

Blakes Bulletin

International Trade & Investment

The "Buy American" Agreement: Opening Up the Canadian and U.S. Procurement Markets

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The governments of Canada and the U.S. have entered into a new agreement relating to government procurements. The impetus behind the recently concluded negotiations was the "Buy American" measures in the U.S. stimulus package. These measures required, as a condition of the funding, that entities use only U.S.-manufactured iron, steel and manufactured goods in projects funded by the stimulus package. The result of the negotiations was the *Agreement Between the Government of Canada and the Government of the United States of America on Government Procurement* (the Agreement). The text of the Agreement was released by the Government of Canada on February 16, 2010, and was to take effect that day. The following will explore the scope and meaning of the Agreement, with a particular focus on Canada's commitments.

BACKGROUND

The Agreement is complex in its structure and contains many detailed provisions. It is necessary to review the Agreement itself to fully understand its impact. The Agreement has both temporary and permanent concessions. Given that the permanent concessions largely function through the WTO *Agreement on Government Procurement* (GPA), the primary international agreement stipulating obligations relating to government procurement, it is useful to begin with a brief description of the GPA.

The parties to the GPA use schedules that they incorporate into the GPA to offer access to procurements exceeding specified values conducted by specified government entities. Although access is offered under the GPA, parties need only grant such access to suppliers of other parties who have offered similar concessions. To illustrate how this functions, the U.S., a party to the GPA, used its schedule to offer access to procurements by specified federal government

entities. Canada, also a party to the GPA, offered similar access to its federal procurement market. Therefore, the parties had mutual obligations, and were no longer free to restrict access to federal procurements to exclude suppliers from the other country. On the other hand, while the U.S. had offered access to procurements of 37 of its states, Canada had not offered access to any of its provinces or territories. As a matter of practice, Canadian suppliers had enjoyed access to the procurement markets of those U.S. states. But since Canada had not offered reciprocal access to U.S. suppliers (i.e., to its provincial and territorial procurement markets), the U.S. was not obliged to give access to Canadian suppliers. Now that Canada has offered access to the provincial and territorial markets, Canadian suppliers have formalized access to the sub-federal procurements that the U.S. listed in its schedules to the GPA. U.S. suppliers are now able to bid on numerous projects from which they had previously been excluded.

TEXT OF THE AGREEMENT

The Agreement prescribes the commitments made by each party. Both parties provide temporary access to certain procurements until September 30, 2011. Notably, the exceptions from the "Buy American" requirements are temporary. In addition, both parties made permanent commitments. In the case of Canada, this represents a significant change to its procurement obligations to the U.S.

U.S. TEMPORARY CONCESSIONS

The U.S. has agreed to temporarily grant an exemption from the "Buy American" requirements for procurements of seven programs. The concessions apply only to procurements valued at US\$606,308 for supplies and services, and US\$7,578,850 for construction.

The seven programs are:

- U.S. Department of Agriculture, Rural Utilities Services, *Water and Waste Disposal Programs*;
- U.S. Department of Agriculture, Rural Housing Service, *Community Facilities Program*;

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- U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, *Energy Efficiency and Conservation Block Grants*;
- U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, *State Energy Program*;
- U.S. Department of Housing and Urban Development, Office of Community Planning and Planning and Development, *Community Development Block Grants Recovery (CDBG-R)*;
- U.S. Department of Housing and Urban Development, Office of Public and Indian Housing, *Public Housing Capital Fund*; and
- U.S. Environmental Protection Agency, *Clean Water and Drinking Water State Revolving Funds*, for projects funded by reallocated ARRA [the U.S. stimulus legislation] funds where the contracts are signed after February 17, 2010.

The exemption will apply only to Canadian suppliers of iron, steel and manufactured goods. However, other countries may have access to the exemptions should those parties provide mutually acceptable reciprocal commitments to the U.S.

CANADIAN TEMPORARY CONCESSIONS

Canada has given U.S. suppliers temporary access to certain sub-central construction procurements. U.S. suppliers will be able to bid to supply construction services to specified entities for procurements valued at C\$8.5-million or more. These temporary commitments are covered in the Agreement only and it appears that Canada, unlike the U.S., will not add them to its schedule to the GPA. Consequently, the Agreement, in addition to specifying the particular entities on behalf of which Canada has made temporary commitments, also stipulates a series of provisions that largely mirror the provisions of the GPA. These provisions require that national treatment be afforded to U.S. suppliers, non-discrimination provisions, requirements related to the transparency of the procurement process, provisions related to the resolution of procurement-related disputes, and general exceptions related to measures necessary to protect human and animal health, the protection of public morals, etc.

