

## How Agencies 'Buy Foreign' Under The Buy American Act

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A December 2018 Government Accountability Office report provides the government procurement and national security communities with greater insight into how federal agencies purchase foreign products within the parameters of “Buy American” requirements.

The Buy American Act of 1933 instructs federal agencies conducting procurements for public use to purchase,

“[o]nly manufactured 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.”[1]

The Federal Acquisition Regulation implements this mandate and provides a number of exceptions for circumstances in which procurement of solely domestic items is not practicable or violates international agreements.[2]

The GAO’s December 2018 report, “Buy American Act: Actions Needed to Improve Exception and Waiver Reporting and Selected Agency Guidance,”[3] assessed “the extent to which (1) the federal government procures foreign products through Buy American Act exceptions and waivers, and (2) selected agencies provide training and guidance to implement the Act.”

This article focuses on the first aspect of the GAO’s assessment, which sheds light on how federal agencies use these exceptions to procure non-domestic items while still technically “Buying American” — i.e., complying with the BAA.

Using data from the Federal Procurement Data System - Next Generation, or FPDS-NG, the GAO determined that in fiscal year 2017, foreign end products accounted for approximately \$7.8 billion of federal obligations. In the grand scheme, these foreign product purchases accounted for only a small portion — approximately 4 percent — of the \$196 billion the government spent on end products as a whole, and an even smaller portion — approximately 1.5 percent — of the government’s total \$508 billion obligation. While these numbers are not particularly groundbreaking, of greater interest are the helpful breakdowns the report provides regarding which Buy American exceptions agencies use to procure



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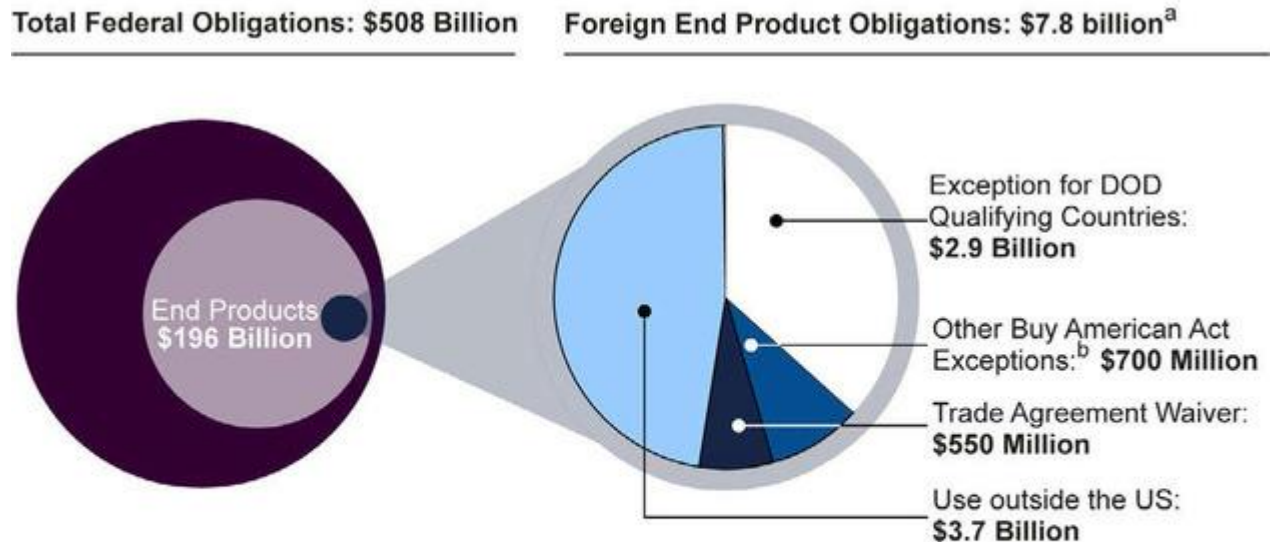


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these foreign end products.

### Buy American Act Exceptions

The BAA and its implementing regulations provide a number of exceptions and waivers that allow agencies to procure foreign end products in certain situations when the BAA would otherwise apply.[4] The GAO report grouped these exclusions into four categories: (1) use outside the U.S., (2) U.S. Department of Defense qualifying country exception, (3) trade agreement waiver and (4) “other exceptions” — including public interest, non-availability, unreasonable cost, commercial information technology and commissary resale:



<sup>a</sup> This includes nearly \$16 million for awards under the micro-purchase threshold (generally \$3,500 at the time of our review) that were not subject to the Buy American Act.

