BUY AMERICAN BASICS

The Issue

- The Canadian government has failed in its efforts to gain a meaningful exemption for Canadian suppliers from the Buy American provisions employed in the February 2009 U.S. stimulus package.

- The tentative deal, announced on February 5, gives Canadian suppliers an opportunity to bid on the remaining contracts under seven federally funded U.S. stimulus programs.

- While the overall budget for these programs totals $US 18 billion, over three-quarters of this money has already been spent and the remainder must be allocated by February 17. Canadian suppliers will only have a brief opportunity to access a fraction of this amount (although some sub-contracts will be awarded as the remaining stimulus projects proceed).

- In short, Canadian suppliers have a brief opportunity to compete for an estimated $US 4–5 billion of federally funded stimulus projects, representing less than 2% of the approximately $US 275 billion of procurement funded under the Recovery Act.

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➔ In return, Canada has guaranteed U.S. suppliers interim access to a range of provincial and municipal infrastructure spending projects until September 2011, when the U.S. stimulus package expires. A rough estimate of the value of these contracts is $CAD 25 billion. U.S. suppliers will have the opportunity to bid on the full amount of these contracts right up until the September 2011 deadline.

➔ In addition, Canada has bowed to U.S. pressure to permanently bind purchasing by Canadian provincial governments under the WTO Agreement on Government Procurement (the GPA). This is the first time that Canadian provincial procurement has been covered under an international trade deal.

➔ Unfortunately, the proposed deal will thwart Canadian provincial and municipal governments from preferring local goods or suppliers and from using government purchasing as a policy tool, while leaving Buy American policies almost fully intact.

➔ The Harper government has taken advantage of the economic crisis to justify what it has wanted for a long time — more private access to public sector resources and further restrictions on the ability of all levels of governments in Canada to negotiate local benefits when they procure goods and services.

➔ The Conservative government has been working for months to convince provinces that they must agree to make this change. This is also a key demand made by the European Union in advance of starting any negotiations with Canada on a trade and investment deal.

Government Procurement

➔ In Canada, the purchase of goods and services on behalf of governments or a public authority — generally using a public tendering process — amounts to at least $100 billion annually.

➔ In 2006–07, Federal provincial and territorial governments in Canada reported that they spent $21.8 billion procuring goods and services. This figure does not include spending by municipalities, social service, academic or health entities, or by crown corporations.[1]

- Governments and not-for-profit institutions funded by governments spend tax dollars in order to deliver public services across Canada.

- Governments are the single largest purchasers in the Canadian economy and government purchasing can be used to create good jobs, regional economic development, and other benefits for Canada and the Canadian people.

Timelines

- With the passage of the U.S. stimulus package in February 2009, the Canadian government accused the United States of protectionism after the Obama administration chose to direct stimulus spending to U.S. suppliers of goods and services.

- In July 2009, the Harper government, with the support of many provincial governments, offered to guarantee U.S. suppliers access to Canadian provincial and municipal government procurement. In return, Canada asked for an exemption from the Buy American provisions of the U.S. stimulus bill.

- The U.S. refused to grant an exemption but the two governments continued to negotiate.

- On February 5, 2010 the U.S. and Canadian governments announced that they had reached a tentative agreement.

Legal Background

American Recovery and Investment Act (2009)

- The $US 787 billion stimulus package, of which $US 275 billion is allocated to "contracts, grants, or loans" (mainly procurement), includes Buy American preferences.
- The US Chamber of Commerce and other U.S. business lobbies oppose the Buy American provisions of the stimulus package.

Buy American Act (1933)

- Applies to direct purchasing by U.S. federal government and its agencies.
- Requires them to purchase American-made goods.
- Administration may waive these requirements in the public interest.

North American Free Trade Agreement (NAFTA)

- Chapter Ten (Government Procurement) of the North American Free Trade Agreement (NAFTA) covers direct federal purchases, which means that federal Buy American laws generally do not apply to Canadian goods and services.
- Even in smaller federal contracts that are subject to the Buy American preferences, Canadian goods may comprise up to 50% of purchased materials.
- NAFTA does not apply to state or local government procurement.

