

# Commentary



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## Government procurement and Biden's Buy American policies: A way forward

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### Introduction

The Biden administration is not wasting any time in expanding its “Buy American” policies. Signed on January 25, 2021, President Biden’s executive order requires increased preferences for US-made goods in government procurements, thereby adding new restrictions on foreign suppliers to the US procurement market.

The US market is an enormous sector in economic terms. Depending on how its policies are implemented, President Biden’s order could jeopardize the interests of Canadian suppliers of goods and services to that market.<sup>1</sup>

Suppliers and governments alike hope that any restrictions on Canadian suppliers are minimized, but that will depend on how discussions unfold between the two governments. The discussions will reflect economic reality and the fact that Canadian companies are part of integrated and cost-effective supply chains, benefitting American purchasing entities and, ultimately, US taxpayers.

There is a precedent here for the US to ease constraints on Canadian merchants. The 2010 Canada-US Agreement on Government Procurement reduced restrictions on Canadian suppliers that arose out of the Buy Ameri-

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can preferences that were implemented under the *American Recovery and Reinvestment Act* (ARRA).

While the current atmosphere of political goodwill under a new Democrat administration could help Canada achieve the result it needs, even with a mature and respectful bilateral relationship there's bound to be some tough bargaining to get to that point. Goodwill only gets one so far in trade talks, as Canada well knows. President Biden and Prime Minister Trudeau and their teams held a substantive first meeting (via video-conference) on February 23, 2021. However, the US administration's new Buy American policy was not on the agenda, the result being that nothing in the President's executive order of January 25 has changed. That being the case, it is important to understand how international trade agreements affect Buy American preferences generally and Canada-US commercial relations more specifically. That is what the following commentary seeks to explain.

## Contents of the executive order

While it may be obvious, the first point to emphasize is that President Biden's executive order only applies to federally funded procurements. Buy American laws have no bearing on purchases made by individual states or on private sector supply contracts outside the orbit of US government programs.

No changes to US statutes are anticipated under the order. It is a policy directive to governmental agencies requiring that these agencies, "should, whenever possible, procure goods, products, materials, and services from sources that will help American businesses compete in strategic industries and help America's workers thrive" (White House 2021). In a sense, there is nothing new here. The US has had Buy American measures since 1933 – measures largely grandfathered under successive US trade agreements.

Importantly, the current order requires that all such agency actions be "consistent with applicable law," a part of the directive that could be of some comfort to Canada, in that, at least arguably, it incorporates the *Uruguay Round Agreements Act*, enacted by Congress in 1994 to approve US ratification of the WTO Agreement. Following this argument would mean that any new or expanded Buy American actions would have to comply with US obligations under the WTO Agreement on Government Procurement (GPA) (Johnson 2021).

There are two problems here. First, it is not clear whether the order goes that far – that the order's implementation requires the US to meet its obligations under the WTO agreement.<sup>2</sup> The words "consistent with applicable law" can be subject to different interpretations. Much will depend on how the agencies concerned implement the order. Second, even if the words do incorporate WTO provisions, there are many Buy American preferences that are completely outside of US procurement obligations. This point is also addressed below.

## Government Procurement Agreement

Before we get to specifics, there's a second point to consider. While the NAFTA included a separate procurement chapter,<sup>3</sup> the Canada-US-Mexico Agreement (CUSMA, which came into force from July 1, 2020 onwards), changed that. CUSMA states that in future all US-Canada government procurement obligations will be dealt with exclusively under the Government Procurement Agreement, or GPA.

Unlike the general WTO Agreement, which is a multilateral treaty binding all 167 parties equally, the GPA is “plurilateral,” meaning that the agreement is within the WTO framework, but has been concluded among a limited number of WTO members.<sup>4</sup> Members who have not ratified the GPA have no rights thereunder. As of 2021, there are 48 parties to the GPA, including the 27 members of the European Union, Canada, and the United States.

Access obligations among these GPA parties are “bottom up,” meaning that treaty obligations apply, but only for those entities specifically listed in each country's individual schedule (“covered entities”). Entities not listed are entirely outside GPA procurement obligations. Even for covered entities, obligations only apply to explicit types of purchases listed in each party's schedule. As the WTO website explains:

The text of the Agreement establishes rules requiring that open, fair and transparent conditions of competition be ensured in government procurement. However, these rules do not automatically apply to all procurement activities of each party. Rather, the coverage schedules play a critical role in determining whether a procurement activity is covered by the Agreement or not. Only those procurement activities that are carried out by covered entities purchasing listed goods, services or construction services of a value exceeding specified threshold values are covered by the Agreement.

What does all this mean for Canada and Canadian suppliers?

The US has listed 85 covered entities at the federal level as well as a number in each of the 37 states listed on its GPA schedule. But there are entities and procurements not listed. In those non-listed areas – and they are large – the US has no GPA obligations and can do whatever it likes in terms of expanding Buy American preferences.

In addition to this, there are dollar thresholds that must be met or exceeded for GPA obligations to apply. In the case of US federal procurements, the threshold is US\$182,000 for goods and services generally and US\$7.0 million for construction services. In the case of state procurements, the thresholds are US\$498,000 for goods and services and US\$7.0 million for construction services. Again, Buy American preferences for any projects that are valued at less than these amounts are not constrained in any way by US treaty obligations.

## GPA exclusions to the *Buy American Act*

Apart from the areas not covered by the GPA, numerous US programs were specifically excluded when the US signed on to the agreement. And while Canada has its own GPA exclusion list, the US exclusions are broader and deeper.

