procurement of products or services of requisite quality at competitive prices. Normally the Congress must be notified at least 30 days before the prohibition is waived on a contract or class of contract.

The President must submit to appropriate congressional committees, by April 30 each year, a report on the extent to which countries discriminate against U.S. products or services in making government procurements. The report must identify (1) signatories to the Agreement that are not in compliance with its requirements; (2) signatories to the Agreement whose products and services are acquired in significant amounts by the U.S. government, who are in compliance with the Agreement, but maintain a significant and persistent pattern or practice of discrimination in the government procurement of products and services not covered by the Agreement which results in identifiable harm to U.S. businesses; (3) non-signatories to the Agreement whose products or services are acquired in significant amounts by the U.S. government and who maintain in their government procurement a significant and persistent pattern or practice of discrimination which results in identifiable harm to U.S. businesses; (4) non-signatories to the Agreement, which fail to apply transparent and competitive procedures equivalent to those in the Agreement, and whose products and services are required in significant amounts by the U.S. government; and (5) non-signatories to the Agreement which fail to maintain and enforce effective prohibitions on bribery and other corrupt practices in connection with government procurement, and whose products and services are required in significant amounts by the U.S. government. The law requires the President to take into account a number of specific factors in identifying countries and to describe the practices and their impact in the annual report.

By the date the annual report is submitted, the U.S. Trade Representative (USTR) must request consultations with any identified country, unless that country was also identified in the preceding annual report. If the country is a signatory identified as not in compliance with the Agreement and does not comply within 60 days after the annual report is issued, the USTR must request formal dispute settlement proceedings under the Agreement, unless they are already underway pursuant to a previous identification. If dispute settlement is not concluded within 18 months or has concluded and the country has not taken action required as a result of the procedures to the satisfaction of the President, the country is considered "not in good standing" and the President is required to revoke the waiver of Buy American restrictions granted under the Trade Agreements Act of 1979, as amended. The President will not limit procurement from the foreign country if, before the end of

18 months following initiation of dispute settlement, the country has complied with the Agreement, has taken action recommended as a result of the procedures to the satisfaction of the President, or the procedures result in a determination requiring no action by the country. The President may also terminate the sanctions and reinstate a waiver at any time under such circumstances.

Within 60 days after the annual report is issued, the President must impose the procurement prohibition on any country identified as discriminating on procurements not covered by the Agreement and which has not eliminated its discriminatory procurement practices. The President may terminate the sanctions at such time as he determines the country has eliminated the discrimination.

With respect to either category of countries, if the President determines that imposing or continuing the sanctions would harm the U.S. public interest, the President may modify or restrict the application of the sanctions to the extent necessary to impose appropriate limitations that are equivalent in their effect to the discrimination against U.S. products or services in government procurement by that country. The President also cannot impose sanctions if it would (1) limit U.S. government procurement to, or create a preference for, products or services of a single supplier; or (2) create a situation where there could be or are an insufficient number of actual or potential bidders to assure U.S. government procurement of goods or services of requisite quality at competitive prices.

By April 30 of each year, the President must submit to the Congress a general report on actions taken under title VII, including an evaluation of the adequacy and effectiveness of such actions as a means toward eliminating foreign discriminatory government procurement practices against U.S. businesses and, if appropriate, legislative recommendations for enhancing the usefulness of title VII or any other measures to eliminate or respond to foreign discriminatory foreign procurement practices.

History of actions under title VII

On May 7, 2001, USTR issued its annual report, determining that no new practices met the criteria for Title VII identification. USTR noted, however, that as in previous years, there remain a number of foreign government procurement practices of concern which the Administration is pursuing in bilateral and multilateral fora, including WTO dispute settlement when appropriate, or that require continued monitoring and study.⁶⁵ USTR identified the following countries with concerns: 1) Japan: various discriminatory practices related to procurement for public works such as bid-rigging and use of discriminatory qualification and evaluation criteria; 2) Taiwan: certain discriminatory practices and procedural barriers; and 3) Canada: provincial governments' discriminatory procurement practices. USTR did not prepare an annual report for 2002 because Title VII statutory authority lapsed in 1996, and Executive Order 13116 from March 31, 1999, mandated only three subsequent reports on government procurement. The

⁶⁵ 66 FR 23062 (May 7, 2001).

May 7, 2001 report was the third and last report authorized under this Executive Order.

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