

Government Contracts Blog

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Recovery Act Update -

U.S. Stimulus: "Buy American"

PRC Stimulus: "Buy Chinese"

Canada and WTO: "Not Pleased"

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (Pub. L. No. 111-5), known popularly by a variety of names, including "ARRA," the "Recovery Act," and the "Stimulus Act." We have [previously discussed](#) many of the provisions relating to the Recovery Act at some length, especially the implementing regulations that were recently published this spring.

Now that we have had a chance to see how the policies behind the Recovery Act are unfolding in reality (and there are advocates and detractors on all sides of this debate), we thought it might be interesting to review how the Buy American provision of the Recovery Act (Section 1605) is impacting U.S. relations with its international trade partners. In brief, many countries remain cautiously optimistic about U.S. Buy American practices under the Act, while other countries (such as Canada) seem to be gearing up for a trade war. This latter development should not, we think, be surprising -- a protectionist reaction on the part of at least some of our trading partners seemed likely when the "Buy American" provision was first proposed in January 2009.

Buy American

When Congress first proposed including "Buy American" restrictions in the Recovery Act in January 2009, a number of commentators warned that such measures would prompt an international protectionist reaction resulting in "trade wars," along the lines of those that developed during the initial years of the Great Depression following passage of the Smoot-Hawley Tariff Act of 1930. In an attempt to assuage these concerns, the Senate added language indicating that the "Buy American" provision would be "applied in a manner consistent with United States obligations under international agreements" (§ 1605(d)). While many hoped that this provision would do the trick, it appears that its drafters did not understand that, in the context of stimulus legislation aimed primarily at State and local governments, its ameliorative effect would be minimal to nonexistent.

It turns out that international trade agreements are, for the most part, entered into between the

U.S. and other foreign countries; individual States are sometimes covered by the agreements, but only selectively (and city and county governments are rarely covered at all). The Senate may have dressed up the "Buy American" provision with a fig leaf and a nod toward international trade, but the plain fact is that the Recovery Act "Buy American" provision has effectively created an almost pure "Buy American" requirement that bars most foreign companies and foreign products (even if sold by a U.S. company, employing U.S. persons) from participating in Recovery Act opportunities at the State and local levels. (Click [here](#) for our previous discussion on the impacts of the Buy American provision of the Recovery Act).

Buy China

As if in fulfillment of the warnings about the international backlash to the "Buy American" restriction, the [Financial Times](#) recently reported that China has included a "Buy China" provision in its latest stimulus package. The new Chinese edict, dated June 1, 2009, directs that "Government investment projects should buy domestically made products unless products or services cannot be obtained in reasonable commercial conditions in China." It continues: "Projects that really need to buy imports should be approved by the relevant government departments before purchasing activity starts."

The Financial Times observes that "[t]he new edict bans local governments and departments from discriminating against domestic suppliers in their procurement. [However, f]oreign companies operating in China argue that the opposite is in fact true and that they have been largely cut out of procurement related to the government's stimulus package."

Chinese officials have expressed dismay at the fact that anyone in the international community would have a problem with a "Buy China" provision, especially given the fact that the U.S. included a "Buy American" provision in its stimulus package. The Financial Times observes that this move by the Chinese will likely "amplify tensions with trade partners and increase the likelihood of protectionism around the world."

Bye-Bye Canada?

Our neighbor to the north is learning the hard way the difficult truth of the "true impact" of the Recovery Act's "Buy American" provision. Even though the U.S. and Canada share close to \$600 billion in bilateral trade and are each other's largest trading partners, and even though the U.S. and Canada have entered into numerous free trade agreements, Canadian companies continue to find themselves locked out in the cold when it comes to participating in the many U.S. Recovery Act projects that occur below the federal level. Canadian trade representatives and industry on both sides of the border have loudly challenged the exclusion of Canadian companies and Canadian products, and the issue has been raised all the way to the U.S. Trade Representative and President Obama. Both have assured Canadian authorities that the issues can be resolved. Just last month, Debbie Meloh, spokeswoman for the U.S. Trade Representative, stated, perhaps disingenuously, that the U.S. Government is willing to negotiate with Canada for access, provided there is suitable "reciprocity." Canadian municipal leaders, meanwhile, are threatening to retaliate by keeping U.S. companies from selling to local governments in Canada, giving the U.S. until the middle of October 2009 to roll back the "Buy American"

requirements. Rumors of a trade war abound.

The WTO's Reaction

When the Recovery Act was originally passed in February 2009, many members of the WTO (especially the European Union) were very skeptical of the "Buy American" provision. President Obama assured the WTO that the provision would be applied consistent with America's free trade obligations. The lack of penetration into the State and local market was, of course, not loudly proclaimed. While the WTO has continued to question the wisdom of the "Buy American" provision and warned against other protectionist measures, it has since remained relatively silent on publicly criticizing the "Buy American" provision.

This may well be due to the fact that the WTO is already hosting a number of other trade disputes between the U.S. and its foreign trading partners, perhaps most notably with regard to allegations of illegal subsidies to aircraft manufacturers -- the U.S. alleges that the E.U. is illegally subsidizing EADS/Airbus with improper launch aid, and the E.U. argues that the U.S. is improperly subsidizing the Boeing Company. Just last month, U.S. Trade Representative Ron Kirk warned that the U.S. would move "swiftly and quickly" to squelch any additional aid provided to Airbus from members of the E.U. The underlying dispute of "illegal subsidies" has been simmering since before 2005 (when the U.S. raised its claims with the WTO), and the WTO is expected to issue a preliminary ruling later this year. But, in the meantime, the rhetoric of a "trade war" informs the cross-Atlantic dialogue between the U.S. and the E.U.

Conclusion

If the Smoot-Hawley Tariff Act of 1930 taught us anything, it is that protectionist walls do not rescue a nation from a depression. Quite the contrary, they simply frustrate economic recovery and stifle economic growth. But there are many on Capitol Hill and many across America who do not see it that way; and there are apparently many in China who do not see it that way either. And, perhaps as a simple case of "tit for tat," it seems that there are an increasingly large number of people in Canada who may not see it that way either.

Apparently, Chris Braddock of the U.S. Chamber of Commerce sees things a bit more clearly. The [Canadian Business Online Blog](#) reports that, in Mr. Braddock's view, the "Buy American" end-game is becoming clear: "The point was to stimulate American jobs with American funds," says Mr. Braddock. "Unfortunately, it hasn't quite worked out that way."

Alas, when it comes to its "Buy American" restrictions, the Recovery Act has stimulated only international bickering, both with our single largest trading partner and our largest potential trading partner. Probably the last thing the present Administration wanted to do was to prove the wisdom of former President Reagan's oft repeated criticisms of Smoot-Hawley protectionism. History, President Reagan observed, "points in the opposite direction: more trade, not less; increasing cooperation, not isolationism and retaliation; expanding global networks of investment, production, and communication, not mercantilist national economics shrinking behind tariff barriers." President Reagan summed it up succinctly -- "Protectionism isn't just bad economics, it's bad politics." But, as we all know, politics are often oblivious to the ironic

imperative we know as the Law of Unintended Consequences.

For other recent developments with regard to free trade agreements with Taiwan and China, click [here](#).

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