



# **BIDEN'S BUY AMERICAN PLAN: AN OVERVIEW OF U.S. GOVERNMENT PROCUREMENT**

**EDC Economics**

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## EXECUTIVE SUMMARY

- U.S. President Joe Biden signed the executive order *Ensuring the Future Is Made in All of America by All of America's Workers* in January 2021 to strengthen Buy American domestic sourcing requirements for U.S. government goods procurement and created a “Made in America” office within the Office of Management and Budget (OMB).
- In 2015, U.S. government procurement at all levels is estimated to be US\$1.2 trillion. Canada represents US\$15 billion (or 1.3%) of total government procurement awarded. Federal government procurement is estimated to be US\$291 billion, which Canada accounts for US\$624 million (0.2%).
- This isn't new. Buy American laws are a long-standing issue. Based on our analysis, this impacts about 3,000 contracts with Canadian companies. This represents a modest share of Canada's overall trade—a maximum 4% of Canadian exports to the U.S., and less than 3% of Canada's overall export basket could be at risk, if no exceptions were granted for any Canadian suppliers. Sectors mostly notably at risk are steel and iron producers, with building material producers (i.e., drywall, lumber glass) also affected.
- Since the executive order, the passage of the infrastructure bill required key construction materials and manufactured goods be produced in the United States. In October 2022, the Federal Acquisition Regulatory Council (FAC) made a decision to increase the domestic content requirements for government procurement to 60%, rising to 75% beginning in 2029.
- Canada has a unique strategic position to take advantage of being a reliable continental supplier of goods and services. Preferential procurement opportunities for Canada exist under commitments in the World Trade Organization's Government Procurement Agreement (GPA).

### U.S. president embeds Buy American policies across federal agencies

U.S. President Joe Biden signed an executive order on Jan. 25, 2021, to support the economic recovery in the United States with his “Build Back Better” plan. *Ensuring the Future Is Made in All of America by All of America's Workers*<sup>1</sup> instructs U.S. government agencies to raise the level of American-made content in products they purchase and curb exemptions to existing rules. The executive order aimed to centralize the exceptions process by certain departments and create a Made in America office within the OMB. This new office, now set up with a director, is tasked with ensuring the applicable laws are followed and exemption waivers are only issued in the appropriate circumstances. They'll publish these waiver applications online to give U.S. suppliers a chance to bid. The order also changes articles in the Federal Acquisition Regulations (FAR), which guide the implementation of the relevant Buy American laws.

These proposed changes to the Foreign Acquisition Regulations (FAR) included:

- Replacing the “component test” in Part 25 of the FAR used to identify domestic end products (an item that’s manufactured in the U.S. from components whose cost is more than 50% domestic) and domestic construction materials, with a test under which domestic content is measured by the value added to the product through U.S.-based production or U.S. job-supporting economic activity;
- Increasing the threshold for domestic content requirements for end products and construction materials;
- Increasing the price preferences for domestic end products and domestic construction materials; and
- Updating the list of non-available articles. Before the FAR Council proposes any amendment to the FAR to update the list of domestically non-available articles, the OMB director will review the amendment in consultation with the secretary of commerce and the Made in America director.

In addition to these measures, the Made in America office was tasked to work with the Hollings Manufacturing Extension Partnership (MEP). This public-private partnership aims to promote the sourcing of small-medium enterprises (SMEs) and other diverse businesses. President Biden also reiterated his support for the *Jones Act*, which requires goods shipped within the U.S. to be transported on American vessels.

The Made in America office is required to submit a biannual report on the use of Made in America laws, outlining compliance with implemented laws and the exceptions made.

