

5 Takeaways From Bipartisan BuyAmerican.gov Bill

By **Justin Ganderson, Sandy Hoe and Jeff Bozman** (January 25, 2018, 12:59 PM EST)

On Jan. 9, 2018, Sen. Chris Murphy, D-Ct., proudly announced via Twitter that there now is “bipartisan support for strengthening our Buy American laws” and that he is “excited to have the Trump admin[istration] and partners like [Sens. Rob Portman, R-Ohio, Lindsey Graham, R-S.C., and Sherrod Brown, D-Ohio] working together to get this done.”[1] That same day, these senators reached across the aisle to sponsor the BuyAmerican.gov Act of 2018 (S.2284) to “strengthen Buy American requirements.”[2]

This proposed legislation may be the most significant “Buy American” development since President Donald Trump issued his April 2017 “Buy American” executive order (E.O. 13788), which set forth a policy and action plan to “maximize ... the use of goods, products and materials produced in the United States” through federal procurements and federal financial assistance awards to “support the American manufacturing and defense industrial bases.”[3] At its heart, the bill would formally recognize President Trump’s “Buy American” policy, require certain reporting and assessments, and limit the use of waivers/exceptions. And even if the bill ultimately is not signed into law, this bipartisan effort suggests that some form of “Buy American” action looms on the horizon.

Key Components of the Proposed BuyAmerican.gov Act of 2018

Borrowing heavily from President Trump’s “Buy American” executive order, the bipartisan BuyAmerican.gov Act of 2018 aims to “strengthen Buy American requirements” in any domestic preference law, regulation, rule or executive order relating to federal contracts or grants, including: the Buy American Act (41 U.S.C. §§ 8301-8305), the Berry Amendment (10 U.S.C. § 2533a), the statute regarding restrictions on specialty metals/strategic materials (10 U.S.C. § 2533b), the Federal Transit Administration’s Buy America provision commonly known as the Buy America Act (49 U.S.C. § 5323(j)), and the Kissell Amendment (6 U.S.C. § 453b).

The bill focuses on three major action areas:

1. Formal Recognition of President Trump’s “Buy American” Policy (Section 3)



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Section 3 of the bill would codify key policy components of the “Buy American” executive order — namely, that:

- “every executive agency should maximize ... the use of goods, products, and materials produced in the United States” under federal procurements and federal financial assistance awards; and
- “every executive agency should scrupulously monitor, enforce, and comply with Buy American Laws, to the extent they apply, and minimize the use of waivers.”

Section 8 of the bill would recognize, however, that this policy would need to “be applied in a manner consistent with United States obligations under international agreements,” e.g., free trade agreements and the World Trade Organization Agreement on Government Procurement as covered under the Trade Agreements Act (19 U.S.C. §§ 2501-2581).

2. “Buy American” Reports and Assessments (Sections 4 and 5)

Sections 4 and 5 of the bill would require the executive branch to issue a series of reports regarding “Buy American compliance efforts” and “the impact of free trade agreements ... on the operation of Buy American Laws”:

Governmentwide “Buy American” Report

The commerce secretary would “submit to Congress and the President a report on the implementation of, and compliance with, Buy American laws.” This report would include: (1) information about each agency’s “monitoring of, enforcement of, implementation of, and compliance with Buy American Laws,” (2) information about and related to any waivers/exceptions used by each agency, and (3) “recommendations for policies” to “ensure that, to the extent permitted by law, Federal financial assistance awards and Federal contracts maximize the use of goods, products, and materials mined, produced, and manufactured in the United States, including manufactured products, components of manufactured products, and materials such as steel, iron, aluminum, and cement and services.”

This report must be submitted within 180 days after the bill is enacted and annually for two years thereafter.

Agency-Level “Buy American” Reports

Each agency would submit a “Buy American” report to the commerce secretary and the Office of Management and Budget director. The agency-level and governmentwide “Buy American” reports would cover the same topics.

These reports must be submitted within 180 days after the bill is signed and annually for two years thereafter.

“Buy American” Waiver Assessment and Policy Guidance

The commerce secretary and the OMB director would issue guidance to agencies about “how to make the required waiver assessments and develop the policies” discussed above.

The guidance must be submitted within 60 days after the bill is signed.

Free Trade Agreement Assessment

The commerce secretary and U.S. Trade Representative would “assess the impacts of all United States free trade agreements and the World Trade Organization Agreement on Government Procurement on the operation of Buy American Laws, including their impacts on the implementation of domestic procurement preferences.”

