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"Buy-at-Home" Legislation and Policies Abroad 6 pages

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"Buy-at-Home" Legislation and Policies Abroad

The failure of foreign low bidders to obtain U.S. government contracts or the demands of domestic manufacturers for special advantage when bidding for such contracts, including the demand that bids be closed to foreigners, brings forth strong protests from foreigners and calls to the attention of the American public the issue of "Buy American".^{1/} As of the end of June 1960, the United States was the only country which had legislation clearly labeled as a buy-at-home law. However, this does not mean that foreign countries are necessarily more liberal in permitting foreign bidders to vie for government contracts. While they do not have laws clearly labeled "Buy German," "Buy English," etc., other legislation not so labeled, together with legally required administrative practices, effectively restricts access of foreigners to government contracts in many of the procuring countries.

While there are no reliable statistical data available, there appears to be no evidence that preferential treatment in letting public contracts to local native producers by foreign governments has been an insuperable obstacle to competing American firms. However, balance-of-payments restrictions, varying degrees of inconvertibility of currencies, and the ever-present bias of individual procurement officers in favor of their national products and producers have represented a far more important but unmeasurable barrier.^{2/}

^{1/} The "Buy American" Act of 1933 required, and still requires, Federal Government agencies to favor domestic goods for use in federally financed projects. The Act provides that goods for use in such projects must be of domestic origin unless their cost is deemed unreasonable in the opinion of the head of the procuring agency. In 1934, the Treasury issued a directive setting at 25 per cent the maximum differential by which the cost of the domestic goods may exceed that of competitive foreign goods. Beginning in 1952, the application of such a high differential was somewhat modified in view of the economic advantage to be gained by making certain government purchases abroad under the Mutual Security Program of the United States. In 1954, an executive order established new rules for determining the preference allowed domestic goods, reducing it to between 6 and 10 per cent depending upon whether or not duties were included, but increasing by an additional 6 per cent the preference for domestic suppliers located in depressed or surplus labor areas. Award to domestic suppliers is permitted irrespective of cost if domestic procurement is deemed necessary on the grounds of national security. There are also state and local "Buy American" laws and regulations over which the Federal Government has no authority.

^{2/} It is arguable that American suppliers have not actively sought to win contracts from foreign governments because the magnitude of the contract to be won has not warranted the effort which would be required to obtain the contract. Moreover, the risk that national prejudice might operate to the Americans' disadvantage also may serve as a deterrent.

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In spite of obstructions which American firms face in seeking contracts from foreign governments, American manufacturers of heavy electrical power equipment and heavy machinery usually sell abroad more than ten per cent of their annual production, an appreciable portion of which is sold on foreign government contract.

Austria. Austria has no specific legislation which closes bidding on government contracts to foreign suppliers. However, the method of bidding for public contracts, including invitations for and awards of bids, is specified in Vergabung von Leistungen (Letting of Contracts) Öenorm A 2057, published by the quasi-official Austrian Standardization Association, March 30, 1957. The general rule under which public bids are let is stated in Article 1.34 as follows: "Preferably, only domestic products shall be used and only domestic enterprises shall be employed [on government contracts]." Advertisements for bids on government contract are placed in the official newspaper, Wiener Zeitung, but only Austrian firms are invited to submit bids. This has not been interpreted to mean that foreign bidders may not bid without such invitation.

Canada. There is no "buy at home" law or regulation requiring that domestic suppliers be accorded preferential treatment in contracts for purchases by government agencies, nationalized companies or private companies working on government contracts. However, Canadian Government officials have wide discretionary powers in the letting of contracts, and in actual practice domestic suppliers are in many instances accorded preferential treatment. Moreover, the Government reserves the right on strategic grounds to award to Canadian manufacturers contracts for the manufacture of certain types of defense equipment. In the case of much of the military equipment, however, Canada has reversed its traditional policy of using United Kingdom materiel and has been rapidly changing to United States types. The location within Canada of major subsidiaries of United States firms, which are considered as domestic suppliers in the awarding of government contracts, has for all practical purposes eliminated the major obstacles to American bidding on Canadian Government contracts.

