

Department of Legislative Services  
 Maryland General Assembly  
 2013 Session

FISCAL AND POLICY NOTE  
 Revised

House Bill 191 (Delegate Mitchell, *et al.*)  
 Health and Government Operations Education, Health, and Environmental Affairs

Procurement - Purchase of American Manufactured Goods

This bill requires a public body in the State to require a contractor or subcontractor to use or supply American-manufactured goods when carrying out a contract to (1) build or maintain a public work or (2) buy or manufacture machinery or equipment to be installed at a public work site. The bill establishes exceptions to this requirement and procedures for implementation.

Fiscal Summary

**State Effect:** General, special, and nonbudgeted expenditures increase by a combined total of \$152,400 in FY 2014 for additional procurement staff in the Department of General Services (DGS) and the Maryland Department of Transportation (MDOT) to implement and enforce the bill’s provisions. Out-year costs reflect annualization and inflation. State costs for public works projects may increase in proportion to the use of manufactured goods in State public works contracts; a reliable estimate is not feasible, in part because the bill includes several exceptions to the requirement. Although total State expenditures for public works projects likely do not increase because the capital budget is established annually through the budget process, fewer projects may receive funding due to the increase in costs for individual projects. The Board of Public Works (BPW) can develop regulations with existing budgeted resources. No effect on revenues.

(in dollars)	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	50,800	64,200	67,300	70,500	73,800
SF Expenditure	50,800	64,200	67,300	70,500	73,800
NonBud Exp.	50,800	64,200	67,300	70,500	73,800
Net Effect	(\$152,400)	(\$192,700)	(\$201,900)	(\$211,400)	(\$221,500)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

**Local Effect:** Local government expenditures also increase to implement and enforce the bill’s provisions for public works projects, including school construction projects. The cost of locally funded projects may increase in proportion to their use of manufactured goods without invoking the bill’s exceptions, which may reduce the number of projects funded. **This bill imposes a mandate on a unit of local government.**

**Small Business Effect:** Minimal. Any increased costs for American-made manufactured goods used in public works contracts are likely passed on to the public body. Small businesses may benefit, however, to the extent their products are used in public works projects.

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## Analysis

**Bill Summary:** “American-manufactured goods” are defined as those that are either manufactured or assembled in the United States.

The bill’s requirement does not apply to emergency life safety and property safety goods, as defined in the bill, or if the head of a public body determines that:

- the price of American-manufactured goods exceeds the price of similar foreign-made manufactured goods by an unreasonable amount;
- the item or a similar item is not manufactured or available for purchase in the United States in reasonably available quantities;
- the quality of the item or a similar item made in the United States is substantially less than the quality of a comparably priced, similar, and available foreign-made item; or
- the procurement of a manufactured good is inconsistent with the public interest.

BPW must develop regulations that define (1) “reasonably available”; (2) “unreasonable amount”; and (3) “substantially less.”

The bill must be applied in a manner consistent with the State’s obligations under any applicable international agreement to which the State is bound. It may not be construed to amend, alter, or impair any obligation under the Maryland Buy American Steel Act.

**Current Law:** The University System of Maryland, Morgan State University, and St. Mary’s College of Maryland are exempt from most provisions of State procurement law and, therefore, are not affected by the bill.

### *Maryland Buy American Steel Act*

Chapter 48 of 1988 (the Maryland Buy American Steel Act) requires public bodies in the State to require contractors to use or supply only American steel products for public works construction or maintenance projects and for machinery or equipment that is composed of at least 10,000 pounds of steel and is to be installed at a public work site. The requirement does not apply if it conflicts with a federal law or grant that affects a contract, and an exception to this requirement may be granted if the head of a public body determines that:

- the price of American steel products is not reasonable, as defined in statute;
- American steel products are not produced in sufficient quantity to meet contract requirements; or
- the purchase of American steel products is inconsistent with the public interest.

BPW developed regulations that define a “reasonable” price for American-made steel. A bid or offered price for American steel is considered reasonable if it is no more than:

- 20% above the price of a similar, foreign-made item, including duty; or
- 30% above the price of a similar, foreign-made item (including duty) if the American steel product is produced in a “substantial labor surplus area” as defined by the U.S. Department of Labor.

### *American-made Apparel*

Chapter 314 of 2011 (HB 12) prohibits public employers in the State from knowingly purchasing, furnishing, or requiring employees to purchase or acquire uniforms or safety equipment and protective accessories that are manufactured outside of the United States, subject to specified exemptions. BPW must adopt regulations that establish the conditions under which the Act applies with regard to the price, quality, and availability of items produced in the United States.

The prohibition in Chapter 314 against purchasing apparel and safety equipment manufactured outside the United States does not apply if:

- either the item is not manufactured or available for purchase in the United States, or is not manufactured or available in reasonable quantities;
- the price of the item manufactured in the United States exceeds the price of a similar item not manufactured in the United States by an unreasonable amount; or
- the quality of the item manufactured in the United States is substantially less than the quality of a similar item not manufactured in the United States.

**Background:** According to the National Association of State Procurement Officials, at least 20 states (including Maryland) have some form of Buy American purchasing preference, although they apply to different items. In two states (Montana and Texas), the preference generally applies only in the case of a tie between two or more firms.

According to a 2009 analysis by the Public Economy Research Institute of the University of Massachusetts, imports constitute approximately 11.9% and 13.7% of manufactured supplies used on transportation and school construction public works projects, respectively. They make up a higher percentage (21.9%) of manufactured supplies used on energy-related capital projects.