Examples of specific carve-outs include any Buy American requirements attached to federal funds given to states for mass transit and highway projects as well as all services associated with the management and operation of government facilities or privately owned facilities used for governmental purposes including federally funded research and development centers.

In addition to these, US defence and aerospace procurements and every conceivable kind of military procurements are also excluded.<sup>5</sup> All nuclear-related procurements are excluded, as are procurements of specialty metals, including almost all types of alloy steel. All procurements related to small business set-asides and all federally funded surface transportation procurements are excluded. And so on. There are an equally large number of excluded procurements at the state level. To the extent that President Biden's order deals with Buy America measures in either the excluded or the non-covered categories, those would not be subject to any WTO or CUSMA challenge.

But possibly of greater concern – beyond the bottom-up nature of the GPA and the Buy American carve-outs and points just referred to – is the right of countries to remove items from their GPA coverage, which is allowed under Article XIX of the Agreement. There are provisions for compensation where another's interests are affected, but there is nothing preventing countries from removing items in the first place. In fact, the Trump administration filed a change notice last December to remove “essential medicines,” from the list. If it goes ahead, the effect of that change will be that Buy American provisions will henceforth apply (Inside U.S. Trade 2021). Whether the Biden administration will seek to use Article XIX in a similar way remains to be seen.

## State and provincial (sub-national) procurements

A word of explanation regarding sub-national procurement obligations. Because the provinces and territories resisted when the WTO Agreement was under negotiation in the 1990s, just as they did when NAFTA was being negotiated in 1986, Canada committed to covering federal government procurements only. Consequently, Canadian suppliers were excluded from having access to the 37 states covered under the US GPA schedule.

This changed following the 2008-2009 global financial crisis and the implementation of the *US Recovery Act*, as noted previously. In return for allow-

ing Canada to bid on state procurements funded through the AARA, Canada agreed to add provincial and territorial procurements to Canada's GPA schedule, thereby opening these to US bidders. This eventually led to the current CUSMA provision providing that all Canada-US procurement rights and obligations will now come under the GPA framework.

That said, all of Canada's procurement rights in both US federal and state level are subject to the limitations and exclusions in US GPA obligations, as discussed, where Buy American preferences apply without restraint.

## Other worrisome aspects

Other elements in the executive order will concern Canadian companies. An increase in the required proportion of US-made or US-supplied components that any product must contain in order to qualify for Buy American funding will eliminate Canada from participating at various levels in many projects. In addition, new price preferences will mean that the US purchaser must discriminate in favour of US-made goods and won't obtain waivers – even if the cost is greater than a competitive Canadian product. All of this will obviously affect Canadian companies.

The US Office of Management and Budget is set to create a new office which will be called the "Made in America Office." Any purchasing agency wishing to be exempted from Buy America requirements has to request a waiver from the new office. The office will undertake a complex review before it will issue any waiver approvals. This process will make it more complex – and more difficult – for Canadian suppliers wishing to sell into the US market. Procurements move quickly and if there are bottlenecks that prevent these requests being considered in a timely fashion Canadian suppliers will be kept out of contention.

## Looking ahead

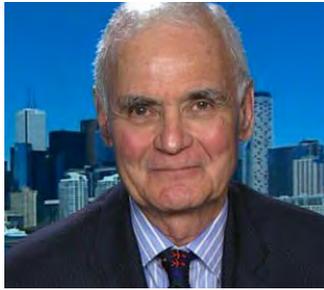
President Biden's Buy American executive order has been issued. The concern for Canada is whether its implementation will be balanced; this country's first task is to ensure the new order doesn't erode Canadian GPA rights. The next task, as was done in 2009-2010, is to get the United States to recognize the benefits Canadian suppliers bring to American procurements by underscoring the integrated commercial linkages and mutually beneficial interests in not interrupting or limiting these arrangements. It is not a zero-sum calculation.

To achieve these goals, Canada's federal government, in concert with the provinces and the business community, will have to muster all their contacts in the US public and private sector and make their case as strongly as pos-

sible. The new era of bilateral cooperation and mutual respect signified in the “Roadmap for a Renewed US-Canada Partnership” issued following the Biden-Trudeau meeting on February 23, 2021, will help in this regard.

Ultimately, the best solution for both countries could be an agreement embodied in a memorandum of understanding (MOU), an exchange of letters, or some kind of bilateral protocol, as was done with the 2010 Agreement on Government Procurement. Whatever the vehicle, even if the US does recognize our shared mutual interests, the bargaining will be hard – a fact of life in dealing with the United States, regardless of which party controls the White House.

# About the author



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## Endnotes

- 1 The financial press and others have commented widely on the potentially damaging effect of the order on Canadian business (St. Onge 2021; McCarten 2021).
- 2 This is in contrast to the ARRA, which specifically stated that it was subject to US obligations under international agreements.
- 3 NAFTA Chapter 10 provided for national treatment and other conditions related to tendering to be accorded to suppliers of goods and services from the three signatories. These requirements applied to the procuring entities listed in the schedules to the chapter. When NAFTA was being negotiated, the Canadian provinces refused to be included, with the result that only federal agencies were listed. As will be seen, this changed during the financial crisis in 2008-2009 and the conclusion of a new Canada-US Government Procurement Agreement.
- 4 As its title indicates, the GPA applies to procurements for governmental purposes “by any contractual means, including purchase; lease; and rental or hire purchase, with or without an option to buy” (Canada 2010, Treaty E105249).
- 5 Under the *Canada-US Defence Production Sharing Arrangement* (DPSA), Canadian companies are generally allowed to compete for prime and sub-contracts on the same basis as US companies (Canada 2014).

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