

What Senate Democrats Added To 'Buy American' Efforts

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September 29, 2017, 11:13 AM EDT

On Sept. 12, 2017, Sens. Chuck Schumer, D-N.Y., Debbie Stabenow, D-Mich., Bob Casey, D-Pa., and Tammy Baldwin, D-Wis., jointly published an article[1] about “strengthen[ing]” the U.S. government’s “Buy American policies.” While these senators acknowledged President Donald Trump’s recent efforts to “re-examine the use of ... Buy American waivers”[2], they also expressed concern that these efforts would “not fundamentally change ... Buy American policies.”

As discussed in their article, Senate Democrats proposed various amendments to the fiscal year 2018 National Defense Authorization Act “to protect and strengthen ... Buy American policies in taxpayer-funded defense contracts.” Although most of these proposed amendments were not incorporated into the version of the NDAA passed by the Senate on Sept. 18, 2017, contractors should take note that key players on both sides of the aisle have “Buy American” reform in their crosshairs, and legislative initiatives will continue to develop.

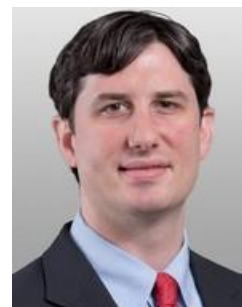
Proposed Changes to “Buy American” Policies and Requirements

In their article, the senators proposed to strengthen Buy American policies by: “1) eliminating the current NDAA provisions that would weaken [B]uy American laws by eliminating Buy American provisions for a number of products, 2) rolling back the ‘overseas exemption’ to the Buy American Act [41 U.S.C. §§ 8301 —8305] and 3) increasing transparency by mandating up-to-date reporting on the use of Buy American waivers for specific products.” The term “Buy American” as used by the administration and the senators comprises a wide variety of domestic preference rules. It includes, but is not limited to, the Buy American Act.

Notable proposed amendments to the Senate version of the NDAA included:

SA 329

Sen. Baldwin — along with Sens. Jack Reed, D-R.I., Tim Kaine, D-Va., and Elizabeth Warren, D-Mass. — sponsored SA 329, the “Supporting America’s Defense Workers Act.” That amendment aimed to remove a provision in the Senate bill



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that sunsets a requirement to procure certain defense items from within the National Technology and Industrial Base (“NTIB”), meaning the United States, Canada, the United Kingdom, and Australia. In effect, SA 329 would have continued the current NTIB sourcing requirement. It was reportedly one of the most contentious points of disagreement among Senate negotiators.[3]

SA 988 and SA 827

In their article, the senators contended that the so-called “overseas exemption” has provided “the Department of Defense (DOD) the ability to waive Buy American rules simply because the item being purchased is intended for use overseas — this made up 65% of the exemptions DOD issued in the last year.” To curtail this apparent condition, the senators proposed SA 988 and SA 827.

SA 988 (which Sen. Stabenow co-sponsored with Sens. Baldwin and Chris Murphy, D-Conn.) proposed to limit the “overseas exemption” in 41 U.S.C. § 8302(a)(2)(A) to only those end products acquired by the government “for use outside the United States needed on an urgent basis or for national security reasons (as determined by the head of a Federal agency).” This language echoed the goals of S.2167, the 21st Century Buy American Act, a bill Sen. Murphy introduced in the previous Congress. That proposed legislation was geared, in part, toward limiting the “overseas exemption.”

SA 827 (which Sen. Stabenow co-sponsored with Sen. Baldwin) proposed that “[f]or any item (excluding petroleum) to be used outside the United States that is not to be used on an urgent basis and is not subject to [the Buy American Act], the Secretary of Defense shall direct contracting personnel to identify and give consideration to domestically sourced and Buy American compliant items before soliciting offers for items that are not compliant with the Buy American Act.”

SA 698 and SA 739

Sen. Murphy proposed SA 698 and SA 739 to amend the Buy American Act by levying additional reporting requirements for waivers.

SA 698 would have amended the Buy American Act by requiring the head of each federal agency to submit a report that would include “an itemized list of all waivers granted with respect to the articles, materials, or supplies under this chapter, including an itemized list of all articles, materials, and supplies acquired through such waivers.”

SA 739 would have amended the Buy American Act by requiring the head of each federal agency to submit a report that identifies “an itemized list of all articles, materials, and supplies acquired through waivers pursuant to [41 U.S.C. § 8302(a)(2)(B)],” which is commonly known as the nonavailability exception. (Section 8302(a)(2)(B) of the Buy American Act provides an exception for “articles, materials, or supplies” that are “not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and are not of a satisfactory quality.” The Federal Acquisition Regulation and Defense Federal Acquisition Regulation Supplement discuss the process for nonavailability determinations.)