Minority and Small-business Set-asides

- U.S. legislation sets aside contracts by federal agencies to ensure that 23% of government procurement dollars goes to small and minority-owned American businesses. Similar "set-asides" apply at the state level.

➔ The U.S. has fully excluded these set-asides from its international trade treaty commitments and they are unaffected by the current Canada-U.S. deal.

Buy America Requirements Under U.S. Stimulus Package

➔ Buy America requirements refer to the conditions requiring the use of American goods and construction services which are attached by the U.S. federal government when it transfers funds for infrastructure projects to state and local governments.

➔ Such requirements are often inserted into important pieces of federal legislation, including laws funding transportation, mass transit, and airport and highway construction.

➔ Typically, domestic content for construction materials must be 60% and iron and steel used in construction must be 100% produced in the U.S.

➔ If a state or local government project is even partially funded by federal grants, Buy America conditions must be met.

The World Trade Organization *Agreement on Government Procurement*

➔ Canada has never bound its provinces and territories under the WTO Agreement on Government Procurement (the GPA).

➔ 37 U.S. states have made some commitments under the GPA.

→ Until now, Canada has considered that these U.S. GPA commitments do not provide meaningful market access, due to the many Buy America, small business and minority set-asides and other sectoral exclusions.

→ As a result, Canada has not covered sub-national governments under international trade treaties, because the U.S. does not provide reciprocal access.

Terms of the February 2010 Canada-U.S. Deal

→ The tentative deal announced on February 5 has three components:

1. An interim arrangement providing mutual access to certain state, provincial and municipal infrastructure projects;

2. Canada will permanently bind certain provincial government procurement under the GPA, while the U.S. will extend its WTO GPA commitments in 37 states to Canada; and

3. A pledge to further negotiations over increased market access in procurement and consultations regarding Buy American preferences in future U.S. legislation.

Spin vs. Reality

The Spin

→ The Harper government says this is a deal that shows Canada's leadership in fighting protectionism in a time of global economic crisis.

→ The government also asserts that the deal will provide significant new market access to Canadian suppliers, although it refuses to provide any estimates of the value of these new opportunities.

Buy American BASICS

The Reality: The Interim Arrangement

- The interim arrangement, lasting until September 2011, is highly unbalanced. It provides significantly better access for U.S. suppliers to the Canadian procurement market than for Canadian suppliers to U.S. stimulus projects.

- Most of the overall U.S. stimulus spending has already been allocated. As of December 31, 2009, $US 200 billion of contracts, loans, and grants (76%) under the Recovery Act had already been allocated. Today, the percentage of already allocated funds is even higher.

- Under the interim arrangement, Canadian suppliers get the opportunity to bid on the remaining contracts under seven U.S. stimulus programs, administered by the U.S. federal departments of Energy, Housing and Urban Development, Transport and the Environmental Protection Agency.

- While spending under these seven programs totals $US 18 billion, over three-quarters of this money has already been awarded and the remainder must be allocated by February 17.[2]

- This means Canadian suppliers will have a brief opportunity to access approximately $US 4–5 billion in stimulus spending (although some subcontracts will be awarded as the remaining stimulus projects proceed).

- In return, Canada has guaranteed U.S. suppliers interim access to a range of provincial and municipal infrastructure spending projects until September 2011, when the U.S. stimulus package expires. U.S. suppliers will have an opportunity to bid on the full amount of these contracts right up until the September 2011 deadline.

- Procurement by provincial and territorial governments and Canadian municipalities with a population over 50,000 is covered under the proposed interim arrangements.

- A rough estimate of the value of this procurement is $CAD 25–30 billion. The Ontario government estimates that approximately $10 million of Ontario procurement is covered under the tentative deal. (Since Ontario represents 37% of Canadian GDP, the total amount of Canadian procurement covered under the deal can be estimated at $27 billion.)

