

International Trade Agreements and State Procurement

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Introduction

- Benefits of international agreements that cover government procurement
- Overview of international agreements that cover state procurement
- “Buy American” provision in the American Recovery & Reinvestment Act
- Current international procurement issues



Benefits of International Agreements that Cover Government Procurement

- A long-standing objective of U.S. trade policy has been to open new opportunities for U.S. goods, services and suppliers in foreign government procurement.
- Government procurement typically comprises 10% to 15% of a country's GDP.
- States gain when their purchases are covered under international agreements:
 - Positive signal of welcoming international business and investment.
 - Increases U.S. leverage to open foreign procurement markets.
 - Broadens choices for state procurement, and can stretch scarce taxpayer dollars.

International Agreements That Cover State Government Procurement

- WTO Government Procurement Agreement (GPA) ,
entered into force in 1996
 - Predecessor – 1981 GATT Government Procurement Code was
first international procurement agreement.

- Free Trade Agreements

- U.S.-European-Communities Exchange of Letters (May
30, 1995)



WTO Government Procurement Agreement (GPA)

- Currently, 41 WTO Members are subject to the GPA:
 - Canada, European Communities and its 27 Member States (Austria, Belgium, Bulgaria, , Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, and the United Kingdom), Hong Kong China, Iceland, Israel, Japan, the Republic of Korea, Liechtenstein, the Netherlands with respect to Aruba, Norway, Singapore, Switzerland, Chinese Taipei (Taiwan) and the United States.

- WTO Members in the process of acceding to the GPA include:
 - Armenia
 - China
 - Jordan
 - Moldova

Free Trade Agreements that Cover State Procurement

- Five free trade agreements (FTAs) cover some state government procurement:
 - U.S.-Australia FTA
 - U.S.-Chile FTA
 - Dominican Republic-Central America-U.S. FTA (DR-CAFTA) covers Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua
 - U.S.-Morocco FTA
 - U.S.-Peru Trade Promotion Agreement
 - U.S.-Singapore FTA (Singapore is also a GPA Party)

FTAs Awaiting Congressional Approval

- U.S.-Colombia Trade Promotion Agreement: signed in 2006 (will cover 8 states plus Puerto Rico).
- U.S.-Korea Free Trade Agreement: Signed in 2006 (does not cover states because Korea is a party to the GPA).
- U.S.-Panama Trade Promotion Agreement: Signed in 2007 (will cover 8 states plus Puerto Rico).



Basic Obligations in International Agreements

➤ National treatment obligation

- Must treat the goods, services, and suppliers of the other Parties no less favorably than domestic goods, services, and suppliers.
- May not apply domestic preferences and other discriminatory purchasing provisions for procurement covered by an international agreement.

➤ Prohibits offsets: Includes requirements of domestic content, technology transfer).

➤ Transparency and procedural obligations

- Aimed at ensuring that procurement covered by an international agreement is conducted in a manner that is transparent, predictable, and fair.
- Includes types of provisions that are common to most state procurement systems.

Procedural Requirements for Procurement Covered by an Agreement

- Publication of a Notice of Intended Procurement: For each procurement covered by an agreement, except where limited tendering (single sourcing) is used.
- Minimum Time Period for Tendering: Generally 40 days, but may be reduced to not less than 10 days in certain cases.
- Development of Technical Specifications: Use of performance and functional requirements preferred over design characteristics, where appropriate.
- Conditions for Participation: Limited to those essential to ensure that a supplier has the commercial, technical, and financial abilities to undertake the procurement.

Procedural Requirements (cont.)

- Tender Documentation
 - Must be made available to all interested suppliers.
 - Must include all the information necessary to enable suppliers to prepare and submit responsive tenders.

- Contract Award: May be made only to a supplier whose tender conforms to the essential requirements in the notices and tender documentation.

- Contract Award Information
 - Must be published and provided to participating suppliers.
 - Unsuccessful suppliers must be provided with an explanation of the reasons why they were not selected.

- Domestic Review Procedures: Right of suppliers to challenge conduct of procurement covered by the agreement before an impartial and independent review authority.



Outline of Procurement Covered by International Agreements

- No country covers all of its procurement in an international agreement
- Agreements only cover the procurement that is specified in the agreement
- Procurement covered by agreements:
 - Entities listed in the agreement
 - Thresholds (contract values above which the agreement applies)
 - All goods are covered unless explicitly excluded
 - Services (negative list or positive list)
 - U.S. uses negative list: lists the services that it does not cover such as utilities and transportation services.
 - Construction services (negative list or positive list):
 - U.S. uses negative list: covers all except dredging.
 - Exclusions: For U.S., includes exclusion for set-asides for small and minority businesses.