There is no law or administrative regulation which directs preferential treatment of the United Kingdom as against other foreign bidders. For several years, the United Kingdom argued that it should receive such preference, but acceptance by the United Kingdom of the need to coordinate Western Hemisphere defense supply on national security grounds helped to reduce greatly the United Kingdom complaints.^{3/}

^{3/} Several times in the past the United Kingdom has failed to secure Canadian government contracts despite lower bids in competition with Canadian manufacturers. On one occasion, the Canadian Minister of Transport admitted that a British company's low bid had been rejected in favor of a higher bid by a Canadian company, in spite of representations to the effect that acceptance of the British bid would be helpful to United Kingdom-Canadian trade. In this case, the Minister said, the Department of Defense Production had recommended acceptance of the higher Canadian bid on the grounds that the procuring agency had had considerable experience with the products of the domestic manufacturer.

On more than one occasion, the Canadian Government has explicitly stated its policy to be one of granting the contract to the lowest bidder. In certain cases, however, a clause in the specification governing the bidding establishes the right of government agencies to give a contract to the next lowest bidder when, in the opinion of their experts, the lowest bidder is 1) incapable of fulfilling the contract, 2) is not known to have the necessary equipment, or 3) is not known generally in the field.

Italy. Italy is of interest in the question of government procurement because it was the one European country which had explicit legislation on "Buy Italian." In 1952, Italy annulled such legislation,^{4/} but the Government continued until recently to award certain contracts domestically "due to the 'dollar shortage.'"

Italian policy, however, still places the foreigner bidding for a government contract at a disadvantage, even though Italian laws pertaining to public procurement do not make a distinction between possible domestic and foreign contractors except that for the Ministry of Public Works bids in most cases may be made only by Italian citizens. Usually only domestic industry is invited to bid on State Railway contracts.

Procurement opportunities are restricted in fact very largely to domestic industry by almost all government ministries, which maintain registers of bidders on which only Italian concerns appear. Italian representatives of foreign firms, however, often are listed on such registers. Generally, only Italian nationals may be listed on bidding registers; however, a company incorporated in Italy is considered Italian whether it is wholly or only partially foreign owned. For certain products,^{2/} usually already being imported into Italy, and under certain exceptional conditions, ministries may call for international bidding, including bids on contracts let by the Italian State Railways, the most restrictive of the Italian ministries.

In accordance with Law no. 1139 of June 10, 1937, the Italian Ministry of Public Works is required to maintain a national register of contractors on public works;^{6/} only such contractors may bid for government contracts, and a

^{4/} The Fascist Law No. 189 of January 9, 1939, which established absolute preference for domestic industry for all Government procurement, was repealed in August 1952 by the Italian Parliament.

^{5/} Fuel and tobacco are usually procured from abroad by "private negotiation" with the foreign supplier.

^{6/} Other laws establishing rules of bidding on government contracts are: Ministerial decree of May 28, 1895 (general conditions governing contracts for public works); Law decree No. 426 of November 17, 1944, and Royal decree No. 383 of March 3, 1934 (procurement of supplies and services by Italian Municipalities and Provinces); Law No. 646 of August 10, 1950 (public contracts by the Italian Fund for the Development of Southern Italy); Law No. 429 of July 7, 1907 (procurement procedures for Italian State Railways); Royal decree No. 135 of March 13, 1910 (general conditions for procurement contracts of the Italian Navy).

certificate of Italian citizenship is required for listing except for contractors who are nationals of countries granting the same privilege to Italian citizens on a reciprocal basis.⁷ Even in the latter case, a certificate of residence in Italy for at least ten years is required. Public announcement for bids is usually required, but private negotiation is permitted under several excepting provisions.⁸ A foreign firm may negotiate directly with an Italian government agency in a private negotiation for a contract. In almost every case the Italian supplier enjoys a five per cent differential advantage over the "offered price of a foreign bidder" such price to include payment of all duties and delivery charges.

Italian government officials have never made public any list of successful foreign bidders on Italian government contracts. They admit giving priority to Italian industry on the basis of 1) unemployment, 2) the necessity to use machinery and equipment whose replacements are readily available from the domestic market, especially when defense considerations are involved, and 3) the necessity to stimulate the domestic economy. The lowest bid is not necessarily the winning bid since almost any agency has "unreviewable power" to choose the preferable product in procurement for supplies, and the preferable project in public works and services. The contracting agency may, therefore, award a contract to the bidder offering the most costly equipment or service if it considers it as offering major advantages and/or higher technical specifications than that offered by competitors, or if the bidder offers major guarantees with respect to experience, "technical suitability," or reliability.

The United Kingdom. The Board of Trade of the United Kingdom has commented as follows in regard to their legislation and practices on government procurement:

1. There is no legislation nor are there any over-riding administrative regulations covering the policy or practice of government procurement. Departments have discretion to follow the practices best suited to the nature of the goods being purchased.

