CRS INSIGHT

# Trade Implications of the President's Buy American Executive Order

May 2, 2017 (IN10697)

|

## Related Authors

- Rachel F. Fefer
- Ian F. Fergusson

|

Rachel F. Fefer, Analyst in International Trade and Finance (rfefer@crs.loc.gov, 7-1804)
Ian F. Fergusson, Specialist in International Trade and Finance (ifergusson@crs.loc.gov, 7-4997)

With the April 18, 2017, issuance of President Trump's Executive Order on Buy American and Hire American, U.S. procurement obligations with 57 countries under the World Trade Organization (WTO) Government Procurement Agreement (GPA), the North American Free Trade Agreement (NAFTA), and other U.S. free trade agreements (FTAs) are coming under scrutiny. Some may question whether the order, when implemented, could conflict with current U.S. obligations under these agreements. More specifically, could the EO run counter to U.S. policy on government procurement, which generally seeks to balance support for U.S. industries with ensuring a competitive, cost-efficient process?

Buy American v. Buy America

Congress over the years has enacted several domestic content statutes that seek to ensure that public procurement projects funded by U.S. tax dollars benefit U.S. firms and workers to the greatest extent possible. They also seek to restrict the acquisition and use of end products or construction materials that are not "domestic." The Buy American Act of 1933 requires federal government procurement of U.S. origin unmanufactured articles, supplies, and material or manufactured products produced "substantially all" from domestic inputs (see CRS Report R43354, *Domestic Content Restrictions: The Buy American Act and Complementary Provisions of Federal Law*, coordinated by Kathleen Ann Ruane). As implemented, however, the act generally establishes a price preference for domestic end products and construction materials.

Buy American may be waived in exceptional circumstances, including (1) if it is in the public interest to do so; (2) if the cost of U.S.-made products is unreasonable; or (3) if the products are not available in sufficient quality or quantity from U.S. producers. The Trade Agreements Act of 1979, as amended, also permits the waiver of the Buy American Act with regard to procurement bids originating from countries that have provided reciprocal access to their own domestic procurement markets.

Conversely, the Buy America Act (23 U.S.C. 313(a)) applies to federal transportation funds used to support projects carried out by state and local government, mainly involving highways, public transportation, aviation, and other certain federally funded infrastructure projects.

According to President Trump, his Buy American and Hire American executive order aims "to defend our workers, protect our jobs and finally put America first." The order requires federal agencies to "monitor, enforce, and comply with Buy American Laws, to the extent they apply, and minimize the use of waivers, *consistent with applicable law*." To that effect, the order does the following:

- instructs the Secretary of Commerce and the United States Trade Representative to assess the impacts of all free trade agreements and the WTO's GPA on the operation of Buy American Laws and provide recommendations to strengthen implementation of the laws;
- requires agencies to minimize the use of waivers;
- requires waivers to be made by the head of the agency authorizing the procurement; and
- obligates a procuring agency to analyze whether the price advantage of a foreign-produced product is due to dumped or subsidized iron, steel, or manufactured goods.

The *consistent with applicable law* phrase has been interpreted to mean consistent with U.S. trade obligations.

The Government Procurement Agreement (GPA)

The GPA is a binding WTO plurilateral agreement that requires reciprocal market access for various generally nondefense government projects among its signatories. Membership in the GPA is voluntary. Members who choose to join agree to rules on open competition and transparency. Each member negotiates with the other members by submitting lists of government entities and goods and services (with thresholds and limitations) that are open to bidding by firms of the other GPA members. Non-GPA signatories do not enjoy any rights under the GPA. A revised GPA entered into force on April 6, 2014.

The United States is among the 47 WTO members (including 28 European Union countries) that are a part of the GPA. South Korea, Moldova, and Ukraine joined the GPA in 2016. Several countries, including China, the world's biggest steel-producing country, are observers or are in negotiations to accede to the GPA. Under the GPA, the U.S. market access schedules of commitments include procurement by certain federal and state agencies that meet specified criteria. State and local governments are only covered if the states or localities voluntarily agree to comply, even if federal funds are involved.

According to a recent Government Accountability Office (GAO) report, from 2008 to 2012, 8% of total global government expenditures, and approximately one-third of U.S. federal government procurement, was covered by the GPA or similar commitments in U.S. FTAs. However, it also found that the amount of U.S. procurement available for bidding by companies of other GPA or FTA partners was worth more than double the combined amounts reported by the next five largest procurement markets in the GPA (European Union, Japan, Canada, Switzerland, and Norway). The Administration argues that the United States benefits less from the agreement than do other GPA signatories, however, GAO also found that U.S. methodology for reporting statistics on procurement to the GPA suffers from deficiencies, limiting detailed comparison or transparency.

Possible Issues for Congress

- **Open up or restrict government procurement markets?** Opening up procurement to foreign firms allows for greater international competition, providing a government agency with greater choice and often lower-cost or more-efficient options. Restricting procurement to domestic sources supports U.S. firms and workers, but reduces competition, which could raise costs for public entities and displace jobs in other sectors.
- **Change U.S. content requirements?** The proportion of U.S. content required in a product in order to qualify as a U.S. good may come under scrutiny. For manufactured goods, Buy American regulations set domestic content requirements at 50% U.S. inputs, although policy under other domestic content laws varies, including a 100% U.S.-made requirement for iron, steel, and manufactured goods under Buy America laws (see CRS In Focus IF10628, *Buy America, Transportation Infrastructure, and American Manufacturing*, by Michaela D. Platzer and

William J. Mallett). Some Members of Congress have introduced legislation to increase the domestic content requirements. The integrated nature of modern industrial supply chains, especially in North America as a result of NAFTA, can make it difficult to determine the domestic content.

- **Foreign market access for U.S. companies?** By participating in the WTO's GPA, U.S. companies gain access to the government procurement markets of other participating countries. Violating the agreement would subject the United States to WTO dispute settlement procedures, and withdrawing from the GPA would eliminate these export opportunities for U.S. companies. In weighing the merits of such a course, Congress may wish to seek a more complete statistical picture of the economic effects of the GPA and FTA-wide government procurement market to evaluate their costs and benefits to the U.S. economy at large.
- **Renegotiate?** As a result of this executive order, the United States may seek to renegotiate its commitments in the GPA or government procurement agreements in FTAs. This could take the form of terminating or reducing some U.S. commitments or seeking further access from trading partners for U.S. suppliers. Either way, U.S. trading partners may seek concessions in return. Congress has established trade promotion authority (TPA) negotiating objectives to shape the Administration's negotiating stance and may conduct oversight of any negotiations (see CRS In Focus IF10038, *Trade Promotion Authority (TPA)*, by Ian F. Fergusson).