### **Increased domestic content thresholds now in effect**

The FAC made its final rule in October 2022 to raise the domestic content requirements for federal contracts from 55% to 60%. It’ll be further increased to 65% in 2024 and will reach 75% starting in 2029.<sup>2</sup> This action moves U.S. government procurement priorities closer to home. In addition, the *Build America, Buy America Act* within the *Infrastructure Investment and Jobs Act*, requires all iron, steel, manufactured products, and construction materials used in infrastructure projects are produced in the United States. Each move to a higher threshold has a grace period and the eventual increase to 75% comes with a one-year fallback clause for agencies to adjust. Section 25.105 of the FAR also sets out list of critical items and components in the FAR, along with their associated enhanced price preference(s). As stated in the regulations, “*Critical component* means a component that is mined, produced, or manufactured in the United States and deemed critical to the U.S. supply chain.” It’s clear that the U.S. is strengthening their domestic industry preferences for procurement, but exceptions remain for claims of “nonavailability” or “public interest.”

### **How Canadian companies could benefit**

Canadian companies may fare better with the centralized exception and waiver process because they’ll only need to make their case once with federal authorities. Under current arrangements, individual procurement officers make decisions on exceptions and waivers. The centralized exception and waiver process may eliminate the risk of individual decision-making on multiple transactions.



As Canada and the U.S. have defence-production sharing agreements, which allow Canadian companies to bypass Buy American laws in certain circumstances, there's a precedent for Canadian firms to benefit from systematic exceptions and waivers.<sup>3</sup>

Given that supply chains for both countries rely heavily on each other, there should be some advantage to Canadian companies. There are products and materials that the U.S. government won't be able to domestically source. For instance, the sourcing of aluminum from Canada will remain significant as the U.S. lacks domestic smelting capacity, which would be costly to restore. In 2009, state and municipal governments—often excluded from multilateral agreements—had difficulties finding suitable domestic suppliers for water infrastructure projects, offering other opportunities where Canadian exporters may be able to benefit from exceptions and waivers.<sup>4</sup> Other activities offer similar prospects, and these will be better understood in the coming months as infrastructure investment and other government-funded initiatives become more apparent through the budgetary approval process.

Recent legislation, like the *CHIPS and Science Act* and *Inflation Reduction Act*, are aimed at changing the investment playing field, making the U.S. a key market for semiconductor and electric vehicle (EV) manufacturing. Fortunately, Canadian companies are already embedded in these critical supply chains.<sup>5</sup> A major element of the legislation is the tax credit to purchase EVs, for which the qualifying vehicles can include components from Canada. The subsidy requirements stipulate that batteries must include critical minerals extracted or processed in a country with which the U.S. has a free trade agreement (FTA) or were recycled from depleted batteries at a facility in North America. Canadian miners for graphite, cobalt and lithium are poised to secure market share from countries, like Argentina and Indonesia.

### **U.S. government procurement**

Procurement at all levels of government is estimated to be about US\$1.2 trillion.<sup>6</sup> The Government Accountability Office (GAO) conducts periodic studies of central U.S. government procurement of foreign-located companies.<sup>7</sup> Due to data limitations, 2015 is the most recent year available to compare across countries. In 2015, the U.S. federal government awarded 511,000 contracts valued at US\$291 billion (Canada accounted for US\$624 million). Sub-national government procurement is estimated to be more than double federal government procurement.<sup>8</sup> Foreign-located companies accounted for US\$104 billion—only 9%—of the total contracts awarded. Canada ranked second-largest (US\$15 billion) in the list of members to the WTO's Government Procurement Agreement (GPA), behind the European Union (EU).

In the context of the Canada-U.S. relationship, Canada exported US\$393 billion in goods and services to the U.S. Canadian procurement activity in the U.S. represents about 4% of the total activity, which could be at risk.<sup>9</sup> The Department of Defense (DOD) and Department of Homeland Security account for the largest shares in government procurement awarded to foreign companies (78% and 10%, respectively). Most of those contracts aren't covered by the GPA.