SA 1014

Sen. Stabenow — along with Sen. Baldwin and centrist Republican Sen. Susan Collins, R-Maine — proposed SA 1014 which would “require the Government Accountability Office to evaluate Buy American training policies for the Defense acquisition workforce.” The report would include a “summary

and assessment of mandated training courses for Department of Defense acquisition personnel responsible for procuring items that are subject to the Berry Amendment and Buy American Act” and provide “[o]ptions for alternative training models for contracting personnel on Buy American and Berry Amendment requirements.”

Disposition of the Amendments

The version of the NDAA passed by the Senate on Sept. 18, 2017, included only a fraction of the hundreds of amendments proposed. Ultimately, SAs 329, 698, 739, 827 and 988 were left out of the bill. Sen. Baldwin noted in a press release that she “strongly object[ed] to the bill’s elimination of critical Buy American standards. I fought against this misguided policy with my pro-Buy American amendment that was also supported by the Trump Administration.”[4] Notwithstanding, Sen. Stabenow still was pleased that SA 1014 was incorporated into the version passed by the Senate.[5]

Key Takeaways

Certain Senate Democrats Appear to be Aligning With the Trump Administration

It is clear that certain Senate Democrats want to strengthen “Buy American” policies and requirements, and they likely will continue to focus their efforts on “Buy American” reform. It is also quite notable that these same Senate Democrats essentially are aligned with the Trump administration on these matters.

Understanding the “Overseas Exemption”

Although there has been much focus on the so-called “overseas exemption,” it does not appear that all involved understand the contours of this exemption.

First, it is important to recognize that Congress established the “overseas exemption.” Specifically, 41 U.S.C. § 8302(a)(2)(A) plainly states that the domestic preferences in the Buy American Act are inapplicable to purchases by the government of “articles, materials, or supplies for use outside the United States.” Unlike other waivers/exceptions to the Buy American Act, the “overseas exemption” is not discretionary: the end products being procured are either for use inside or outside the United States. In other words, the statement in the senators’ article that the DOD has “the ability to waive Buy American rules simply because the item being purchased is intended for use overseas” is somewhat misleading.

Second, the DOD actually has limited Congress’ broad “overseas exemption” through the DOD’s Balance of Payments Program (DFARS subpart 225.75). This program requires the DOD to acquire domestic end products for use outside the United States as a means to address balance of payments issues, although it does provide for certain exceptions or waivers. Although the senators’ proposed legislation would have brought purchases of end products for use outside the United States — other than those needed on an urgent basis or for national security reasons or petroleum generally — within the ambit of the Buy American Act’s domestic preference regime, it is unclear how this proposed legislation would be reconciled with DOD’s Balance of Payments Program. To that end, it also is unclear if the senators’ reference to “65% of the exemptions DOD issued in the last year” related to exemptions under the Balance of Payments Program or the “overseas exemption” generally.

Further Scrutiny and Legislative/Regulatory Reform Efforts Still on the Horizon

Although the Senate Democrats failed to resolve their apparent concerns with the current domestic preference regimes applicable to federal government contracts in this version of the FY 2018 NDAA, this undoubtedly is not the end. Pursuant to the “Buy American” executive order, by November 2017, Commerce Secretary Wilbur Ross (in consultation with Secretary of State Rex Tillerson, OMB Director Mick Mulvaney and U.S. Trade Representative Robert Lighthizer) must submit a report to President Trump that provides “specific recommendations to strengthen implementation of Buy American Laws, including domestic procurement preference policies and programs.” This report likely will spark further scrutiny of Buy American compliance and result in recommendations for legislative or regulatory reform. Accordingly, contractors selling end products to the government, along with businesses in their supply chains, should continue to pay close attention to developments in this area.

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[1] “A Better Deal: Taxpayer Dollars Should be Used to Support & Create American Jobs, Not Ship Them Overseas,” available at <https://medium.com/@SenateDems/a-better-deal-taxpayer-dollars-should-be-used-to-support-create-american-jobs-not-ship-them-f53748ebec3c>.

[2] See Justin Ganderson, Frederic Levy, E. Sanderson Hoe & Scott Freling, “4 Key Takeaways From The ‘Buy American’ Executive Order,” Law360 available at <https://www.law360.com/articles/914680/4-takeaways-from-the-buy-american-executive-order>.

[3] See Jordain Carney, “This Week: Senate Wrapping Up Defense Bill After Amendment Fight,” The Hill (Sept. 18, 2017) available at <http://thehill.com/blogs/floor-action/scheduling/350964-this-week-senate-wrapping-up-defense-bill-after-amendment-fight>.

[4] See “U.S. Senator Tammy Baldwin Votes For National Defense Authorization Act” (Sept. 18, 2017) available at <https://www.baldwin.senate.gov/press-releases/ndaa>.

[5] See “Stabenow Statement on Senate Passage of National Defense Authorization Act” (Sept. 19, 2017) available at <https://www.stabenow.senate.gov/news/stabenow-statement-on-senate-passage-of-national-defense-authorization-act>.
