



Office of the United States Trade Representative
Executive Office of the President

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U.S.-Canada Agreement on Government Procurement

On February 16, 2010, the U.S.-Canada Agreement on Government Procurement entered into force. The Agreement has two major elements.

The Agreement provides permanent and reciprocal commitments under the WTO Agreement on Government Procurement (GPA) with respect to provincial, territorial and state procurement. Canada is covering its provinces for the first time under the GPA, and the United States is providing Canada with access to the 37 states already covered by the GPA.

The Agreement also provides for additional, reciprocal guarantees of access on a temporary basis through September 2011. Canada is guaranteeing American companies access to a broad range of construction projects undertaken by provincial entities (not included in Canada's GPA commitments) and municipal entities. The United States will allow Canadian iron, steel, and manufactured goods to be considered in the following programs funded by the American Recovery and Reinvestment Act of 2009 (ARRA) where the project is above \$7.8 million in value.

- (i) U.S. Department of Agriculture, Rural Utilities Service, *Water and Waste Disposal Programs*;
- (ii) U.S. Department of Agriculture, Rural Housing Service, *Community Facilities Program*;
- (iii) U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, *Energy Efficiency and Conservation Block Grants*;
- (iv) U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, *State Energy Program*;
- (v) U. S. Department of Housing and Urban Development, Office of Community Planning and Development, *Community Development Block Grants Recovery (CDBG-R)*;
- (vi) U. S. Department of Housing and Urban Development, Office of Public and Indian Housing, *Public Housing Capital Fund* ; and
- (vii) U.S. Environmental Protection Agency, *Clean Water and Drinking Water State Revolving Funds*, for projects funded by reallocated ARRA funds where the contracts are signed after February 17, 2010.

The Agreement may be found at: [U.S.-Canada Agreement on Government Procurement](#)

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The American Recovery and Reinvestment Act (ARRA)

What is the American Recovery and Reinvestment Act (ARRA)?

The *American Recovery and Reinvestment Act of 2009* (referred to as the "ARRA", "Recovery Act" or "Stimulus Bill") was signed into law in February 2009 and was intended to stimulate the U.S. economy by injecting \$787 billion in spending and tax cuts. Of this, approximately \$80.9 billion¹ was designated for infrastructure projects, \$61.3 for energy and \$12.7 for housing. For a further breakdown, please refer to the link in our [Additional Resources](#) section below.

The ARRA includes a Buy American provision, Section 1605 that mirrors the previously existing *1933 Buy American* and *1982 Buy America Acts*. This means that for federal, state and municipal projects funded by the ARRA, there is a preference for the use of U.S. domestic products. It is important to note that the version of Buy American rules found in the ARRA only applies to Recovery funded projects and will cease to apply when the lifespan of this act is complete.

What are the Buy American provisions in the ARRA?

Section 1605 of the Recovery Act specifies that for any ARRA funded project requiring the construction, alteration, maintenance or repair of a public building or public work, 100% of the iron, steel and manufactured goods used in the project must be produced in the U.S.

Section 1605 also stipulates that the Buy American provisions must be applied in a manner consistent with U.S. obligations under international agreements, such as the North American Free Trade Agreement (NAFTA) and the World Trade Organization Government Procurement Agreement (WTO GPA). It also declares that exceptions to use of domestic products may be made by heads of federal departments or agencies through a waiver process. For more information, please visit our [Exceptions and Waivers](#) section.

Section 1605 [Interim Final Guidance](#) defines a 'public building or public work' as "a building or work of a government entity," though in practice, this definition has interpretive elasticity that varies between agencies and departments.

Is ARRA Buy American different from existing Buy American and Buy America legislation?

Yes. Buy American legislation has existed since 1933, applies to all U.S. federal procurement and is allowed as an exception under NAFTA Chapter 10 and the WTO GPA, within specific thresholds. Buy America legislation was passed in 1982 and is limited to the Department of Transport, applying to transit-related procurements.

Section 1605 of the ARRA, or the 'Buy American' ARRA provision, is similar in language to the *1933 Buy American Act* but differs in a few key ways:

1. **Project Cost versus Component Cost:** In order to qualify for an unreasonable cost waiver, the use of a U.S. domestic product must increase the total cost of the project by 25%. Under the *1933 Buy American Act*, an unreasonable cost waiver could be obtained if the particular U.S. domestic component cost 25% more than its foreign counterpart.
2. **Defined Lifespan versus Permanency:** ARRA Buy American rules apply to projects funded by the ARRA and will only last as long as the \$275 billion in federal contracts,

grants and loans are being spent. The *1933 Buy American* and *1982 Buy America Acts* are permanent.

- 3. ARRA Exemptions for Canada:** Canada and the U.S. have reached an agreement on ARRA Buy American, whereby Canada receives exemptions from these rules for seven programs, within trade obligation thresholds. For more information, visit our page on the [Canada-U.S. Agreement on Government Procurement](#). The *1933 Buy American* and *1982 Buy America Acts* still apply for non-ARRA funded procurement, now, and in the future when the ARRA ends September 30, 2011. The provisions of these acts are unaffected by the new agreement.

How can ARRA Buy American apply in light of free trade obligations to NAFTA and the WTO?

Under NAFTA, the U.S. requires that Canadian goods and suppliers be exempt from Buy American requirements if procurement is being done directly by a listed U.S. federal department or agency and if the value of procurement exceeds NAFTA thresholds (currently US\$25,000 for goods, US\$70,079 for general services and US\$9,110,318 for construction services). A similar requirement exists under WTO obligations however the threshold level for procurement is US\$7,804,000.

Buy American can still apply in many cases because the ARRA bill was drafted so that stimulus money was allocated to the federal agencies and departments, who then grant the money to state and municipal projects. When states and municipalities are the procuring entities, most U.S. international trade obligations do not apply.