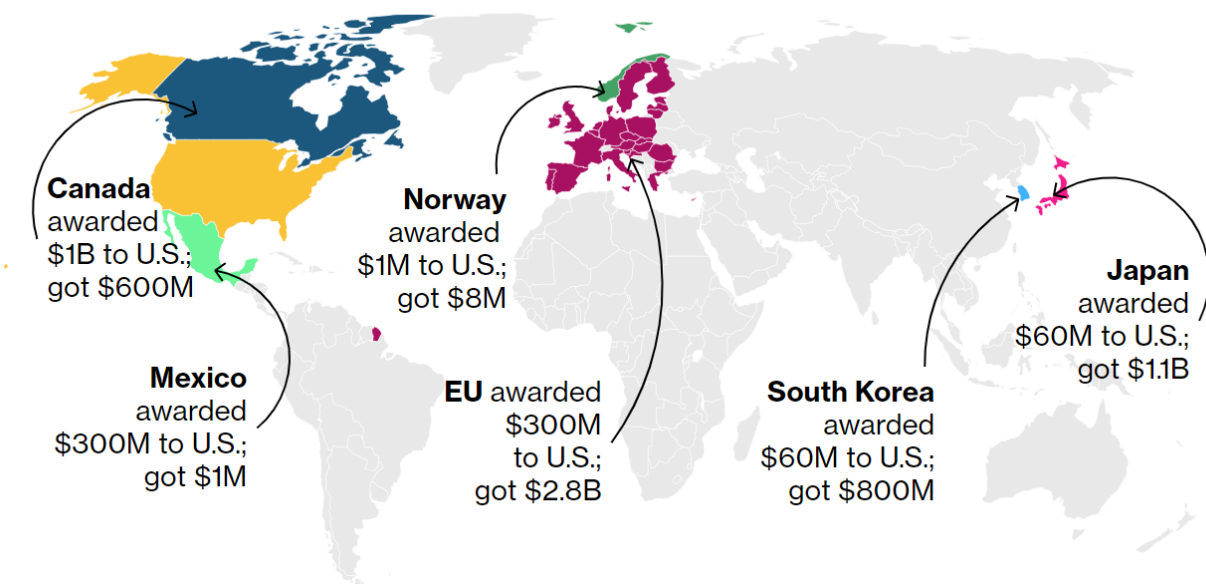
Buy American policies aren't new statutes, although every U.S. president can decide to alter the rules and expand or reduce the enforceability of the existing statutes. The original statute was former president



Herbert Hoover's *Buy American Act of 1933*—implemented to restart the U.S. economy from the Great Depression. After the 2008 Global Financial Crisis, then U.S. president Barack Obama signed the US\$787 billion *American Recovery and Reinvestment Act of 2009*, which required all public works projects funded by the bill to use only U.S.-made goods. Luckily, Canada was able to secure some exceptions. Past U.S. administrations, including that of president Donald Trump, proposed leaving the WTO GPA, raised foreign price preferences to 20%, and strengthened domestic sourcing rules for iron and steel products (at least 95%) and other manufactured goods (at least 55%).<sup>10</sup>

### Procurement contracts awarded to the U.S. and international countries, 2015

■ U.S. ■ Japan ■ South Korea ■ Canada ■ Mexico ■ Norway ■ European Union



**Source:** Bloomberg, GAO Analysis of 2015 U.S. and foreign government procurement data. In U.S. dollars.

**Note:** Central government procurement values.

### How does it work?

The *Buy American Act of 1933* states that agencies must prefer domestic bidders on all supply contracts worth more than US\$10,000 (See Annex 1). Under the act, there's a price penalty applied to foreign competitors. When evaluating bids from international and domestic companies, most agencies will assess a price preference of 6% or 12% (large and small businesses, respectively) against foreign bidders. The largest preference penalty (50%) is applied to DOD contracts. It's worth noting the *Buy American Act* doesn't apply to services.

Exceptions can be made for reasons including non-availability (List 25.104 of the FAR), unreasonable costs, and inconsistent with public interest. Annex 1 lists waivers and exceptions.



## Foreign trade agreement commitments

Where preferential trade agreements cover U.S. government procurement, the *Trade Agreements Act* will apply (Annex 1). Under the previous North American Free Trade Agreement (NAFTA), Canada and the U.S. agreed to certain government procurement commitments in Chapter 10. The Canada-United States-Mexico Agreement (CUSMA), which came into force in July 2020, doesn't include those protections and instead relies on preferential access through the WTO GPA.