This assessment must be made within 150 days after passage of the legislation.

These reporting requirements essentially are the same requirements found in Section 3 of the administration’s “Buy American” executive order.

3. Limiting the Use of “Buy American” Waivers/Exceptions and Increasing Transparency (Sections 6 and 7)

Borrowing from Section 4 of the “Buy American” executive order, Section 6 of the bill provides that “public interest waivers from Buy American Laws shall be construed to ensure the maximum utilization of goods, products, and materials produced in the United States.” This section of the bill also would restrict public interest waiver authority to the “head of the agency with the authority over the Federal financial assistance award or Federal procurement under consideration,” and would require waiver determinations to consider whether the “cost advantage” of the foreign product is the result of dumping, the use of subsidized items, or the use of items that enter the U.S. in violation of U.S. customs law.

Section 7 of the bill would implement certain requirements geared towards increasing “transparency” regarding the use of “Buy American” waivers/exceptions:

Establishment of BuyAmerica.gov

Within one year after the bill is enacted, the General Services Administration would be required to establish a public website (BuyAmerica.gov) that would provide information about “all waivers of and exceptions to Buy American laws that have been requested, are under consideration, or have been granted by executive agencies and be designed to enable manufacturers and other interested parties to easily identify waivers.”

“Waiver Transparency and Streamlining”

The bill prescribes specific requirements regarding the types of information needed to “adequately document and justify the statutory basis cited for the requested waiver,” including “a certification that the procurement official or assistance recipient made a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and communications with the prime contractor.”

Additionally, no agency would be permitted to approve a “Buy American” waiver unless the waiver request (and certain information regarding the request) was made publicly available and an opportunity for public comment was provided within certain time periods.

Sen. Murphy previously introduced these features in the 2017 version of his proposed 21st Century Buy

American Act (S.2196).[4]

Key Takeaways

1. Does the bill seek to reduce the number of “Buy American” waivers/exceptions that are granted?

It is apparent from the plain language in Sections 4 and 5 of the bill that the sponsors desire to reduce the number of “Buy American” waivers/exceptions granted by agencies. Section 4 of the bill states that “public interest waivers” should be used “judiciously.” And although Section 5 frames the discussion about waivers/exceptions in terms of “transparency,” it still is premised on a stated policy to “minimize the use of waivers.”

Sen. Murphy’s Jan. 9, 2018, press release[5] about the legislation confirms our understanding and interpretation. The press release noted generally that “[t]here is currently no government-wide system tracking the use and abuse of these waivers by federal agencies.” Sen. Graham added that “bring[ing] transparency to the process” should “bring a much-needed system of checks-and-balances to the current waiver process,” and that “manufacturers ... across the United States” should be “prioritized when it comes to the bidding and awarding of contracts.” In this context, terms like “checks-and-balances,” “transparency,” and “prioritized” appear to be code for increasing scrutiny and reducing the number of waivers/exceptions.

2. Will U.S. manufacturers actually benefit from increased scrutiny over “Buy American” exceptions/waivers?

Sen. Murphy’s press release about the bill stated that the new BuyAmerica.gov website would “allow manufacturers and other interested parties to identify contract opportunities and hold federal agencies accountable for abusing Buy American waivers.” In the press release, Sen. Portman added that “[b]y improving transparency, the BuyAmerican.gov Act will encourage federal agencies to support American workers and American jobs by faithfully complying with Buy American law.”

We agree that increased scrutiny over “Buy American” waivers likely will present some new opportunities for contractors. For example, an agency may shy away from utilizing a waiver to obtain a foreign item, and instead seek out domestic items. At the same time, a contractor may gain important insights from the BuyAmerica.gov website that may allow it to challenge an agency’s use of a waiver, or to identify opportunities to manufacture items that currently are not available domestically.

However, the number of opportunities that actually may arise for U.S. manufacturers as a result of this increased scrutiny remains to be seen. For example, according to the fiscal year 2016[6] and FY 2015[7] U.S. Department of Defense reports submitted to Congress regarding purchases from foreign entities, the DOD issued only 34 “public interest exceptions” (in the amount of \$570,467) in FY 2016 and 31 “public interest exceptions” (in the amount of \$623,165) in FY 2015. Thus, at least for the DOD, there does not appear to be a significant number of “public interest exceptions” being granted.

