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BUY AMERICAN

MICHAEL S. BARAM*

The role of American technology in the Western Alliance has recently become a much-discussed issue. As should have been apparent long ago, this technology is the basis for America's economic dominance of the Alliance and, therefore, for its military and political dominance as well. This connection between technological and political supremacy has only recently received the public discussion it deserves, largely as a result of the economic hardships facing the British airframe and shipbuilding industries.¹

In the early 1950's, federal government agencies began dispensing the funds that fed American industrial and academic research. Today, the expenditure of billions of dollars for research is a fixture of the annual federal budget. New technologies have grown from the confines of their initial military environment, and thousands of American "new-technology" firms are now applying the fruits of their sponsored research to commercial products and services. The Western Alliance relies increasingly on this new American industry for support and technological progress. Reliance on American industry for most of the know-how behind the new technologies poses a serious threat to the European partners in the Alliance. It seems that only de Gaulle has had the foresight to realize that, today, technological independence is the key to economic and political independence.² Gaullist "go-it-alone" policies, particularly France's independent nuclear force, supersonic aircraft and space programs, have lessened French dependence on American technology.³ The cost has been great, and much enmity has

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¹ The Aerospace Industry Situation, 20 *Interavia* 1373 (1965).

² See, e.g., Address by General Charles de Gaulle, quoted in 149 *Science* 1217 (1965):

To safeguard our independence—economic, scientific, technical—we must ensure that our activities remain under French direction and administration, even though we confront the enormous wealth of certain countries and although we will not refuse to carry out all kinds of exchanges with them. Likewise, we must support, no matter what the cost, those activities which assure the value, the autonomy, the very life of all our industry, those sectors which require the most research, experiment and sophisticated tools or which need the largest team of scientists, technicians and workers of the highest quality. Finally, when it is opportune in a selected branch to join our inventions and money and skills with those of another country, we must choose the country nearest to us and whose weight could not crush us.

³ French Avionics Industry Expands in Size and Diversity, *Aviation Week and Space Technology*, June 14, 1965, p. 118; French Nationalism vs. U.S. Technology, *id.* at 120.

been incurred;⁴ but French airframe employment is up, the French aerospace industry has blossomed, Paris is now the center of Europe's space efforts, and France is America's major rival in international arms trade.⁵

There are signs of American recognition of the problem confronting its allies and the Alliance. The recent visit of Secretary of Defense McNamara to England was presumably made to allay British concern. As a step in this direction, some American military ship orders may soon be placed with British shipyards, despite the fact that the governors of several states have lodged public protests. The late Adlai Stevenson, in his recent magnificent commencement address at Harvard, maintained that:

. . . Our best policy is, I think, on the one hand, to keep our defense commitment to Europe unequivocal and to explore all reasonable ways of transferring greater responsibility to them by joint purchasing, by joint burden-sharing, by our readiness to consider any pattern of cooperation that Europeans care to suggest.⁶

A logical beginning for the implementation of Mr. Stevenson's suggestion is the relatively limited NATO market place. Small NATO procurements, generally for construction and supplies, fall within NATO's Infrastructure Program, and are open to international bidding from NATO country firms.⁷ However, the large multi-million dollar procurements of weaponry, planes and tanks are placed after high-level negotiations between defense and other governmental officials, in which the American presence naturally dominates.

An even more basic method of curing the stifling effect of American technological dominance, however, would be a revision of the "Buy-American" Act,⁸ a little-publicized statute, passed by Congress in 1933, which remains as today's major protectionist barrier favoring United States industry. "Buy-American," straightforwardly entitled "American Materials Required for Public Use," was an anti-depression measure passed in the first Roosevelt administration. It provides simply that

. . . only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have

⁴ Is French Scientific Policy Chauvinist? 149 *Science* 1216 (1965).

⁵ *N.Y. Times*, May 24, 1965, p. 1, col. 5.

⁶ *Boston Herald*, June 18, 1965, p. 1, col. 3.

⁷ Gov't Cont. Rep. §§ 4045, 4048.