The Reality: The WTO GPA Commitments

- Thirty-seven U.S., states have varying levels of commitments under the WTO Agreement on Government Procurement (GPA). U.S. municipal government procurement is not covered under the GPA.
- Until now, Canadian suppliers have not had the right to challenge decisions to exclude them from bidding on routine contracts tendered by the 37 U.S. states which have signed on to the GPA
- If Canada commits its provincial government procurement under the GPA, the U.S. will drop these restrictions *only*.
- The U.S. has exceptions to its WTO GPA commitments that allow it to continue to apply buy-local procurement preferences including Buy America, small-business and minority set-asides and sectoral exclusions.
- Under the deal just announced, the U.S. will not make any new GPA commitments at the sub-federal level or remove or dilute any of its exceptions or exclusions.
- Canadian suppliers will not have access to federally-funded mass transit, or highway construction projects, which the U.S. has exempted from its WTO commitments.
- Canadians cannot bid on public utility contracts, such as electricity or telecommunications.
- Canada will not have access to contracts by the 13 states which have made no commitments at the WTO.
- Even in many of the 37 states that have signed on to the GPA, Canadian suppliers will not be allowed to supply construction-grade steel, vehicles, coal or printing services.

Buy American BASICS

- Canada will not have access to the 23% of U.S. federal procurement dollars set-aside for small businesses and minority-owned businesses. Comparable programs at the state level are also exempted from the U.S. WTO GPA commitments.

- Municipal governments are not covered by U.S. GPA commitments and, except for the temporary arrangements discussed above, will not be required to consider bids from Canadian companies for infrastructure projects.

- Municipal procurement funded by transfers from state or federal governments to U.S. municipalities is also excluded from the U.S. GPA commitments.

- Canadian suppliers will be able to compete on U.S. state contracts on the same basis as other foreign suppliers from countries that have signed on to the GPA. But suppliers from these countries also face the same raft of Buy American preferences.

- Canadian provincial governments have also excluded a range of procurement programs, entities (such as crown corporations) and sectors (such as renewable energy and mass transit) from Canada's proposed GPA offer.

- Reportedly, Canadian municipal government procurement will not be covered under the GPA offer.

- Initially, Canada's new commitments under the GPA would only apply to American suppliers. But Canada will be expected, in due course, to make the same commitments available to suppliers from all WTO GPA signatories.

- GPA rules prohibit governments from negotiating any form of local content, even if the procurement contract is open on a non-discriminatory basis to bidders from all WTO GPA member countries.

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The Reality: Further Negotiations and Consultations

- A key demand of Canadian governments when they first entered negotiations with the U.S. in the summer of 2009 was that any deal should protect Canada against Buy American rules in future U.S. legislation.
- The just-announced deal fails to achieve this objective. Instead, it provides for a "fast-track consultation process" to alert the Canadian government to Buy American preferences in impending U.S. federal legislation.
- Several pending U.S. bills, including the $US 100 billion "Jobs for Main Street" legislation, contain Buy American preferences.
- Other legislation now before the Congress would make it more difficult for the executive branch to grant waivers from Buy American rules to foreign suppliers, including Canadian ones.
- The tentative deal provides for future bilateral negotiations (to begin within one year) to negotiate additional government procurement commitments.

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Notes | 1. Government of Canada, Internal Trade Secretariat, MARCAN, "Statistics on Government Procurement: Summary of Procurement Reported by Year", http://www.marcan.net/index_en/procure.htm | **2.** "In a statement today, U.S. Trade Representative Ron Kirk said that the value to U.S. firms from the provinces and territories signing on to the GPA will be 'tens of billions of dollars.' By contrast, the extent of the benefits for Canada under the tentative agreement is limited, according to a U.S. trade official. This official said that Canadian firms will, under the deal, only have immediate access to seven programs funded by the stimulus totaling $18 billion, or about 2 percent of the total stimulus funding. However, access to these programs for Canadian firms will be restricted to only projects above $7.8 million in value and only projects in which contracts have not yet been awarded, the official stressed. '[O]bviously, as we enter into the second year of the Recovery Act funding, much of the funding has already been awarded in contracts,' the official said." From *World Trade Online*, February 5, 2010. Available at http://www.insidetrade.com (subscription required).

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