By contrast, the DOD “authorized waivers pursuant to MOUs, the TAA or other international agreements” that led to “20,126 purchases totaling approximately \$1.3 billion” in FY 2016 and “9,686 purchases totaling approximately \$653.4 million” in FY 2015. Because Section 8 of the bill indicates that the bill “shall be applied in a manner consistent with United States obligations under international agreements,” it is unlikely that the Trade Agreements Act waiver (which permits agencies to procure items from “designated countries” subject to a free trade agreement or the WTO Agreement on

Government Procurement when a procurement is valued in excess of certain specified dollar thresholds) and the qualifying country waiver (which permits the DOD to procure end products from those countries that have a reciprocal defense procurement memorandum of understanding with the United States) would be significantly affected unless changes are made to those international agreements.

3. Will procurements be streamlined under the bill?

In the press release about the legislation, Sen. Graham indicated that the proposed requirements implemented through BuyAmerican.gov are intended to “streamline procurement.” It is possible that granting fewer “Buy American” waivers/exceptions and requiring information to be reported in a more uniformed fashion could help “streamline” some procurements. On the other hand, the proposed notice-and-comment procedures and cumbersome requirements for certifications of contracting officials could further complicate an already byzantine system. Such potential effects would run counter to the goal of bringing efficiency to our procurement system. The Section 809 panel is the most prominent example of initiatives to implement those efficiency goals.[8]

4. What comes first: support for the bill or the commerce secretary’s overdue “Buy American” report?

This bill should appeal to President Trump. Not only would it help the president deliver on his “Buy American” campaign promise, but as the co-sponsors of the bill point out in their press release, the bill essentially “codifies President Trump’s Buy American Executive Order.”

Nevertheless, it is possible that this bill may not receive much support until Commerce Secretary Wilbur Ross issues his now overdue “Buy American” report, which was required by the “Buy American” executive order and which must include “specific recommendations to strengthen implementation of Buy American Laws.” The administration may be cool to legislative action until its officials give their own suggestions about how “Buy American” laws can be strengthened — some of which likely would not require legislative action. At the same time, the similarities between the executive order and the bill suggest that the bill may be an attempt to push the administration to issue that report soon.

5. Is “Buy American” action likely?

In the month before this bipartisan bill was introduced in the Senate, Sen. Tammy Baldwin, D-Wis., submitted a letter to President Trump urging bipartisan “Buy American” action and inquiring about the status of Secretary Ross’ overdue “Buy American” report.[9] Additionally, a group of seven House Democrats on the Committee on Transportation and Infrastructure sent Secretary Ross and OMB Director Mick Mulvaney a letter expressing “support for this Administration’s stated intent to bolster U.S. manufacturing,” and “welcom[ing] the opportunity to explore provisions to strengthen Buy America and Buy American laws” as “Congress prepares to work with the Administration on an infrastructure package.” [10] They also asked about the status of Secretary Ross’ “Buy American” report.

With all this recent activity, it seems that some form of “Buy American” action is on the horizon — whether it be through this bipartisan bill, other legislation or some form of executive action. Accordingly, contractors should closely monitor these developments, as any change to the current “Buy American” regime could have significant consequences.

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[1] <https://twitter.com/ChrisMurphyCT/status/950841245168996352>.

[2] <https://www.congress.gov/bill/115th-congress/senate-bill/2284>.

[3] See “4 Takeaways From The ‘Buy American’ Executive Order,” Law360 (Apr. 19, 2007) for an analysis regarding the “Buy American” Executive Order, available at <https://www.law360.com/articles/914680/4-takeaways-from-the-buy-american-executive-order>.

[4] <https://www.congress.gov/bill/115th-congress/senate-bill/2196/>.

[5] The Senate sponsors issued substantially similar press releases about the bill. See, e.g., Senator Murphy’s Press Release at <https://www.murphy.senate.gov/newsroom/press-releases/murphy-portman-graham-brown-introduce-buy-american-bill-to-improve-transparency-and-support-manufacturing-jobs>.

[6] https://www.acq.osd.mil/dpap/cpic/cp/docs/FY_16_Foreign_Entities_RTC_USA001870-17_signed_June_29_2017.pdf.

[7] https://www.acq.osd.mil/dpap/cpic/cp/docs/RTC_on_Foreign_Entities_for_FY_2015_signed_June_20_2016.pdf.

[8] <https://section809panel.org/>.

[9] https://www.baldwin.senate.gov/imo/media/doc/Baldwin_Signed_Letter_to_Trump_on_Buy_American_EO_12.12.17.pdf.

[10] <https://democrats-transportation.house.gov/news/press-releases/top-transportation-democrats-push-stronger-buy-america-requirements-request-copy>.