⁸ American Materials Required for Public Use, 47 Stat. 1520 (1933), 41 U.S.C. § 10(a) (1964).

been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use.⁹

Four exceptions to this general rule are noted:

This section shall not apply with respect to articles . . . for use outside the United States, or if articles . . . of the class or kind to be used or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured . . . in the United States in . . . reasonably available commercial quantities and of a satisfactory quality.¹⁰

The act also states that the general rule applies "unless the head of the [federal] department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable."¹¹

The history of the act is one of continually increasing significance. At the time of its passage, Government procurement and, indeed, the federal budget itself, were relatively minor factors in both the American economy and international trade. Further, during the following decade of war preparation and effort, American economic policy was, of necessity, protectionist.

In the years following 1945, national trade barriers began to fall, largely at American instigation, and an Atlantic community of interests was conceived and implemented. The Buy-American Act became, for a time, an anachronism and an embarrassing legacy to post-war administrations. Nevertheless, its self-interest philosophy was applied in various foreign aid programs. As much as seventy per cent of the Marshall Plan funds provided European countries were tied to the purchase of American supplies; and eighty per cent of the commitments made by the Agency for International Development to foreign countries today similarly require the procurement of United States goods and services.¹²

In the early 1950's, the act itself was "rediscovered" and invoked by important segments of American industry which realized that they had a strong potential weapon against a revived and highly competitive European industry. Today, the act applies to virtually all procurement placed under the mammoth \$100 billion annual federal

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Letter From Secretary of the Treasury Douglas Dillon to Senator Hugh Scott, June 8, 1964.

budget, and is thereby a major factor in the national and international economies.

The "rediscovery" of the act occurred when several federal agencies, including the Tennessee Valley Authority, sought to buy heavy electrical equipment by means of the normal federal procurement practice of formal advertising. The formal advertising procedure consists of the solicitation of bids and award of the contract to the lowest bidder who is both responsive to the specifications of the solicitation document and responsible in terms of management and plant.¹³ Low bids for several procurements came from qualified British and Japanese firms, and awards of the contracts to them would have resulted in a saving of millions of dollars to the federal government. American firms in each case sought strict application of the Buy-American Act by raising the spectre of the irreparable damage which allegedly would result to important segments of American industry as well as the detrimental effect such awards would have on national security. Despite convincing proof to the contrary offered by the federal agencies concerned, the American firms raised sufficient political support to win awards of the procurements to domestic businesses.¹³

Not until the late 1950's, when liberal trade attitudes had gained ground in Washington, were federal agencies able to buy such goods from low-bidding foreign firms. An unpublished executive branch study has since reported that the savings from turbine orders placed with British and Japanese firms in 1959 and 1960 approximated some \$19 million.¹⁴ Two other aspects of the turbine procurements subsequently came to light. In 1958, the Comptroller General reported to Congress that the Tennessee Valley Authority, which had been stymied in its efforts to buy from foreign sources, had experienced major technical difficulties and financial damage with domestic steam turbine generators.¹⁵ This was followed by the largest price-fixing conspiracy uncovered by the United States Department of Justice, involving the same American firms that had so successfully invoked the Buy-American Act.¹⁶ The evidence, thus, is convincing that "Buy-American" is not always in the best interests of the nation. Nevertheless, the act has recently been embellished and implemented so that it is more effective than ever.

As mentioned, the original act is brief and to the point, simply stating that only United States-made goods will be purchased with federal funds unless such goods are to be used outside the country

¹³ See N.Y. Times, April 17, 1953, p. 17, col. 1; J. of Commerce, April 16, 1953, p. 1, col. 6.

¹⁴ See Knapp, *The Buy-American Act*, 61 Colum. L. Rev. 430 (1961).

¹⁵ Comp. Gen. Audit Rep. to Congress on TVA, Feb. 14, 1958, quoted *id.* at 449, n.70.

¹⁶ *Ibid.*

(offshore procurement and overseas base supplies), or the goods are not available from domestic sources, or the price of the American goods is unreasonable, or if it is determined at Secretarial level that the best interests of the United States are served by purchasing such goods from foreign sources.