The GPA is a US\$1.7-trillion procurement pact, last revised in 2014. Any contracts worth more than US\$182,000 are open to the 19 other members of the GPA, which includes Australia, Canada, the EU, Japan and South Korea, as well as members of other U.S. trade deals. Table 1 outlines the minimum thresholds applicable to preferential procurement. The GPA only includes some government agencies, with defence largely excluded. State and municipal procurement are usually left out of preferential procurement agreements.

**Table 1: Trade agreements with preferential procurement thresholds**

Agreement	Supply contract	Service contract	Construction contract
WTO GPA	\$182,000	\$182,000	\$7,008,000
CUSMA	N/A	N/A	N/A
NAFTA			
Canada	\$25,000	\$83,099	\$10,802,884
Mexico	\$83,099	\$83,099	\$10,802,884

Source: Foreign Acquisition Regulations.

**Table 2: Implications for Canada**

Issue	Risks to Canada	Positive risk mitigants	Negative risk mitigants
<b>Reduced access to local/county/state procurement</b>	Tighter procurement rules and expansive federal funding	Not all funding for local and state projects are funded by the federal government. Certain services like public safety, transportation, and public works are in local responsibility. Federal spending is primarily focussed on defence and critical infrastructure. GPA preferential procurement available.	The federal government is responsible for a significant share of funding to states. President Biden's new legislations are expansive and could account for many local/state projects.
<b>Investment versus trade</b>	Incentives for U.S. imports diminish when U.S. firms can produce comparable goods and services.	Canadian companies may undertake direct investments or joint ventures in the U.S. market. Constructive proposals to work together on joint initiatives of North American concern.	Dispute resolution via CUSMA.
<b>Domestic investment and inward FDI are higher priorities than trade and new trade deals.</b>	Small-scale Canadian firms may not have the resources needed to invest directly in the U.S. market and may be left out of some procurement if they rely on cross-border exports. U.S. focus to be on re-industrialization.	Thanks to CUSMA, a framework is already in place. Capacity of firms to be linked to U.S. supply chains as part of re-industrialization.	
<b>Multilateral framework</b>	Bipartisan globalization concerns in the U.S., partly due to perceived abuses via WTO, lack of coverage in agriculture and services, and general impact of de-industrialization. Canada could be challenged to replace a loss in trade with the U.S. market.	U.S. planning to support consensus candidate at WTO currently supported by Canada and many/most U.S. allies.	
<b>Supply chain management</b>	Tighter procurement may constitute import substitution in some cases.	Canadian Direct Investment Abroad (CDIA), CUSMA framework, constructive proposals to work together on joint initiatives of North	



		American concern (e.g., pharmaceuticals).	
<b>Increase in domestic content requirements for federal procurement contracts.</b>	America's top trading partners and strategic allies have long complained that Buy American measures are protectionist.	CDIA into U.S., similar to how the European Union (EU) operates using tariffs and non-tariff barriers, but allowing the free flow of goods, services and capital within EU markets. Investment within EU markets is treated similarly to domestic investment. This is true in the U.S. market as well. GPA preferential procurement available.	
<b>Use taxpayer money to rebuild the industrial sector and support American jobs, union jobs.</b>	Being shut out of government contracts.	CDIA. GPA preferential procurement available.	If Canada were to introduce similar practices. Reversal on commitments to rare earths, aluminum, and other strategic needs of U.S.
<b>Crackdown on waivers that are routinely allowed for the use of foreign suppliers.</b>	Being shut out of government contracts.	Canada can potentially negotiate waivers where its products are important to the U.S. industrial capacity. Joint ventures and CDIA may also help with negotiations. Waivers are being reviewed and tightened, not eliminated. GPA preferential procurement available and services excluded from Buy American laws.	
<b>Support for the Jones Act, which requires goods shipped within the U.S. to be transported on American vessels.</b>	Mainly a shipping issue that affects European and Asian producers. Limited risk to Canada, as most bilateral trade in goods travels by truck and rail. It remains undetermined if goods from Canada will need to be off-loaded to U.S. carriers at border points.	Supply chains are already integrated, so disruption would be counterproductive for parties on both sides of the border. There's recognition that speed matters in logistics, as does security.	



