

# Blakes Bulletin

## International Trade & Investment

### Canada–U.S. "Buy American" Agreement

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The Canadian and U.S. governments have announced a tentative agreement (the Agreement) that will provide Canadian suppliers with access to government procurements that had been previously excluded by the "Buy American" provisions of 2009. Canadian suppliers will now be able to bid on projects funded by the U.S. stimulus package. In exchange, U.S. suppliers will now have access for the first time to a number of Canadian procurement markets.

#### "BUY AMERICAN"

In 2009, in response to the economic downturn, the U.S. government enacted the *American Recovery and Reinvestment Act* (the ARRA). Included in the ARRA were so-called "Buy American" provisions, which required that all steel, iron and manufactured goods used in the construction, maintenance or repair of any public building or public work funded by the ARRA be produced in the U.S. These provisions were a cause of concern to Canadian industry in that they restricted Canadian access to the U.S. procurement market and did so in areas in which Canadian suppliers had traditionally enjoyed access even in the absence of formalized access commitments. As a result, the Canadian government engaged in discussions with the U.S., with the goal of providing to Canadian suppliers an exemption from these restrictions. Those discussions resulted in the Agreement, which was announced on February 5, 2010.

#### SCOPE OF AGREEMENT

While the text of the Agreement has yet to be released, the scope of the Agreement has been addressed by individual statements released by the Canadian and U.S. governments and a joint statement prepared by both parties (the Statements). On the basis of the Statements, the Agreement appears to extend reciprocal access concessions to public procurements. Some of these are permanent access concessions granted under

the WTO Agreement on Government Procurement (GPA), in accordance with undertakings made pursuant to the GPA. Other access concessions are temporary.

According to the Statements, Canadian suppliers will have permanent access to the public works procurement markets of 37 states "already covered by the GPA," as well as temporary access to a number of state and local public works projects funded by the ARRA. ARRA funding is administered through specific programs. Canada has negotiated access for Canadian suppliers to some of those programs, including programs run by the U.S. Department of Energy, the U.S. Department of Housing and Urban Development and the U.S. Environmental Protection Agency. In return, U.S. suppliers will gain permanent access to provincial and territorial procurement markets and temporary access (through September 2011) to construction contracts of provincial and municipal entities not otherwise covered by the GPA.

The Statements also indicate that the parties have agreed to establish an expedited consultation mechanism that will be used to address similar disputes in the future. Additionally, the parties have indicated their intent to continue exploring opportunities for further reciprocal concessions.

#### WTO AGREEMENT ON GOVERNMENT PROCUREMENT

While the Agreement will provide access to certain ARRA-funded procurements for Canadian suppliers, Canada obtained this benefit by giving U.S. suppliers access to provincial and territorial procurements under the GPA – an agreement between 14 parties that provides a framework in which the parties can negotiate access to each other's procurement markets. Canada and the U.S. had already provided mutual access to each other's federal procurements pursuant to the GPA, subject to certain exclusions. However, access to "sub-federal" procurement markets was not formalized. The Agreement provides for access to these sub-federal markets. As discussed above, according to the U.S. statement, Canada has gained for its suppliers access to 37 states "already covered by the GPA". That is,

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the U.S. had already held out in its schedule to the GPA that parties could have access to these markets in exchange for similar concessions. Canada's sub-federal commitment under the GPA, however, was to provide access to provincial and territorial markets on the basis of commitments from the provinces and territories. Therefore, prior to the recent commitments from the provinces and territories, Canadian suppliers' access to U.S. state procurement markets was informal. The Canadian government formalized access to the U.S. state markets by obtaining commitments from the provinces and territories that now give U.S. suppliers access to provincial and territorial procurements.

### NEXT STEPS

The Agreement will need the domestic approval of both parties before it can be signed and finalized. In Canada, this will require approval by the provincial and territorial governments in addition to the federal Cabinet. The Canadian government hopes the Agreement will be signed by February 16, 2010.

Until the text of the Agreement is made public, a number of questions will remain. For example, it remains to be seen what areas are excluded from the permanent access concessions and, therefore, how significant an impact the Agreement will have on the provincial and territorial procurement markets. Indeed, it may be that the Agreement will impact the way in which provinces and territories are entitled to treat suppliers of other provinces and territories under the *Agreement on Internal Trade* and the *B.C.-Alberta Trade, Investment and Labour Mobility Agreement*. However, the full impact on Canadian internal procurement markets will need to be assessed in light of the text of the Agreement. Further, it is not yet clear which specific ARRA programs Canadian suppliers will have access to or how long these temporary concessions will last. Moreover, the Statements do not identify which municipalities are now open to U.S. suppliers. The Agreement appears to be a step forward for Canadian suppliers, but the full impact can only be assessed on review of the full Agreement.

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