To provide guidelines for federal agencies and thereby promote uniformity of federal policy, a 1954 Executive order set forth "Uniform Procedures for Certain Determinations" regarding the permissibility of foreign purchases.¹⁷ The order provides that goods are foreign in origin if the costs of the foreign materials used in the end product constitute fifty per cent or more of the total cost of all products used in the finished item, without considering assemblage or manufacturing costs which are incurred in the United States and may constitute most of the final cost of the item. As a result of this order, an administrative board has determined that nails manufactured in the United States of only one component, Belgian wire, were foreign goods and could not be purchased unless one of the four exceptions applied in the case.¹⁸

In addition, the largest federal purchaser, the Department of Defense, provides that the transportation costs and import duties of foreign materials and components are to be included in totalling costs and determining the "source" of the end item.¹⁹ As a result, a recent procurement of lime packed in pails from an American firm was halted because it was found that the end item was "foreign."²⁰ The lime was imported, and its cost including duties and transportation to the American firm came to \$1.40 per end item. The only other components were the domestically-produced pails costing eighty cents each. Packaging costs, labor and overhead incurred in the United States were not considered in determining the "source" of the end item. Therefore, \$1.40 of the total component cost of \$2.20 per end item was for foreign components; the end item was from a "foreign source" and, hence, was ineligible for procurement unless one of the four statutory exceptions applied. It should also be noted that components are "foreign" even if furnished by the foreign subsidiary of an American firm.

The Executive order also defines as an "unreasonable price" for an American product, one exceeding the bid price of a like foreign item, including its shipping and duty costs, by six per cent of the bid price

¹⁷ Uniform Procedures for Determination, Exec. Order No. 10582, 19 Fed. Reg. 8723 (1954).

¹⁸ Comp. Gen. Op. No. B-154501 (1964).

¹⁹ 41 C.F.R. § 1-6.101 (1965).

²⁰ Comp. Gen. Op. No. B-152352 (1963).

of the foreign item.²¹ The percentage handicap favoring American items has been raised to twelve per cent if the domestic goods are to be supplied by a firm located in an area designated by the Department of Labor as one of substantial unemployment, or if the United States supplier is deemed to be a "small business" within the regulations of the Small Business Administration.²² A "small business" is generally one employing less than five hundred people, that is not dominant in its field, and is independently owned and operated.²³

The Department of Defense, in a burst of zeal prompted by the continuing "gold outflow," has gone far beyond the guidelines suggested in the order, which are followed by all other agencies. Since the Department's annual budget is half the total federal budget of \$100 billion, the departure is significant. In a memorandum dated July 16, 1962,²⁴ Secretary McNamara directed that procurements by the Department's contracting offices that will result in dollar expenditures outside the United States shall be held to an absolute minimum, and may be made only in the following cases: (1) Procurements required to be made pursuant to a treaty or executive agreement between governments; (2) procurements estimated not to exceed \$500; (3) procurements estimated not to exceed \$10,000 required by compelling emergencies; (4) procurement of perishable subsistence items; and (5) procurements as to which it is determined in advance that the requirements can only be filled by foreign supplies or services. Such a determination must be made by various designated officials, depending upon the total dollar amount involved. The memorandum further provides that

... (1) when it is estimated that the price delivered from US sources will not exceed \$10,000, procurement shall be restricted to domestic source end products, or services of domestic concerns *without regard to possible price differentials*, and (2) such procurements which are estimated to exceed \$10,000 shall be similarly restricted provided that *the cost of domestic source end products or services . . . is estimated to be not more than 50 percent in excess of the cost of foreign*

²¹ Or, in the alternative:

The sum determined by computing ten per centum of the bid or offered price of materials of foreign origin exclusive of applicable duty and all costs incurred after arrival in the United States: provided that when the bid or offered price of materials of foreign origin amounts to less than \$25,000, the sum shall be determined by computing ten per centum of such price exclusive only of applicable duty.

Exec. Order No. 10582, *supra* note 17.

²² This is a result of internal agency practices.

²³ 41 C.F.R. § 1-1.701-1 (1965).

