

# Government Contracts

## E-ALERT

February 5, 2009

### "Buy American" Provisions in Stimulus Package Stir Controversy

The U.S. stimulus bill, the American Recovery and Reinvestment Act of 2009 ("ARRA"), is igniting a contentious debate about whether stimulating the U.S. economy will be done at the cost of sparking a protectionist trade war. U.S. trade partners, notably Canada and the European Union ("EU"), have criticized the "Buy American" provisions in both the House bill that passed last week and the Senate's proposed bill. This client alert provides an overview of these provisions and the trade issues they raise.

Whether these provisions ultimately will be part of the stimulus package remains uncertain. While President Obama voiced concern about the provisions in a February 3 interview, the provisions still have broad support among many Members of Congress, the domestic steel industry, and trade unions. If the current provisions become law, they could severely restrict the participation of foreign companies in projects funded by the ARRA, subjecting the United States to the risk of both retaliatory actions abroad and World Trade Organization ("WTO") litigation.

#### OVERVIEW OF "BUY AMERICAN" PROVISIONS IN THE STIMULUS PACKAGE

The Buy American provisions passed by the House would forbid the use of ARRA funds for projects involving public buildings or public works "unless all of the iron and steel used in the project is produced in the United States." The current version of the Senate bill expands this provision to cover all "manufactured goods," in addition to iron and steel. Public buildings and public works projects covered by both the House and Senate provisions include airports, bridges, railroads, mass transit, roads, and harbors. In a separate provision, the House bill also requires the Department of Homeland Security ("DHS") to purchase only U.S.-made textiles, including clothing.

Both the House and Senate provisions include limited exceptions. A federal agency can waive the Buy American provision if it provides a written justification explaining that application of the provision (1) would be inconsistent with the public interest, (2) the iron, steel, or manufactured good at issue is not produced in sufficient or reasonably available quantities in the United States, or (3) the inclusion of the U.S. iron, steel, or manufactured good would increase the overall cost of the product by more than 25 percent. There is no guidance on what constitutes an application that is inconsistent with the public interest, but similar language has been used to override the Buy American Act for defense purchases from NATO allies.

The ARRA restrictions are potentially significant. Examples of projects seeking funds from the bill include a \$35-40 million renovation of school heating, cooling, electrical, and plumbing systems and a \$50-60 million power plant. Many of these types of construction projects may require considerable amounts of iron and steel products. The impact of the provisions would

COVINGTON

COVINGTON & BURLING LLP

BEIJING

BRUSSELS

LONDON

NEW YORK

SAN DIEGO

SAN FRANCISCO

SILICON VALLEY

WASHINGTON

WWW.COV.COM

increase if the Senate version were passed and all manufactured goods were included in the final bill. Foreign suppliers of everything from hammers to wiring would be precluded from participation in these construction projects.

## TRADE IMPLICATIONS

At the G-20 summit in November 2008, the United States and 19 of the world's largest economies promised to "refrain from raising new barriers to investment or to trade in goods and services, imposing new export restrictions or implementing [WTO] inconsistent measures to stimulate exports." The Buy American provisions have sparked fears among the G20 and other countries that if the United States reneges on this promise, other leading world economies will follow suit. A Peterson Institute for International Economics report issued February 3 warned that retaliatory protectionist measures by U.S. trading partners could cost more U.S. jobs than the Buy American provisions are designed to create.

The United States already has a Buy American law that does not violate U.S. trade commitments. Both the House and Senate versions of the stimulus bill are similar to the current Buy American Act, which states that unmanufactured and manufactured products used for public buildings and public works projects must be of U.S. origin. However, the Buy American Act is limited by the Trade Agreements Act ("TAA"), which gives USTR the authority to waive the applicability of discriminatory procurement laws or regulations if they are inconsistent with the WTO's Agreement on Government Procurement ("GPA") or U.S. Free Trade Agreements ("FTAs"). As a result, parties to these agreements, such as the European Union, Canada, and Japan, may compete for certain contracts which would otherwise be barred from them by the Buy American Act. USTR has granted this waiver for all members of the GPA and U.S. FTA partners. USTR also has authority to grant a waiver for least-developed countries.