State Procurement Covered by International Agreements

- Each state determines whether it will participate in an international agreement, and if so, the procurement that it will cover under the agreement:
 - Lists the entities that are subject to the agreement
 - Excludes specific goods and services

- Thresholds
 - \$528,000 for goods and services; \$7, 443,000 for construction services
 - Adjusted every two years; next adjustment at end of 2009

- Exceptions that apply to all states
 - Printing services
 - Preferences and restrictions associated with promotion of development of distressed areas and businesses owned by minorities, disabled veterans, small businesses, and women.
 - Restrictions that promote general environmental quality.
 - Restrictions attached to Federal funds for mass transit and highway projects.



“Buy American” Requirement in the American Recovery & Reinvestment Act (ARRA)

- Section 1605 of ARRA: “Buy American” provision in ARRA requires the use of U.S.-produced iron, steel and manufactured products in public works and public buildings funded by the Act.
- Application: Requirement applies to federal procurement as well as procurement undertaken by states and local governments with financial assistance (grants, loans, and cooperative agreements) provided under the ARRA.
- Exceptions: Nonavailability, unreasonableness of cost, and inconsistent with the public interest).
- International Agreements: Requirement must be applied in a manner that is consistent with U.S. obligations under international agreements.

Implementation of the “Buy American” Requirement in State Procurements

- U.S. Office of Management & Budget (OMB) issued Interim Guidance for financial assistance awards on Apr. 3, 2009; it was published on Apr. 23, 2009 in the *Federal Register* (74 FR 18449-463).
- Guidance applies to financial assistance awards (grants, loans & cooperative agreements) to states and local governments using ARRA funds.
- Guidance was effective immediately and provided for a 60-day comment period that closed on June 22, 2009.
- Based on public comments, OMB will modify the Guidance as necessary and publish final Guidance.

Relationship of “Buy American Requirement to International Agreements

- Where a procurement funded by the ARRA is covered under an international agreement, the “buy American” requirement may not be applied to products from countries that are parties to the agreement.

- OMB Guidance includes a chart that specifies the obligations of states under international agreements. It lists:
 - Each state that is subject to an international agreement;
 - The agreement(s) that apply to the state;
 - The entities covered by the state;
 - Any exclusions, such as construction services, taken by the state; and
 - Exclusions that apply to all states:
 - Restrictions attached to federal funds to states for highways and mass transit projects; and
 - Dredging.

Waivers of “Buy American” Requirement

- ARRA provides for three types of waivers of the “buy American” requirement:
 - Nonavailability of U.S.-produced iron, steel or manufactured goods.
 - Unreasonableness of cost of U.S.-produced iron, steel or manufactured goods.
 - Application of the requirement would be inconsistent with the public interest.
- Waivers are issued by the relevant federal agency.
- OMB Guidance describes waiver process.

Current International Procurement Issues

- China's Accession to the WTO GPA
 - China commenced negotiations to join the GPA in Dec. 2007.
 - China's accession to the GPA is an important issue for U.S. industry because of China's extensive "buy China" policies.
 - U.S. is seeking coverage by China that would be on the same level as that of the U.S. and other Parties.
- Revision of the GPA
- Canadian proposal for bilateral procurement arrangement

Additional Information

- USTR website (Government Procurement page):
<http://www.ustr.gov/trade-topics/government-procurement>
 - Includes links to the WTO/GPA and all FTAs.

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Improving Federal-State Consultation on Trade & Procurement Policies and Understanding Buy America Impacts on States

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The International Trade Context for Procurement Market Access:

- Progression of trade liberalization via World Trade Organization Government Procurement Agreement (WTO GPA) and various procurement chapters in Free Trade Agreements (FTAs)
- Sub-federal under greater scrutiny by trading partners and civil society
- Evolving area of international law

When was this comment made?