²⁴ Reprinted in Gov't Cont. Rep. ¶ 80,308.

supplies or services [I]f the estimated or actual cost differential exceeds 50 percent, the matter shall be referred to the Secretary of Defense for determination. (Emphasis supplied.)²⁵

The real impact of this memorandum is felt in those situations where the procurement is expected to exceed \$10,000 and both foreign and domestic goods are available. In such cases, the foreign goods must be less than two-thirds the price of the American goods to reach the point of even being considered for procurement. As a result, few foreign firms can expect to be awarded Department of Defense contracts for supplies or services.

The 1954 Executive order provided finally that the agencies can reject any bid "to protect essential national-security interests" or "for reasons of the national interest not described or referred to in this order." This open-end clause has unfortunately resulted in a diversity of criteria which the order sought to prevent, such as the Department of Defense memorandum which has been cited.

Policing the sources of components and materials used by American firms has naturally proven a difficult task. The usual method is to require that each prospective American contractor certify, before award of a contract, the amount of foreign source components and materials which he intends to use in the performance of his work. Justification for such foreign subcontracting is required, and the certification becomes a part of the terms of the contract. Prime contractors, in turn, require similar certification from significant subcontractors. Breach by the prime or subcontractor of the certification terms can result in contractor debarment—ineligibility for future work for a period of several years.²⁶ Upon such a breach, the contractor is not entitled to the stipulated contract price, but only, at best, to payment on a *quantum valebat* basis.²⁷

Contracts for research, while not clearly within the scope of the act and 1954 Order, nevertheless are rarely awarded competitively to foreign firms. The Department of Defense has directed that research and development contracting outside the United States should be held to an absolute minimum and be undertaken only pursuant to treaty obligations or if the research could not be performed in this country. Additionally, security, quality control and administrative requirements preclude consideration of foreign firms in many cases.

Other relevant federal regulations allow the purchase of specified raw materials, from antimony to vanilla beans, from almost any

²⁵ Ibid.

²⁶ 32 C.F.R. § 1.6 (1965).

²⁷ Comp. Gen. Op. No. B-141911 (1960).

source;²⁸ but no purchase of these or any other items for public use can be made from Soviet-controlled areas, including by some stretch of the imagination China and Albania.²⁹ Canadian-American relations are favored by provisions that certain Canadian materials and goods should be listed by the agencies and regarded for procurement purposes as American and, hence, not subject to the price differentials and strictures of the Buy-American Act.³⁰ Finally, the Berry Amendment, incorporated into the Defense Department's procurement regulations, provides that no Department funds can be used to buy food, clothing, cotton, silk or wool not grown, reprocessed, reused or produced in the United States unless such items are not available in the United States, or are needed for emergencies or combat.³¹

Despite these obstacles to foreign firms, federal contracts continually are awarded to firms such as Rolls-Royce for their high-quality aircraft engines and to Martin-Baker for the ejection seat used in virtually all American aircraft. Some \$50 million in American funds have been awarded to British firms for research and development of the V/STOL aircraft and engines because of the British leadership in this new technology.³² The Army continues to buy antibiotics from Italian firms at a price below the low American bid, despite the fact that the Italians are accused by the American pharmaceutical industry of infringing American-held patents. Thus far, administrative decisions have upheld the Army procurements,³³ probably because the Federal Trade Commission has leveled price-fixing charges against several American firms for their activities in the commercial pharmaceutical market.

A 1963 study of foreign procurement by federal agencies compiled by the Bureau of the Budget³⁴ indicates that contracts placed by all agencies with foreign firms because of the unreasonable cost of domestic goods and services totalled \$25 to \$30 million per year in the years 1960, 1961, and 1962. And contracts placed in those years with foreign firms, on the basis of the nonavailability in this country of like items or services approximated another \$140 million annually. Nonavailability of domestic items was, therefore, the primary cause for foreign procurement. For this reason, the Bureau of the Budget study concluded that various suggestions for further reducing foreign procurement, such as raising price differentials for all agencies to

²⁸ 32 C.F.R. § 6.105 (1965).

²⁹ 32 C.F.R. §§ 6.401-1, -2 (1965).

³⁰ 32 C.F.R. § 6.103-5 (1965).

³¹ 32 C.F.R. § 6.304-1 (1965).

³² Fed. Cont. Rep., No. 45, Dec. 28, 1964, p. A-7.

