



Canadian
Manufacturers &
Exporters

Manufacturiers et
Exportateurs du
Canada

BUY AMERICAN Briefing Document May 25th, 2009

The Issue

- On February 17th, President Obama signed the ***American Recovery and Reinvestment Act of 2009*** ("Recovery Act"). Section 1605 of the Recovery Act attaches *Buy American* conditions to the US\$90 billion in infrastructure funding it provides for projects involving the "construction, alteration, maintenance or repair of a public work or public building". This provision requires that "**all of the iron, steel and manufactured goods used in the project are [to be] produced in the United States.**"
- The Recovery Act allows for three types of waivers that can be applied to its *Buy American* provisions. Waivers can be granted when:
 1. Application of the *Buy American* clause would be inconsistent with the public interest;
 2. The iron, steel, and relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or,
 3. Inclusion of iron, steel, and manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent
- The Recovery Act also requires that the application of *Buy American* requirements be consistent with US obligations under international trade agreements.
- All funds under the Recovery Act must be dispersed in very short timeframes and all must be "under contract" by February 2010, with one half of all projects well underway by June 2009.
- Terms for the interpretation of *Buy American* provisions in ARRA are clarified in a note from the White House Office of Management and Budget in response to enquiries by the Canadian Government – see Appendix 2 below.
- Since passage of the Recovery Act, similar *Buy American* provisions are appearing in other US legislation and business leaders in the US anticipate that a "*Buy America baseline*" will be inserted into most if not all US appropriation and authorization legislation in the months to come. One particular bill recently passed by the House of Representatives and now under consideration by the Senate confirms

this expectation. The **Water Quality Investment Act** (Water Quality Act) provides \$13.4 billion over the next five years for clean water and drinking water improvements. Section 608 of that bill repeats the *Buy American* provisions of the Recovery Act. More recently the **Green Schools Act** has been introduced in the House of Representatives replicating the same *Buy American* provisions.

Canadian Concerns

- Although Canada and the United States have agreed to international procurement obligations at the federal level under the NAFTA and the WTO Government Procurement Agreement (GPA), there are no international obligations at the sub-national level, i.e. States or municipalities.
- *Buy America* content requirements have been applied to US state and local procurement since the 1930s. However, the *Buy American* provisions now appearing in the Recovery, Water Quality, and Green Schools Acts significantly extend conditions applied to state and local procurement to an outright restriction on imports of iron, steel, and manufactured goods unless waivers are applied.
- The appearance in other appropriations bills and authorizing legislation of *Buy American* provisions similar to those in the Recovery Act threaten to expand the scope of US market access restrictions applied to imports from Canada and other countries – in spite of commitments made by G20 nations not to undertake further protectionist measures in response to the current recession.
- Canadian companies will be ineligible to compete for state and local procurement projects funded under the Recovery Act or other US legislation containing similar *Buy American* provisions if waivers are not granted. Meanwhile, US companies continue to have access to Canadian provincial and municipal infrastructure projects.
- There is a danger that other countries will impose protectionist measures in retaliation to US Buy America restrictions, further limiting market access for Canadian exporters.

Impact on Canadian Exporters

- Canadian and US industrial markets are closely integrated with material and components of complex products and technologies crossing our border many times before being sold to the final customer.
- Canadian exporters supplying state and local procurement projects affected by new *Buy America* restrictions are being asked to sign affidavits verifying that their products are manufactured in the United States. US manufacturers selling directly to state and local procurement projects are also beginning to ask their Canadian suppliers to sign similar affidavits.
- Canadian companies are already losing contracts, leading to production shutdowns in Canada and forcing some businesses to consider moving production to the United States.