- *“The changes that the UR agreements will bring in US trade policy will require that the Federal Government enter a new partnership with state and local governments. This partnership will require establishing and funding adequate organizational capacity within the Federal Government to assist state and local governments in the implementation of the UR and other trade agreements.”*

1994 IGPAC Report on “The Uruguay Round of Multilateral Trade Negotiations” submitted by Chair Governor Tommy Thompson

Core IGPAC Recommendations

- **Create a Federal-State International Trade/Investment Policy Commission**
- **Objective: to provide institutional structure and capacity for continuous bipartisan consultation about US federal-state trade policy issues**

Priorities for Commission

- **assessing investor-state concerns;**
- **consulting on content, process & implementation related to international procurement;**
- **conducting benefit-cost analysis of federal resources and trade protections allocated to agriculture, goods, services and technology;**
- **improving trade and investment data collection and dissemination;**
- **increasing trade development collaboration, and**
- **transforming trade adjustment assistance programs to advance global competitiveness of firms and workers.**

IGPAC & NASPO over the years

- 2004: addition of NASPO representation to provide comment on procurement chapters in various FTAs and on GPA negotiations.
- Honor Roll: current rep Sherry Neas (ND); Kent Allin (MN); Walt Bikowitz (NY); Ron Bell (VA);
- and pre-dating IGPAC, review of Uruguay Round commitments pre-WTO GPA, Paula Moskowitz

IGPAC Role on Procurement

- Providing essential technical expertise about state procurement processes before, during and after negotiations, and by highlighting some state/local concerns

IGPAC Procurement Principles:

- “As a matter of general principle, IGPAC members support the goal of improving transparency and increasing fair market access in government procedures and regulatory decisions related to procurement, while preserving the independent authority of state and local governments to adopt legislation, standards and procedures consistent with their experience and interests.”

Past IGPAC Comments - Examples:

- **Policy concerns when state legislatures challenge sign-on via letters from the Governor to the USTR;**
- **Inclusion of states' letters' terms and conditions with full legal effect, even if not included in trade agreement;**
- **Need for conforming amendments to clarify implementation, given inconsistencies of FTA and the GPA provisions;**
- **Better data collection on the market value of domestic and international procurement opportunities;**
- **Federal-state cooperation on technical assistance to US firms for export success in global procurement markets.**

Background on Reciprocity Policy:

- USTR advises that “reciprocity policy” has now expired
- Originally adopted 2/05 during past FTA negotiations
- Before during and after adoption of this policy, as detailed in some FTA reports, IGPAC offered extensive comments

Buy America Provisions under ARRA – Impact on States:

- Where states are carrying out procurements for public buildings or public works with funding from the **American Recovery and Reinvestment Act (ARRA)**, the procurements will be considered to be state procurements.

Buy America

- Federal and state procurements under ARRA must comply with international obligations, such as the WTO GPA and FTAs with procurement chapters.

Buy America Threshold:

- The applicable threshold for public works is the **project threshold value of \$7,443,000.**
- This is the international procurement agreement threshold for construction services.
- Thus, state procurement activity will need to comply with ARRA Buy America provisions, if such public works and building projects are valued at \$7,443,000 or more.

States' Procurement Coverage

- Some states, including NYS cover their procurement under the GPA and various FTAs (USTR maintains list),
- Objective: to improve their businesses' access to international procurement markets.
- Given ARRA Buy America, such states would not discriminate against signatory countries to the GPA and FTAs that also cover subfederal procurement.

O Canada!

- Though many major trading partners have also included their subfederal government procurement in the WTO GPA and in FTAs,
- **Canada has not yet covered its provinces**, and has only bound coverage at the federal level in the WTO and NAFTA agreements.

Implications for Canadian Provinces:

- Unless Canada takes action to officially liberalize access to provincial procurement markets,
- And absent a federal agency waiver,
- **Canadian provincial suppliers will be barred from participating in covered states' procurements**, as directed by ARRA Buy America provisions.

Canadian Proposal for Arrangement with US:

- Now under consideration by USTR and IGPAC and other officials:
- Submitted to the USTR in late August;
- Time-limited Canada-US arrangement to include subfederal coverage;
- In exchange for a waiver of Buy America provisions.

And the Debates Continue....

- Illustrations of politically sensitive nature of Buy America provisions, from several viewpoints in 2009 articles:
 - 1/09: American Enterprise Institute assails Buy America as protectionist.
 - 4/09: Progressive States Network supports Buy America and 'fair trade'
 - 9/09: Buy America EPA waiver for Maine purchase of Canadian manhole covers

Resources for State Procurement Officials:

- To assist NASPO members with international procurement issues:
- State trade development colleagues (from economic development agencies, State Points of Contact, IGPAC);
- Links to national associations involving state officials (SIDO, NCSL, CSG, etc.)

Questions and Comments??

- Looking forward to continuing our active IGPAC-NASPO-USTR dialogue
- Please feel free to contact me:
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- Thank you NASPO for your commitment to IGPAC and to federal-state trade policy!