2. All bids are treated on the same basis, except in the case of the Stationery Office which gives a 10 per cent preference in favor of U.K. companies.

3. United Kingdom Government Departments do not undertake such major public works as dams, power stations, etc. The major part of Government procurement is by the Defense Departments, and this defense procurement is, as in the United States, governed by security and other considerations which necessitate most contracts being placed by negotiations.

⁷/ Government agencies may invite bids from firms not listed on the register if 1) the amount of the work does not exceed 100,000 lire (\$160), and 2) special work is involved for which no firm on the register is equipped.

⁸/ Private negotiation is permitted 1) if public and/or private bids are "unsuccessful" or deemed unwarranted; 2) if special rights (property, etc.) are involved; 3) if monopoly powers are enjoyed by the supplying firm; 4) in renting premises; 5) for urgent projects.

4. In the case of civil departments, the usual practice is to call for tenders from firms which are on the departments' trade lists.

5. Foreign firms have shown little interest in applying for inclusion in departmental trade lists. These lists do not, therefore, generally include foreign firms unless the departments concerned are aware that requirements cannot be met from U.K. sources. Foreign firms are not, however, debarred from applying for inclusion and when they are invited to tender, no distinction (except in the case of the Stationery Office) is made between their bids and those of British firms.

In the past, there have been other obstacles, however, to successful bids from foreign firms. Until 1958, balance-of-payments reasons were used to restrict imports of certain heavy machinery and electrical equipment, thus eliminating government purchase of these items from abroad. Regulations of Defense Departments with regard to testing of equipment has also seriously impeded foreign procurement.

Other Countries. There is no "buy at home" legislation in France, Switzerland, Belgium, West Germany, Spain, Finland, Australia, New Zealand, Norway, Denmark or Sweden.^{9/} In the Netherlands, legislation grants domestic preference where military considerations are involved. Spain and New Zealand often use administrative procedures to exercise preference while Denmark, through administrative action, exercises preference for other Scandinavian countries and for the United Kingdom. Under its administrative arrangements, West Germany permits acceptance of foreign bids on German public contracts if the respective countries of origin permit similar practice with regard to German bids and German products.^{10/} West Germany, Finland and Belgium clearly establish the right to exercise discretionary preference to aid depressed industries. In Belgium, a Permanent Committee reviews all bids and may award contracts to domestic bidders for reasons of "national economic interest."

Spain, Finland, Denmark, Norway, Australia and France consider balance-of-payments problems in awarding contracts to foreign bidders. Balance-of-payments considerations, no doubt, are or have been operative in almost every other European country. Import licensing restrictions have determined the source of supply on government contracts in Spain, Austria, France, Australia and New Zealand, and from time to time in several other countries.^{11/}

^{9/} In Sweden, bidding on public contracts is open to all foreign manufacturers. In the past, foreign competition has been strong with the result that in recent years even such major firms as ASEA (Allmänna Svenska Elektriska AB), the pioneer manufacturer of power transformers, "has lost Government orders to foreign transformer manufacturers." See Foreign Service Despatch No.963 (unclassified) from Stockholm, May 13, 1960

^{10/} In May, the Ministry of Economics suggested larger government purchases abroad, without strict application of the reciprocity condition, as one way of increasing imports and reducing the German balance-of-payments surplus.

^{11/} Austria, for instance, has effectively avoided the issue of explicitly excluding bids by foreigners by openly inviting bids without reference to source of supply on items whose import from certain countries was blocked by restrictions having nothing to do with public bidding.

Underdeveloped countries, lacking production facilities for heavy capital equipment, tend to procure from traditional sources of supply in those highly industrialized countries with which relations in the past have been closest, usually without invitation to open bidding on public contract.^{12/} Open invitation is, however, practiced in several of the less developed countries, notably in the United Arab Republic which for several years advertised for bids in leading United Kingdom newspapers and journals and has advertised most recently in American publications.^{13/}

^{12/} British Guiana, with close ties to the United Kingdom and long experience with British supply agencies, has, however, recently announced the award to Hungary of a contract to build a glass factory. The Hungarian company's bid was accepted in open bidding over tenders from Britain and West Germany. New York Times, February 16, 1960.

^{13/} In the June 6, 1960, issue of the Foreign Commerce Weekly (p. 22), the U.A.R. issued a bid for the supply of printing machinery and equipment for the General Organization for Government Printing Offices in Cairo. Documents as to terms, lists of printing machinery and equipment wanted, and specifications were reported as obtainable at the U.A.R. Embassy, with bids open through August 2.