- Canada's water and wastewater equipment industry is a good example of the integrated nature of the Canada-US market and of a sector that has already been affected by the *Buy American* provisions inserted into the House version of the Water Quality Act.
- The Canadian water and wastewater equipment market generates over CDN\$7 billion per year. In the US, it is estimated that water and wastewater infrastructure needs over the next five years would require up to \$500 billion in new spending. In both countries, most of this spending is at municipal levels.
- In 2008, US manufacturers of water and wastewater treatment equipment exported \$2.8 billion of product to Canada, while Canadian companies sold \$1.8 billion into the United States.
- Canada has been a leading supplier of water and wastewater treatment technology, including:
 - UV water treatment equipment manufactured by Trojan based in London, Ontario;
 - Membrane technology for water and wastewater treatment manufactured by GE Water and Process Technologies (formerly Zenon) in Mississauga, Ontario; and,
 - Energy efficient pump technology manufactured by Hayward Gordon in Halton Hills, Ontario.
 - Longstanding, non-corrosive plastic pipe used in municipal, plumbing, electrical, industrial and heating construction industry manufactured by IPEX Inc., based in Don Mills, Ontario and with 25 other production facilities and sales offices across Canada. Since its inception in 1949, IPEX has produced enough plastic pipe and fittings to circle the globe approximately 150 times.
 - Many leading Canadian water and wastewater equipment suppliers purchase significant inputs from the United States.
- Canada's suppliers of water and wastewater treatment technologies face the threat of being excluded from US state and local markets.
- More is at stake than Canadian exports for both Canada and the United States:
 - Restrictive procurement practices increase costs, complexity, and project timing, slowing down infrastructure spending when it is needed the most.
 - US restrictions on Canadian exports kill American jobs for US suppliers to Canadian companies.
 - Possible retaliatory actions would close off markets for Canadian and US exporters around the world.

Growing Protectionist Pressures

- The fear of growing protectionism and retaliation on the part of US trading partners is the most important consideration for opponents of *Buy American* provisions in the United States.
- There is growing pressure on the part of Canadian manufacturers, finding themselves locked out of the US market but competing with US companies that can freely bid for provincial and municipal procurement projects in Canada, for provinces and local governments to introduce similar *Buy Canada* or reciprocal procurement provisions.
- The Town of Halton Hills has passed a resolution calling on Canadian municipalities to source from companies whose countries of origin do not impose local trade restrictions against goods and materials from Canada. The resolution has been submitted for endorsement to the Federation of Canadian Municipalities.
- The Halton Hills resolution calls for reciprocal restrictions to be put in place in the case of discriminatory treatment in export markets. It can also be read as a commitment to keep municipal markets open to suppliers from countries that do not restrict Canadian exports.

What is CME Doing?

- In response to growing concern among its membership, Canadian Manufacturers & Exporters is taking the lead in:
 - Monitoring legislative and regulatory developments in the United States, working through CME's office in Washington and with the Canadian Embassy;
 - Raising awareness about *Buy America* issues at federal, provincial, and municipal levels in Canada as well as among the associations that are members of the Canadian Manufacturing Coalition;
 - Briefing Canadian and US officials, business groups, and media about the issue;
 - Identifying Canadian companies affected by *Buy America* restrictions;
 - Encouraging Canadian companies to contact their elected representatives, and their US suppliers to communicate concerns to US legislators;
 - Identifying and mobilizing US business associations opposed to Buy America restrictions; and,
 - Coordinating communication and consultative activities among government officials, business associations, and individual companies affected by the issue.
- CME is the only Canadian business association that has an office in Washington DC.

Canada's Policy Response

- There is an urgent need for leadership from the Government of Canada, and all other levels of government, on this issue. The Senate Committee on Environment and Public Works began their consideration of the Water Quality Investment Act on May 7th. Meanwhile new legislation is appearing in Congress containing *Buy America* provisions.
- The Government of Canada should pursue a two-pronged response strategy aimed at:
 1. The general issue of *Buy America* restrictions; and,
 2. The particular issues of those sectors affected by current legislation.
- The objectives of the Canadian Government's strategy should be to:
 1. Prevent *Buy American* restrictions from being adopted in US Government legislation;
 2. Secure an agreement that *Buy American* restrictions would not apply to Canadian goods if they are present in US legislation or and,
 3. Negotiate an open procurement agreement with the United States.
- The Prime Minister should raise *Buy American* issues with the President of the United States at the earliest opportunity and press for an exclusion for Canadian manufacturers.
- The threat of retaliation by provincial and municipal governments and agencies should be used as negotiating leverage by the Canadian Government.
- Negotiating options for the Government of Canada include:
 - Lobbying US Congressional leaders not to include Buy America provisions in future legislation;
 - Working with the US administration to provide a blanket waiver for Canadian goods recognizing the close integration of our industrial market;
 - Securing an agreement that the US Government would apply NAFTA procurement obligations to federal funds transferred to state and local levels;
 - Negotiating an open procurement agreement covering state/provincial and local levels; and,
 - Negotiating waivers or reciprocal access agreements on a sector by sector basis.