<sup>b</sup> Other Buy American Act exceptions include public interest (excluding DOD Qualifying Countries), domestic non-availability, unreasonable cost, commercial information technology, and commissary resale

Source: GAO analysis of federal procurement data. | GAO-19-17

We discuss each of these exceptions below and summarize the GAO’s findings for each category.

### Use Outside of the U.S. — \$3.7 billion

The BAA states that the domestic sourcing requirements do not apply “to articles, materials, or supplies for use outside the United States.”[5] Accordingly, this exclusion is not a designated “exception” to the BAA, but rather a total exclusion from BAA applicability. According to the GAO’s finding, agencies used this exclusion more frequently — measured in total dollar obligations — than any other, accounting for \$3.7 billion, about 47 percent of the total \$7.8 billion in foreign end product obligations.

This statistic may seem surprising at first, because the DOD, which accounted for 80 percent of all foreign end product purchases and the vast majority of “use outside the U.S.” foreign purchases, implemented its own more restrictive regulation for overseas use, which generally prohibits acquisition of foreign end products even when those products are to be used outside the United States. This policy, known as the Balance of Payments Program, requires DOD agencies to “[a]cquire only domestic end products for use outside the United States.”[6]

How, then, do DOD purchases account for the majority of the “use outside of the U.S.” exception when the DOD generally prohibits the acquisition of foreign end products for use outside the United States? The DOD’s Balance of Payments Program excludes several items from the prohibition, including, most notably, petroleum products.[7] Accordingly, as noted in the GAO report: “Agencies also procured foreign end products, such as fuel, to be used outside the United States, in which circumstance the Buy American Act’s requirements do not apply.”[8]

### **DOD Qualifying Countries — \$2.9 billion**

The DOD uses the BAA’s “public interest” exception to allow DOD agencies to exempt purchases of end products from countries with which the DOD has a reciprocal agreement — often referred to as “DOD qualifying countries”.[9] The BAA would normally prevent purchases of end products from these countries, unless exempted by another trade agreement such as the World Trade Organization’s Agreement on Government Procurement, or WTO GPA. However, as a result of various memoranda of understanding, the DOD has determined it inconsistent with the public interest to apply the BAA — or the Balance of Payments Program discussed above — to qualifying country products. The DOD has negotiated such agreements with 27 foreign countries, including two countries — Egypt and Turkey — that are otherwise excluded from other U.S. free-trade agreements or the WTO GPA.[10]

What some may find notable in this statistic is that, at \$2.9 billion of the total \$7.8 billion in foreign purchases — about 37 percent, it is the second most-used exception government-wide, even though the exception is limited exclusively for DOD agencies.

### **Other Buy American Act Exceptions — \$700 million**

The GAO report groups the “official” Buy American exceptions together in a single category. While all of the scenarios described in this article exclude certain purchases from the BAA requirements, the FAR lists the scenarios in this paragraph in a specific “Exceptions” clause, FAR 25.103: (1) public interest, (2) domestic non-availability, (3) unreasonable cost, (4) commercial information technology and (5) commissary resale.

The public interest exception allows the head of an agency to waive Buy American requirements if application of the BAA would be “inconsistent with the public interest.”[11] This exception includes agency-specific foreign agreements, though the GAO separated the DOD’s “qualifying countries” exception for purposes of its analysis — likely because qualifying country purchases accounted for such a large percentage of total foreign purchases.

The domestic non-availability exception applies when U.S. manufacturers do not supply products or materials in sufficient and reasonably available commercial quantities. The unreasonable cost exception allows agencies to purchase foreign products if the cost of a domestic product would be “unreasonable” — generally defined as a 6 percent or higher premium for civilian agencies, or a 50 percent or higher premium for DOD agencies.

The final two exceptions require little clarification: The government has determined that commercial item IT and items purchased specifically for commissary resale need not adhere to the BAA requirements.

Notably, the GAO found that, even with all the purchases made pursuant to these five exceptions combined, they accounted for only approximately 9 percent of the total \$7.8 billion in foreign product

purchases — significantly lower than the purchases made pursuant to the “use outside the U.S.” exception — 47 percent — or the DOD “qualifying countries” exception — 37 percent.

### **Trade Agreements Waiver — \$550 million**

The Trade Agreements Act is arguably the most notable and well-known exception to the BAA domestic sourcing requirements. The TAA allows the president to waive domestic sourcing requirements, including the BAA, so that the United States can comply with its obligations under various international trade agreements. It requires that products and services from select countries — “designated countries” — receive equal consideration with domestic offers.

