



INTERNATIONAL TRADE UPDATE

Buy American Provisions in President Obama's Proposed "American Jobs Act"

On September 12, 2011, President Obama submitted a legislative proposal entitled the "American Jobs Act of 2011," designed to strengthen the economy and bolster job growth through tax relief, infrastructure investments, and assistance for unemployed workers.¹ Republican reaction has been substantially negative, with House leadership indicating that the proposal as a whole may not be allowed to come up for a vote, so that perhaps only some portions will ever receive significant congressional attention. Nonetheless, it is noteworthy that the President's proposed bill contains "Buy American" provisions for iron, steel and manufactured goods that are identical to the Buy American provisions passed in the American Recovery and Reinvestment Act of 2009 ("Recovery Act").²

These provisions, found in section 4 of the proposed legislation, would require that all iron, steel, and manufactured goods used in projects for the construction, alteration, maintenance, or repair of public works or buildings funded through the bill be produced in the United States. They would also allow this requirement to be waived if U.S. produced materials and goods are not reasonably available in sufficient quantities, if compliance would increase overall project costs by more than 25 percent, or if otherwise found to be inconsistent with the public interest.³

Additionally, also consistent with the Recovery Act's terms, paragraph (d) of section 4 states that the Buy American provision is to be applied "in a manner consistent with United States obligations under international agreements."⁴ The meaning of this condition—the extent to which it modifies the proposal's basic Buy American requirement and the circumstances under which it does so—could have significant consequences for public agencies obligated to comply with both U.S. law and international agreements, as well as for non-U.S. producers seeking to participate in any projects funded under the legislation.

¹ See generally EXEC. OFFICE OF THE PRESIDENT, THE AMERICAN JOBS ACT: PRESIDENT OBAMA'S PLAN TO CREATE JOBS NOW (Sept. 12, 2011), <http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/american-jobs-act.pdf>.

² Compare American Jobs Act of 2011, H.R. 12, 112th Cong. § 4 (2011), with Pub. L. 111-5, § 1605, 123 Stat. 115, 303 (2009). Section 1605 of the Recovery Act would also be made expressly applicable to projects funded under Title II of the American Jobs Act proposal—which covers all infrastructure and building projects—by section 231 of the bill. See H.R. 12 § 231.

³ H.R. 12 § 4.

⁴ *Id.*

In light of the absence of details at this point regarding the intended implementation of the Buy American provisions in the Jobs Act, the implementing regulations for the Recovery Act provision may offer a useful guide to how the Jobs Act proposal, if enacted, might be administered.⁵

Under the Recovery Act grant regulations, these domestic preferences do not apply when two conditions are met:

First, the iron, steel, or manufactured goods to be used in the project are from a party to an applicable international agreement, specifically, the World Trade Organization Government Procurement Agreement, the ten U.S. Free Trade Agreements currently in force, a 1995 agreement between the U.S. and the European Communities, or a February 2010 agreement between the U.S. and Canada.⁶

Second, the public entity receiving funds for the project—whether at the federal, state or local levels—is required by the applicable agreement to treat the goods of the other party in the same manner as domestic goods.⁷

However, there is a marked lack of coherence and uniformity regarding which entities have obligations under these international agreements and under what circumstances such obligations apply, thereby making it complicated to determine when the two conditions are met.

For example, only 37 states are bound by the Government Procurement Agreement. In addition, some states are only bound by a few of the potentially applicable agreements, while other states are obligated by each of the international agreements. Furthermore, within some states, only certain agencies are covered, while some products or activities may be completely exempted from coverage. To illustrate—all of Arizona's executive branch agencies are covered by its obligations under applicable agreements not to discriminate against foreign goods, but only vis-à-vis parties to the Government Procurement Agreement, as well as FTA partners Chile and Singapore. In contrast, Illinois' procurement obligations cover only its Department of Central Management Services, but also apply to goods from Australia, Peru, and a number of European countries (in specified circumstances). However, Illinois has exempted construction-grade steel and motor vehicles from those obligations. The City of Chicago, meanwhile, has a different set of obligations.⁸

It is also noteworthy that, in practice, the passage of the Recovery Act served to catalyze new opportunities for U.S. producers to participate in foreign government procurements. Motivated by the significant addition of federal funding for U.S. state-level public construction projects, the Canadian and American governments reached an agreement to grant Canadian companies nondiscriminatory treatment under the WTO Government Procurement Agreement at the state and local level, as well as for selected projects funded by the Recovery Act. In exchange, U.S. suppliers were provided equal access to significant parts of Canadian provincial procurements, despite the provinces' longstanding objections to abandoning their own use of domestic preferences.⁹ It is conceivable that the American Jobs Act, if enacted, might similarly provide opportunities to open new markets for both U.S. and non-U.S. suppliers.

⁵ Office of Management and Budget regulations, discussed here, apply to projects funded through federal financial assistance programs, such as grants, loans, and cooperative agreements. Projects under procurement contracts with the federal government are subject to the Federal Acquisition Regulation, which contains additional Buy American Act requirements. *Compare* 2 C.F.R. pt. 176 (2011) (OMB regulations), *with* FAR 52.225-21 to -24 (2011); *see also* Recovery Act—Buy American Requirements for Construction Materials, Discussion and Analysis § 11(b), 75 Fed. Reg. 53,153, 53,164 (Aug. 30, 2010) (explaining the different OMB and FAR guidance).

⁶ Agreement on Government Procurement, U.S.-Can., Feb. 12, 2010, *available at* http://www.ustr.gov/webfm_send/1638.

⁷ 2 C.F.R. § 176.90. Additionally, the international agreement exception only applies to projects greater than \$7.8 million in value. *See* Procurement Thresholds for Implementation of the Trade Agreements Act of 1979, 74 Fed. Reg. 68,907 (Dec. 29, 2009).

⁸ U.S. States, Other Sub-Federal Entities, and Other Entities Subject to U.S. Obligations Under International Agreements, 2 C.F.R. pt. 176, subpt. B app.

⁹ *See* Press Release, U.S. Trade Representative, Agreement Would Give American Suppliers New Access to Canadian Procurement Contracts (Feb. 5, 2010), <http://www.ustr.gov/about-us/press-office/press-releases/2010/february/kirk-comments-us-canada-procurement-agreement>.

Nevertheless, the use once again of discriminatory provisions of this kind has already given rise to expressions of concerns, with the Canadian government, for example, promising to initiate the consultation procedures provided for in the February 2010 bilateral agreement.¹⁰

Working through such complex provisions can be a daunting endeavor. Sidley Austin has a team of lawyers experienced in representing firms, governments, and trade organizations on issues of government procurement, international trade obligations, and market access negotiations. We would be pleased to assist your organization in identifying and pursuing new opportunities created by this complex and changing landscape. If you have any questions regarding this update, please contact the Sidley lawyer with whom you usually work.

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¹⁰ Statement by International Trade Minister Ed Fast on the American Jobs Act, September 14, 2011, available at http://www.international.gc.ca/media_commerce/comm/news-communiques/2011/263.aspx?view=d.