Each province and territory has listed entities which will be covered by these temporary concessions. Some have offered sweeping coverage, such as British Columbia, which has offered coverage for all Crown corporations. Many provinces exclude Crown corporations that are involved in energy production or distribution. Included also are certain municipalities. B.C. has offered access to all its municipalities. Of the numerous other covered municipalities, most of the large centres are covered. There are general exclusions, such as: dredging; shipbuilding or repair; measures related to Aboriginal Peoples; publicly funded schools, academic institutions, or hospitals; in some cases, projects intended to contribute to economic development of certain provinces; among other things. However, publicly funded schools, academic institutions, and hospitals are *included* for both Ontario and Quebec.

CANADIAN PERMANENT CONCESSIONS

Canada's permanent sub-central commitments apply to procurements over certain values only. For goods and services, the commitments apply to procurements valued at US\$538,098.35 or more; and for construction services, the commitments apply to procurements valued at US\$7,578,850 or more. Access to U.S. sub-central procurements had been contingent on commitments from the provinces and territories, which had not been forthcoming until the Agreement. The specific entities to which U.S. suppliers now have access vary by jurisdiction. Each province and territory except Nunavut has made its own commitments. While it is beyond the scope of this article to list all of the covered entities, a few are worth special mention. Some provinces and territories have offered sweeping coverage. B.C. offered access to "All Ministries, Boards, Commissions, Agencies and Committees of the Province. This Agreement does not apply to the Legislative Assembly." Ontario has offered access to all ministries of the province, and listed agencies which are also covered. However, Ontario has excluded procurements related to highway construction, urban rail and urban transportation systems and equipment. Quebec, which offered access to its ministries and certain listed agencies, similar to Ontario's commitments, excludes procurements of cultural or artistic goods, seedling production, and construction-

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grade steel, among other things. Certain services, which had previously only been covered for Canadian federal procurements, now apply to sub-central entities specified in the Agreement.

As with the temporary commitments listed above, there are some general exclusions applicable to the permanent commitments. The commitments do not apply to Crown corporations or municipalities; preferences or restrictions in relation to highway projects; measures related to Aboriginal Peoples; publicly funded schools, academic institutions, or hospitals; and in some cases, projects intended to contribute to economic development of certain provinces, among other exclusions. As above, school boards, publicly funded academic institutions, and hospitals in Ontario and Quebec are included.

In exchange, the U.S. has acknowledged that Canadian suppliers are to have access to procurements of specified sub-central entities. Commitments are made in relation to 37 different states for procurements of supplies or services valued at US\$538,098.35 or more and construction contracts valued at US\$7,578,850 or more. These states include Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New York, Nebraska, New Hampshire, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming. While the U.S. had previously held out that parties could have access to procurements of these entities, as Canada had not made reciprocal concessions, access had not been formalized. The Agreement formalizes that access.

OTHER ASPECTS OF THE AGREEMENT

There is very limited recourse for breaches of the Agreement. The parties agreed simply to consult with one another in the event of a dispute over the interpretation of the Agreement, and to attempt to bring the matter to a satisfactory conclusion. However, the substance of the Agreement will be brought into affect through the GPA. Consequently, breaches of the commitments made through the GPA will be subject to WTO dispute resolution, which is substantially more robust than good-faith consultations.

Several other provisions of the Agreement are of note. The Agreement stipulates that the temporary concessions offered by each party can be extended by "mutual written consent." In addition, the parties commit in the Agreement to engage in further discussions to expand procurement-related commitments. They are required to do so within 12 months of the Agreement's entry into force (February 16, 2010). Each party agrees to commence consultations about procurement-related issues within 10 days of receiving such a request from the other party. This provision will allow the parties to fast-track any future disputes that may arise on similar subject matter. Finally, the U.S. has agreed not to enforce certain breaches of procurement obligations for a period of 12 months.

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