³³ Comp. Gen. Op. No. B-141459 (1960).

³⁴ Bureau of the Budget, Staff Study on the Foreign Procurement of the United States Government (1963).

twenty-five per cent, were impractical and would result in additional cost to the Government.³⁵ The problem of foreign competition for federal contracts would seem to be a negligible one for American industry, since less than two per cent of the total dollars spent annually by federal agencies goes to foreign firms.

With so little opportunity to sell to the biggest customer in the world, science-based industry in Western Europe is forced to eke out support from its own governments, which are concerned with cutting costs and which buy much of their military hardware from American companies. To encourage this advantageous relationship, the Department of Defense has appointed a Deputy Assistant Secretary for International Logistics Negotiation, Henry Kuss, Jr. Kuss aids the United States defense industry in selling its products overseas. He has been provided with a \$1.5 billion credit insurance fund to support export sales.³⁶ Last year, sales reached \$1.4 billion, and Kuss was commended by Secretary McNamara at a special ceremony. This maximization of exports offsets much of the gold outflow resulting from the support of American troops overseas. But as a recent New York Times headline ("U.S. Leads World in Sale of Arms") illustrates, this "success" has its dubious aspects as well.³⁷

For America to grant a greater share of its "new-technology" research and hardware procurement to non-American firms would be a selfless deed of heroic proportions, for governments at all times have favored domestic sources, often to a greater degree than does current United States policy. A State Department study of foreign procurement policies of member countries of the Organization for Economic Cooperation and Development indicates that few have defined their "buy national" policies as clearly and as publicly as has America. They rely instead on unpublished, confidentially-placed procurements with national sources, cumbersome administrative requirements, and closed supplier lists.³⁸

A more generous American attitude at NATO negotiations and a revision or revocation of "Buy-American" principles are possible, but depend on several factors. The President and Secretary of Defense must be willing to act, despite the public outcry of American aerospace and defense firms and their groupings, such as the National Security Industries Association, the military personnel of the Department of Defense, labor unions, and congressional representatives. The American public must also appreciate the essential fairness of the situation. There is joint burden-sharing among the allies, and, therefore,

³⁵ *Id.* at 16.

³⁶ Defense Department Does its Bit, *Business Week*, May 8, 1965, p. 82.

³⁷ *N.Y. Times*, *supra* note 5.

³⁸ Bureau of the Budget, *supra* note 34.

there should be joint sharing of the technological and economic benefits; further, "Buy-American" does not always work in the public interest.

The increasing role that new technology plays in the national economies of this country and its allies, the need for economic independence, and the equities of the situation all demand a diminution of the "Buy-American" philosophy. Otherwise, de Gaulle's example will not be difficult for America's other allies to follow.³⁹ As the advertisements of Premier Precision Ltd. have put it so clearly in London newspapers: "The United States Sells Defense Products to Us—but, they *Will Not Buy* from us!"⁴⁰

³⁹ The Technological "Spin-off" (editorial), N.Y. Times, Sept. 15, 1965, p. 42, col. 1.

⁴⁰ The Observer, London, Sept. 20, 1964, p. 4, cols. 1-3. Another example:

Friends, Patrons, Patriots, lend us a drum—of your ear . . . Listen! . . . The roaring flood of increasing technological imports from abroad—which can be made far better and much cheaper in Britain—mutes the Boom of Britain's car exports to a mere whisper. The absurd sound made by our trivial share of the vast equipment contracts which arm N.A.T.O., C.E.N.T.O., S.E.A.T.O.: our diminishing share of Commonwealth and world trade; the enormous volume of misguided and perverse purchases of U.S. aircraft, technological devices and electronic Systems annually multiplied by obligatory expenditure upon expensive spare parts and costly maintenance are the basic cause of such discordant harsh warning notes within our Economy. All very sweet music to the expanding giant industries of our most powerful trade rival . . .

. . . Remember, all contracts placed with British companies pay taxes to the British Exchequer—which cures inflation! . . . Stagnation! . . . Technical Frustration! . . . and, even Brainpower Emigration!

Id., Sept. 26, 1964, p. 4, cols. 1-4.