There has been some controversy over whether the TAA will apply to the Buy American provisions of the ARRA. Since the waiver provision of the TAA applies to "the application of any law, regulation, procedure, or practice regarding Government procurement," arguably USTR could use this authority to waive the Buy American provisions of the ARRA for GPA and FTA partners. On February 4, the Senate passed an amendment co-sponsored by Senators Dorgan and Baucus that would require the Buy American provisions to be applied in a manner consistent with U.S. obligations under international agreements. The House bill does not include this language for purchases of steel and iron, but it does include similar language for DHS's procurement of textiles.

Even if the Buy American provisions are waived for GPA and FTA signatories, there are several key U.S. trading partners that would still be subject to the Buy American provisions. China, India, and Brazil, for example, are not GPA members, and therefore any waiver for GPA members or FTA partners would leave the Buy American provisions in place with respect to these three countries.

If the USTR does not waive the ARRA provisions for U.S. GPA and FTA partners, the United States could find itself in violation of these agreements. Canada and the EU both have raised concerns that the ARRA provisions may violate the United States' trade obligations, and the press has reported that the EU would consider a WTO case if the Buy American provisions are included in the final stimulus package. The Dorgan amendment appears to address WTO concerns, but it does not address more general fears that the Buy American provisions will spur other countries to adopt similar legislation, thereby sparking a new wave of protectionism.

The GPA and FTAs include a commitment to allow foreign companies to compete for contracts on the same terms as domestic companies. Although there are some exceptions, most notably contracts related to federally-funded mass transit and highway programs, the GPA and FTAs generally provide that foreign companies may participate in construction contracts that are expected to exceed \$7.4 million (or \$8.8 million for some countries). Many construction projects under the stimulus package are expected to exceed the \$7.4 million threshold.

### REACTIONS TO THE BUY AMERICAN PROVISIONS

The passage of the Buy American provisions by the House last week led to vocal objections from major U.S. trade partners. Canadian International Trade Minister Stockwell Day said that the provisions set up "protectionist walls, protectionist barriers that actually result in retaliatory trade wars," and EU Ambassador John Bruton sent a letter to congressional leaders stating that "resorting to measures that may effectively close the markets from foreign operations cannot be considered the right or effective response" to the current economic downturn. Japanese Prime Minister Taro Aso also has condemned the provisions.

President Obama's Administration said late last week that it was reviewing the Buy American provisions in the House bill. In the Administration's first clear statement to date on the issue, President Obama stated in a February 3 interview, "I think we need to make sure that any provisions that are in there are not going to trigger a trade war."

Domestic exporters, who fear retaliatory measures, and the construction industry, which may face increased costs, have joined foreign opposition to the Buy American provisions. Many of these domestic companies and business associations sent a letter to Congress on February 3 advocating for the elimination of the provisions. Senator McCain proposed an amendment on February 4 to remove the Buy American provisions from the Senate bill. His amendment failed 31 to 65. At the same time, the U.S. steel industry, trade unions, and other beneficiaries are promoting the provisions and have active supporters in Congress. The House Transportation and Infrastructure Committee Chairman James Oberstar has stated that he would oppose the entire bill if the Buy American provisions are removed. There also is strong popular support for Buy American laws in the United States, according to a poll conducted by the American Iron & Steel Institute, in which 86% of respondents favored such provisions.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our government contracts group:

Alan Pemberton  
Jennifer Plitsch

202.662.5642  
202.662.5611

[apemberton@cov.com](mailto:apemberton@cov.com)  
[jplitsch@cov.com](mailto:jplitsch@cov.com)

---

This information is not intended as legal advice, which may often turn on specific facts. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP is one of the world's preeminent law firms known for handling sensitive and important client matters. This promotional communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to [unsubscribe@cov.com](mailto:unsubscribe@cov.com) if you do not wish to receive future emails or electronic alerts. Covington & Burling LLP is located at 1201 Pennsylvania Avenue, NW, Washington DC, 20004-2401.

© 2009 Covington & Burling LLP. All rights reserved.