- All federal parties should work together in support of a speedy resolution of the issue.

Jayson Myers
President
Canadian Manufacturers & Exporters

Tel. 613 799-2096

Appendix 1 – Other Legislation Currently Under Consideration in the 111th Congress

1. HR 629 Energy and Commerce Reinvestment Act

Section 4103 – Requires that any funds made available to carry out this title be used to purchase health information technology only if such technology is manufactured, including the engineering and programming of any software, in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States

2. HR 689 Air Force One Built in America Act

Section 3 – The Secretary of Defense may enter into a contract for the procurement of an aircraft for use as Air Force One by the President only if that aircraft is manufactured in the United States by an American-owned company.

3. HR 580 Purchasing Low Emission Vehicles for Use in Government Act

Section 3 – In meeting the requirements of paragraph (1)(D), the Secretary, with the cooperation of the heads of other appropriate agencies, shall ensure that the Federal Government acquires not fewer than 100,000 plug-in hybrid electric vehicles manufactured in the United States by entities incorporated or organized under the laws of the United States

4. HR 595 American Steel First Act of 2009

Section 2 – The head of a covered Federal agency shall not obligate or expend funds appropriated to the agency, or provide financial assistance using funds appropriated to the agency, for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron and steel used in such project is produced in the United States.

5. HR 861 Strategic Targeted American Recovery and Transition Act of 2009

Section 1110 – None of the funds appropriated or otherwise made available by this Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron and steel used in the project is

produced in the United States. Subsection (a) shall not apply in any case in which the head of the Federal department or agency involved finds that—

- (1) applying subsection (a) would be inconsistent with the public interest;
- (2) iron and steel are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or
- (3) inclusion of iron and steel produced in the United States will increase the cost of the overall project by more than 20 percent.

6. HR 2187 21st Century Green High-Performing Public School Facilities Act

To direct the Secretary of Education to make grants to State educational agencies for the modernization, renovation, or repair of public school facilities. **Section 306** – Replicates ARRA Section 1605

Appendix 2 – OMB Responses to Canadian Government Questions on Interim Financial Guidance

Responses to *Questions Regarding Interim Final Guidance for Federal Financial Assistance (2 CFR Part 176), Subpart B – Buy American Requirement under Section 1605 of the ARRA.*

1. For a “manufactured good” that consists in whole or in part of materials from another country, the IFG states that the manufactured good must be “substantially transformed in the United States into a new and different manufactured good distinct from the materials from which it was transformed.” (§176.160) Are there definitions, guidance or jurisprudence elsewhere in U.S. law that will assist in the interpretation and application of this phrase?

Response: There are numerous sources such as substantial case law and Government Accountability Office (GAO) decisions relating to substantial transformation.

2. We are receiving reports that some contract bidders are alleging that their competitors’ products do not meet the “substantial transformation” test, in an apparent effort to encourage procuring entities concerned with the timely distribution of Recovery Act funding to reject their competitors’ bid. Given the ambiguity in the application of the “substantial transformation” test to specific products, what evidence will be sufficient to enable bidders to demonstrate that the products do in fact meet the test? How would you recommend that bidders respond to such situations in order to provide to procuring entities reassurance that their products meet the Section 1605 criteria and in order to prevent costly and time-consuming potential litigation?

Response: It is necessary to demonstrate that the product is a new and different manufactured good distinct from the materials from which it was transformed. For example, putting together watch pieces to form a watch has been found to create a new and different product. On the other hand, taking a machine that already works as intended and painting it green is not substantial transformation.

Study of existing case law and decisions will provide further detail for those cases that are unclear.