## Annex 1: Applicability of contracts

Figure 1. Applicability of the Buy American Act	
Application	
Will the good be procured under a contract with an award value above the micro-purchase threshold (\$10,000), but below the <i>Trade Agreements Act</i> (TAA) threshold (generally \$182,000)?	
Compliance test	
<b>Manufactured good</b> Is it “manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States” (41 U.S.C. 8302) <b>AND</b> does the cost of its components mined, produced or manufactured in the United States exceed 50% of the cost of all its components (48 C.F.R. 25.101)?	
<b>Unmanufactured good</b> Is it “mined or produced” in the U.S. (41 U.S.C. 8302)?	
Exclusions	
<ul style="list-style-type: none"> <li>• Nonavailability (quantity and quality)</li> <li>• Resale</li> <li>• Information technology that’s a commercial item</li> </ul>	
Waivers	
<ul style="list-style-type: none"> <li>• Public interest</li> <li>• Unreasonable cost</li> <li>• Commercially available off-the-shelf (COTS) items</li> <li>• “Qualifying countries” (48 C.F.R. 225.872-1)</li> </ul>	
Source: CRS, BAA, and 48 C.F.R. Subpart 25.1	

Figure 2. Applicability of the Trade Agreements Act	
Application	
Will the good or service be procured under a contract with an award value at or above the TAA threshold (generally \$182,000)?	
Compliance test	
<b>Good</b> Is it wholly the growth, product, or manufacture of the U.S. or a designated country? If no, has it been substantially transformed in the United States or a designated country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed (19 U.S.C. 2518)?	
<b>Service</b> Is the firm that’s providing it established in the U.S. or a designated country (48 C.F.R. 25.402)?	
Exclusions	
<ul style="list-style-type: none"> <li>• Acquisitions set aside for small businesses</li> <li>• Acquisitions of arms, ammunition, or war materials, or purchases indispensable for national security or for national defense purposes</li> <li>• Acquisitions of end products for resale</li> <li>• Nonavailability or insufficient availability</li> <li>• Contracts for certain services (e.g., research and development, utility services, dredging, and military support services)</li> </ul>	
Designated countries	
<ul style="list-style-type: none"> <li>• WTO GPA countries</li> <li>• Certain U.S. FTA countries</li> <li>• Least-developed countries (“United Nations List”)</li> <li>• Caribbean Basin countries</li> </ul>	
Source: CRS, TAA, and 48 C.F.R. Subpart 25.4	

Source: U.S. Government Procurement and International Trade, CRS, Jan. 14, 2021.

## RELEVANT LINKS

[North American Free Trade Agreement \(NAFTA\), Chapter 10](#)

[WTO Government Procurement Agreement \(GPA\)](#)

[U.S. Foreign Acquisition Regulations](#)

[Made in America Office](#)

## ENDNOTES

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<sup>1</sup> <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/executive-order-on-ensuring-the-future-is-made-in-all-of-america-by-all-of-americas-workers/>

<sup>2</sup> Federal Register, Volume 88, No. 27 (govinfo.gov)

<sup>3</sup> Ottawa to press Joe Biden on exemption from 'Buy American' rules, The Globe and Mail, Jan. 25, 2021

<sup>4</sup> President Joe Biden signs an Executive Order to Buy American, The Economist, Jan. 26, 2021

<sup>5</sup> <https://financialpost.com/commodities/energy/electric-vehicles/inflation-reduction-act-canada>

<sup>6</sup> Table 3 in *Foreign Sourcing in Government Procurement*, GAO, Report 19-414, May 2019

<sup>7</sup> *Foreign Sourcing in Government Procurement*, GAO, Report 19-414, May 2019

<sup>8</sup> Table 1 in *United States Reported Opening More Opportunities to Foreign Firms Than Other Countries, but Better Data Are Needed*, GAO, Report 17-168, February 2017

<sup>9</sup> Using Statistics Canada Table 36-10-0014-01 and Bank of Canada exchange rate for 2019

<sup>10</sup> President Joe Biden signs an Executive Order to Buy American, The Economist, Jan. 26, 2021

## ABOUT THIS REPORT

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