Are Stars Aligning for a Major Shakeup of the Buy American/ TAA Domestic Preference Regime?

A recent Federal Circuit decision and the current administration's threatened GPA withdrawal may seriously impact U.S. domestic sourcing policies.

BY JEFFREY A. BELKIN, MICHAEL J. MORTORANO, and MJ KIM

Domestic sourcing policies may soon see a major shakeup after a one-two punch from the Trump administration and U.S. Court of Appeals for the Federal Circuit in February.

The WTO GPA

First, government officials circulated plans for the Trump administration to issue an Executive Order threatening the United States' withdrawal from the World Trade Organization's (WTO) Government Procurement Agreement (GPA) unless undisclosed changes favored by the administration are made. The WTO GPA provides the baseline of international participation in government procurements around the globe, with signatories earning equal status to domestic manufacturing in procurements by participating central governments.

The GPA is a plurilateral agreement to open government procurement markets among its parties. The GPA currently has 20 parties covering 48 WTO members, 10 WTO members in the process of acceding, and 34 WTO members/observers observing the GPA. Parties to the GPA include economies large (such as the European Union and United States) and small (such as Armenia and Moldova), from the Americas (Aruba) to the Middle East (Israel) to East Asia (Singapore).

Parties to the GPA have opened procurements worth an estimated $1.7 trillion annually to international suppliers of goods, services, and construction work. Through the GPA, domestic suppliers are ensured access to foreign procurement markets, and competition and transparency are promoted in domestic procurement markets. With government procurements accounting for 10–15% of a country's economy and additional countries moving to join the GPA, the GPA continues to play a critical role in the procurement marketplace.

Withdrawing from the GPA would seriously impact the U.S. procurement market, to say the least. In a 2017–2019 study of foreign sourcing in government procurements,[1] the U.S. Government Accountability Office (GAO) found that the United States awarded $12.1 billion in contracts to foreign firms ($16.5 billion for foreign goods and services) in fiscal year 2015, with 80% coming from U.S. Department of Defense contracts. Should the U.S. withdraw from the GPA, foreign firms contracting with the United States would lose their GPA access to the U.S. procurement market and instead be left to rely on limited bilateral deals and USMCA-like treaties.

Likewise, U.S. firms contracting with foreign countries would lose their GPA access to the international procurement marketplace. That said, foreign contracts do represent a minority share of the United States' overall procurement awards. By threatening to withdraw from the GPA, the Trump administration may be using the GPA as another opportunity to gain an upper hand in its continued pursuit of re-forming the U.S. approach to international trade.

The *Acetris Health* Decision

Secondly, the U.S. Court of Appeals for the Federal Circuit issued an opinion that may have a major impact on U.S. government procurements, opening products delivered to the U.S. government to new competition – *Acetris Health LLC v. United States*.[2]

As government purchasers and customers are likely aware, many U.S. procurements require goods to comply with either the Buy American statute[3] or the Trade Agreements Act of 1979 (TAA).[4] These statutes limit the U.S. government's ability to purchase products with a foreign origin and, in turn, sellers' abilities to procure and resell certain foreign products to U.S. government end users. Generally, procurements subject to Buy American requirements require manufactured products to have been substantially all "manufactured" in the United States using a majority of U.S. "components," with certain exceptions – such as for commercially available off-the-shelf[5] products. Procurements subject to the TAA generally require goods that are manufactured in, or "substantially transformed" in, designated countries (including those signatories to the WTO GPA).

A provision seen in many U.S. government procurements is the "Trade Agreements" clause,[6] which requires a contractor to deliver only "U.S.-made or designated country end products." In its *Acetris Health* decision, the Federal Circuit clarified this requirement, stating:

> [A] product need not be wholly manufactured or substantially transformed in the United States to be a "U.S.-made end product." Instead, such products may be – as Acetris' products are – "manufactured" in the United States from foreign-made components.[7]

In other words, the Federal Circuit

The Buy American statute and TAA limit the U.S. government's ability to purchase products with a foreign origin and, in turn, sellers' abilities to procure and resell certain foreign products to U.S. government end users.

held that products such as Acetris Health's pharmaceutical pills, composed of active pharmaceutical ingredients from India, can be "U.S.-made end products" and "manufactured" in the United States, even if they are not "substantially transformed" in the United States.

The *Acetris Health* decision could represent a major shakeup in the world of Buy American/TAA procurements because a significant amount of qualified U.S. "manufacturing" may look more like packaging or assembly of largely foreign materials or components. In larger federal procurements, *Acetris Health* might effectively eliminate the TAA's substantial transformation test or the Buy American statute's "components" test in favor of a streamlined *Acetris Health* manufacturing test.

Conclusion

The effect of *Acetris Health* may be even greater if the Trump administration makes good on its threat to withdraw from the WTO GPA. Far fewer products manufactured overseas may be eligible for TAA coverage because fewer "designated countries" appear in the TAA list, serving in the short term at least as a boost to domestic manufacturing. Further, the ruling in *Acetris Health* may have a multiplying effect, encouraging suppliers to the U.S. government to alter their supply chains to ensure that final "manufacturing" occurs in the United States, while ignoring previously challenging regulations that limited the component origin of those very products. In combination, domestic production for domestic U.S. government consumption may increase dramatically as a result of these two developments.

Let us hope that decreases in U.S. manufacturing exports to foreign governments, previously covered by the WTO GPA, do not drown out those potential gains. CM

Jeffrey A. Belkin
- Partner, Alston & Bird
- Leader of Alston & Bird's Government Contracts Group

Michael J. Mortorano
- Senior associate, Alston & Bird

MJ Kim
- Associate, Alston & Bird

ENDNOTES

1 U.S. Government Accountability Office (GAO), GAO-19-414, "International Trade: Foreign Sourcing in Government Procurement" (Washington, DC: GAO, May 2019), *available at* https://www.gao.gov/assets/700/699393.pdf.
2 *Acetris Health LLC v. United States*, No. 18-2399 (Fed. Cir. 2020). (Hereinafter "*Acetris Health*.")
3 41 USC Chapter 83 (formerly known as the Buy American Act (BAA)).
4 *Pub. L.* 96-39, codified at 19 USC Chapter 13.
5 The *Federal Acquisition Regulation* (*FAR*) defines a *commercially available off-the-shelf item,* in relevant part, as "any item of supply (including construction material) that is (i) a commercial item (as defined in [FAR 2.101]); (ii) sold in substantial quantities in the commercial marketplace; and (iii) offered to the government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace...." (FAR 2.101.)
6 FAR 52.225-5, "Trade Agreements (Oct 2019)."
7 *Acetris Health, see* note 2.