Initially, international trade agreements, most notably the General Agreement on Trade and Tariffs, did not apply to government procurement. This changed in 1981 with the adoption of the Agreement on Government Procurement (GPA), which was most recently renegotiated in March 2012 and currently has 15 parties – including the United States – and 26 “observers,” to promote three main principles:

- nondiscrimination on the basis of national origin in the procurement of goods and services;
- transparency in the laws, regulations, and procedures governing government procurement; and
- competitive contracting practices.

In general, the Maryland Buy American Steel Act and other State preference programs, in addition to procurements by several designated State agencies, including DGS, are exempt from challenge under GPA in accordance with stipulations first made by Governor William Donald Schaefer and later reaffirmed by Governor Robert Ehrlich. However, other State procurement preference programs that are adopted after GPA’s effective date, such as the one required by this bill, may require similar protection or be subject to challenge by GPA member nations. A 2005 letter of advice from the Attorney General’s Office explains that international trade agreements that promote nondiscrimination on the basis of national origin, including GPA, do not preempt State procurement law.

“Buy American” provisions in federal law, including such provisions in the American Recovery and Reinvestment Act, include a stipulation that they be “applied in a manner consistent with U.S. obligations under international agreements.” This ensures that, for federal projects, products produced by parties to GPA receive the same treatment as products produced in the United States. This bill includes a similar stipulation and, therefore, may not be subject to challenge under GPA.

However, to the extent that a challenge by a member nation before the World Trade Organization (WTO) is successful, it does not preempt State procurement law; only federal action can preempt State law. A challenge would likely prompt the federal government to encourage the State to modify its procurement law to conform to GPA requirements. Failure on the State's part to make those modifications could subject the United States to trade sanctions imposed by WTO. If federal action were taken against Maryland and a federal court were to hold that State law was preempted by GPA, the Attorney General's Office advised that any action would only be applied prospectively.

**State Fiscal Effect:** The bill's fiscal effect stems both from the cost of enforcing its provisions and from potential increases in the cost of public works projects. Road projects, which almost invariably receive federal transportation funds, are already subject to federal Buy American requirements and, therefore, are generally not affected by the bill. However, other construction projects procured by MDOT are affected.

#### *Administrative Costs*

The bill does not provide a mechanism to enforce its requirements regarding American-made manufactured goods; the Department of Legislative Services (DLS) assumes that the requirement to enforce the bill falls on each major procurement unit that contracts for public works projects. These typically include MDOT, DGS, and the Maryland Transportation Authority.

Although DGS advises that it can likely implement the bill with existing budgeted resources, DLS believes that meaningful enforcement of the bill's provisions likely requires additional resources; MDOT advises that the bill increases both project costs and administrative costs to implement its provisions. At a minimum, enforcement requires procurement staff to identify, prior to issuing a bid request, all of the manufactured goods included in a public works contract that are subject to the bill's requirement and verify their origin during the performance of a contract. This requires on-site inspections and additional follow-up with contractors. Processing of waivers under the bill's exemption provisions, which may be considerable in number, may also require substantial staff time to confirm that domestic manufactured goods either are not available or are within the bill's cost limitations established by regulation. To the extent that these determinations by procurement staff are contested, the prospect also exists that the bill may prompt additional bid or contract protests, which require additional time and effort from procurement staff and the Office of the Attorney General.

Therefore, general, special, and nonbudgeted fund expenditures increase by a combined total of \$152,397 in fiscal 2014, which accounts for the bill's October 1, 2013 effective date. This estimate reflects the cost of hiring one additional procurement officer in each of the three agencies referenced above to assist in procurement planning and enforcement

of the bill's provisions for public works projects. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses. Each fund represents one-third of the total. Each position costs about \$51,000 in salary, benefits, and other direct costs in the first year.

Positions	3.0
Salaries and Fringe Benefits	\$137,259
Operating Expenses	<u>15,138</u>
<b>Total FY 2014 State Expenditures</b>	<b>\$152,397</b>

Future year expenditures reflect full salaries with annual increases and employee turnover as well as annual increases in ongoing operating expenses.

To the extent that additional agencies procure public works projects, personnel costs may be higher. Also, to the extent procurement staff in the three affected agencies do not *actively enforce* the bill, existing staff *may* be able to implement the bill.

#### *Public Works Costs*

The bill may result in the cost of manufactured goods used in public works projects increasing, depending on the regulations adopted by BPW. The proportion of a public works contract that is devoted to manufactured goods varies from contract to contract, so a reliable estimate of the bill's effect on the cost of those projects is not feasible. Barring frequent use of the exemptions allowed by the bill, the total cost of individual public works contracts may increase in proportion to the use of manufactured goods by the contractor. Total expenditures for public works projects likely do not increase because the capital budget is established annually through the capital budget process. However, fewer projects likely receive funding in a given year due to an increase in costs for individual projects.

**Local Fiscal Effect:** Similar to the State, local governments also experience increased administrative and procurement costs to carry out the bill's provisions.

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### **Additional Information**

**Prior Introductions:** SB 432 of 2012 passed the Senate and received a hearing in the House Health and Government Operations Committee, but no further action was taken on the bill.

**Cross File:** SB 47 (Senator Young, *et al.*) - Education, Health, and Environmental Affairs.

**Information Source(s):** Anne Arundel, Baltimore, Charles, Frederick, and Montgomery counties; Board of Public Works; Department of Budget and Management; Department of General Services; Maryland Department of Transportation; University System of Maryland; U.S. Department of Labor; National Association of State Procurement Officials; Public Economy Research Institution of the University of Massachusetts; Alliance for American Manufacturing; Department of Legislative Services

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