3. Does assembly in the United States meet with substantial transformation test?
Response: Assembly in the United States may meet the substantial transformation test, but not in every case. Substantial transformation is a more stringent standard than assembly. For example, assembly of a radio has been found to constitute substantial transformation.
4. Will the test for determining whether a product is manufactured in the United States be the same for the IFG as it is for the Final Interim Rule issued by the FAR Council?
Response: Yes, whether a product is manufactured in the United States will be determined in the same way under both the Interim Guidance and the Final Interim Rule.
5. IFG contains a procedure for the timely determination of the inapplicability of Section 1605 (§176.100). Is there a similar procedure contemplated for a timely determination of whether a “manufactured good” meets the substantial transformation test?
Response: We can only answer questions on the Interim Guidance, not what may be contemplated in the future.
6. The IFG provides a definition of “manufactured good”. The definition states that the good must be “brought to the construction site for incorporation into the building or work...”? (§176.140) Can you confirm that Section 1605 does not cover items such as tools or equipment used in a public building or public work but not incorporated into the structure.
Response: Yes, that is correct.
7. Unlike the Interim Final Rule issued by the FAR Council, the IFG does not appear to cover “unmanufactured” goods, other than possibly iron and steel. Can you confirm that Section 1605 of the Recovery Act does not cover “unmanufactured” goods, other than iron and steel?
Response: Iron and steel are manufactured goods, according to the definition of that term in the Interim Guidance. The Guidance does not cover unmanufactured goods.
8. Many “components” are themselves “manufactured goods”. What factors are taken into consideration when distinguishing between “component” and “manufactured good” for the purposes of the IFG?
Response: 176.70(a)(2)(ii) of the Interim Guidance states that there is no requirement with regard to the origin of components or subcomponents of manufactured goods. Components are items that are incorporated into the end product. For example, if a radio is manufactured or substantially transformed in the United States, it is irrelevant where the individual components were manufactured.
9. IFG incorporates the list of non-available items set out in 48 CFR 25.104(a). Does OMB anticipate any additions, modifications or deletions to this list that could affect “manufactured goods”?

Response: We can only answer questions on the Interim Guidance, not what may be contemplated in the future.

10. Please confirm whether or not a waiver has been issued for COTS information technology products or waiver OMB or any federal department or agency will be issuing one.

Response: We can only answer questions on the Interim Guidance, not what may be contemplated in the future.

11. Other than the waiver for previously determined unavailable goods, does the OMB anticipate issuing any generally applicable waivers applying to a "category of cases"?

Response: We can only answer questions on the Interim Guidance, not what may be contemplated in the future.

12. Do the Buy American requirements apply to award recipients who are non-governmental entities (i.e. private sector companies)? For instance,

- would the Buy American requirements apply to private sector recipients of awards granted under the National Information and Technology Administration (Department of Commerce) broadband programs;
- would the Buy American requirement apply to private water service providers who receive funding under the EPA state-revolving loan programs?

Response: The "buy American" requirement would apply to private sector entities where they are carrying out a public work as defined in 2 CFR 176.140 and 176.160, unless an exception applies and a waiver has been granted by the head of the federal agency.

13. Is a grant in such circumstances considered a procurement by government entity?

Response: See Response to Question 12.

14. If there is a conflict between the OMB IFG and guidance documents put out by federal agencies and departments, which document would take precedence? For instance, there appears to be an inconsistency in the scope of "manufactured good" as defined by the Federal Highway Administration and by the IFG. (FHWA, American Recovery and Reinvestment Act of 2009, Implementing Guidance, (Updated April 1, 2009), Section VI(E))

Response: Pursuant to Title XII of the Recovery Act, the "buy American" requirement in section 1605 does not apply to mass transit and highway projects, since those projects are subject to a separate "buy American" requirement.

15. What does the phrase "inconsistent with the public interest" mean? Is there any definition, guidance or jurisprudence elsewhere in procurement law that will assist in the interpretation and application of this phrase?

Response: This is a subjective term that is subject to broad discretion of the official with the authority to issue a waiver. However, the term has been long used for determination under the Buy American Act.

16. Is OMB concerned about the negative impact on jobs in the United States that may result in the event other countries seek to adopt similar measures to block

U.S. exports? If the likelihood of such job losses could be demonstrated, would it be in the "public interest", as the term is used in Section 1605(b)(1), to restrict the application of the Buy American requirements in order to protect those jobs?

Response: OMB is committed to implementing laws in the appropriate manner.