The TAA waiver applies when three circumstances are present: (1) the anticipated procurement value is above the threshold established in the relevant trade agreement, (2) the procurement involves goods or construction materials listed in the relevant trade agreement and (3) none of the other exceptions outlined in the trade agreements apply — e.g., the procurement is set aside for small business concerns or it is being conducted as a sole-source procurement.

Thresholds for TAA applicability vary depending on the trade agreement. The most widely applicable trade agreement is the WTO GPA, although the United States participates in a number of other free trade agreements as well.[12] Surprisingly, though we often think of the TAA first when identifying Buy American exceptions, it made up the smallest percentage of foreign purchases in the GAO’s study: \$550 million out of the total \$7.8 billion, or approximately 7 percent — of course, if the GAO separated the FAR 25.103 exceptions above, TAA would likely have been higher on the list.

### **Key Takeaways**

Analytics are only as good as the data captured: The GAO noted the coding errors in how agencies input data into FPDS-NG “highlights data reliability issues” with regard to these statistics. Nevertheless, we can observe the following trends from the GAO’s assessment:

- The “use outside the U.S.” exception accounts for nearly half of agencies’ foreign purchases, even though the DOD’s Balance of Payments Program extends Buy American requirements to DOD acquisitions for use overseas. We can therefore assume that the bulk of these purchases are for one of the products exempt from the Balance of Payments Program, notably petroleum products.
- The DOD relies heavily on its reciprocal agreements with foreign countries to purchase foreign products, as these purchases accounted for 37 percent of the total obligation for foreign products. When combined with purchases made pursuant to government-wide trade agreements — the WTO GPA and other free trade agreements, this number rises to 44 percent of total foreign obligations.
- The delineated FAR 25.103 exceptions account for only a small number — 7 percent — of total foreign purchases, perhaps because agencies may be more likely to take advantage of more clear-cut exceptions — such as the “qualifying country” or “use outside the U.S.” exclusions — first, and the data does not capture whether additional exceptions would also apply.
- The reciprocal trade agreements statistics can cut both ways. On one hand, the total TAA expense — \$550 million — represents only a small percentage of overall foreign product

purchases, suggesting that trade agreements do not weaken the BAA as much as some may think. On the other hand, the DOD's reciprocal agreements do account for a large percentage of foreign purchases.

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[1] 41 U.S.C. Section 8302(a)(1).

[2] For more on the Buy American Act and related domestic content requirements, see Nibley, Conant and Bakies, The Government Contractor Feature Comment, Real Steps Towards 'Buy American' Compliance — Part I: Unpacking FAR Pt. 25 And The Application Of 'Buy American' Laws, 60 GC ¶ 52.

[3] U.S. Government Accountability Office, Report to the Ranking Member, Subcommittee on the Legislative Branch, Committee on Appropriations, U.S. Senate, Buy American Act: Actions Needed to Improve Exception and Waiver Reporting and Selected Agency Guidance, GAO-19-17 (Dec. 18, 2018) (hereinafter, "Report").

[4] The BAA does not apply to purchases below the micro-purchase threshold, which is currently \$10,000 for both DOD and civilian agencies — though the threshold was only \$3,500 during the time period reviewed by the GAO. The \$7.8 billion in foreign end product obligations includes approximately \$16 million in awards below the micro-purchase threshold.

[5] 41 U.S.C. Section 8302(a)(2)(A); FAR 25.100(b).

[6] Defense Federal Acquisition Regulation Supplement Section 225.7501.

[7] DFARS Section 225.7501(a)(2)(ii).

[8] Report at 13.

[9] DFARS Section 225.872-1.

[10] The 27 Qualifying Countries as of the time of this publication are: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Israel, Italy, Japan, Latvia, Luxembourg, the Netherlands, Norway, Poland, Portugal, Slovenia, Spain, Sweden, Switzerland, Turkey and the United Kingdom. DFARS Section 225.872-1.

[11] The FAR notes the "use outside the U.S." and Trade Agreements Act exceptions at the outset of FAR Part 25 under FAR 25.001—General.

[12] For more on the Trade Agreements Act, see Nibley, Conant and Bakies, The Government Contractor Feature Comment, Real Steps Towards 'Buy American' Compliance—Part II: Demystifying BAA and TAA Requirements, 60 GC ¶ 97.