There are 37 states² which are signatories to the WTO GPA and therefore have free trade obligations at the state level to foreign signatories of the WTO GPA. As a recent signatory at the sub-federal level, Canada will have open access to procurement in these 37 states and is therefore exempt from Buy American provisions at the state level.

What is the Canada-U.S. Agreement on Government Procurement and how does it affect current legislation?

The [Canada-U.S. Agreement on Government Procurement](#) (GPA) came into effect in February 2010, in order to overcome procurement barriers that resulted from ARRA. Of particular concern to Canada has been the provision in the legislation that imposes a requirement that "all iron, steel and manufactured goods" used in the construction and repair of "public works and public buildings" funded by the ARRA be produced in the United States. Despite the requirement that the Buy American provisions be applied consistently with the United States' international obligations, Canada remained concerned about the potential negative impact on Canadian suppliers given the lack of international obligations at the sub-federal level between Canada and the United States and the fact much of the ARRA infrastructure spending is by way of transfers from the federal government to state and local governments.

Prior to the Canada-U.S. Agreement on Government Procurement, Canada and the United States only had government procurement commitments to each other at the federal level through NAFTA and WTO GPA. As a result, Canadian suppliers had access to federal-level procurement as per these agreements; however, the absence of procurement commitments at the sub-federal level (state and local level) meant that Canadian suppliers were no longer eligible to compete for procurements funded by the ARRA but carried out by state and local governments. The Canada-U.S. Agreement on Government Procurement provides relief for Canadian suppliers in this area.

The Canada-U.S. GPA has three major components:

Provincial and territorial procurement commitments under the WTO GPA for all provinces and territories, except Nunavut in exchange for U.S. sub-federal GPA commitments;

U.S. exemptions for Canada from the Buy American provisions of the ARRA for seven (7) programs of interest in exchange for temporary Canadian procurement commitments for construction projects for some provincial/territorial agencies not included in the WTO GPA and a number of municipalities; and

A commitment by both governments to explore the scope for a long term government procurement agreement between Canada and the U.S., within the next 12 months, to deepen, on a reciprocal basis, procurement commitments beyond those in the WTO GPA and NAFTA.

The GPA also includes a process for expedited consultation on future concerns related to procurement issues, such as new legislation. The Agreement does not change pre-existing rights of Canadian companies to participate in U.S. federal government procurement, established under the NAFTA and WTO GPA.

How will this affect Canadian businesses?

The ARRA and its provisions apply to all 50 U.S. states and all municipalities. Canada has received an exemption from the Buy American provisions of the ARRA via two avenues:

1. for seven programs funded by the ARRA for procurements valued at US \$7,804,000 or greater; and
2. for the 37 U.S. states² subject to the WTO GPA in accordance with their respective undertakings therein. As well, Canadian companies are still able to benefit from the existing waivers to Buy American provisions based upon public interest, non-availability of material, or unreasonable costs as well as any national blanket or project-specific waivers that may be in place or may be granted upon application.

The seven programs covered under the Agreement are:

1. U.S. Department of Agriculture, Rural Utilities Services, Water and Waste Disposal Programs
2. U.S. Department of Agriculture, Rural Housing Service, Community Facilities Program
3. U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Energy Efficiency and Conservation Block Grants
4. U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, State Energy Program
5. U.S. Department of Housing and Urban Development, Office of Community Planning and Planning and Development, Community Development Block Grants Recovery (CDBG-R)
6. U.S. Department of Housing and Urban Development, Office of Public and Indian Housing, Public Housing Capital Fund
7. U.S. Environmental Protection Agency, Clean Water and Drinking Water State Revolving Funds, for projects funded by reallocated ARRA funds where the contracts are signed after February 17, 2010.

For Canadian firms, it is critical to determine the specific U.S. federal government program that is funding the project on which they are bidding. This is complicated by the fact that projects not funded directly by the U.S. federal government, but through grants/loans to state, regional or local government authorities require searching through multiple information sources. **It is important to trace the funding source** to ensure that it qualifies. The project owner, prime contractor or distributor should be able to identify whether the project is being funded, at least in part, under the ARRA and through which program. If a Canadian company is being asked to provide a Certificate of Compliance with

Buy American requirements, then the project is likely being funded under the ARRA, but it is not necessarily funded under one of the seven programs.

Buy American "Certificate of Compliance" (sometimes referred to as a "certification") is a document that the prime contractor on an ARRA-funded project signs and submits to the granting U.S. agency to demonstrate they are in compliance with section 1605 of the *Recovery Act* (the Buy American provisions). Often prime contractors require sub-contractors to sign a Certificate of Compliance in order to pass on liability, though contractors should only sign such a Certificate of Compliance when they are certain they comply with the requirements, as signing such a certificate falsely is a serious offence.

The exemption only applies to infrastructure projects **where the value of the project as a whole exceeds the WTO GPA threshold (US\$7.804 million)**. If the project value exceeds this threshold, then all purchases going into the project are covered by the exemption. The value of the project as a whole should be the value of the prime contract awarded by the government entity. The project owner, prime contractor or distributor should be able to provide the project value or estimated project value for a contract that has not yet been awarded.

It is important for Canadian companies seeking opportunities in ARRA funded projects to be aware of the limitations created by the ARRA Buy American provisions, but should note the new exemptions to these provisions. In addition, waivers can still be obtained for opportunities that fall outside the seven exempt programs but are still ARRA funded.

Additional Resources

[Canada-U.S. Agreement on Government Procurement](#)

The American Recovery and Reinvestment Act | [PDF](#) (full text 1.07 MB)

A Breakdown of the Final Bill | [PDF](#) (722 Kb)

Interim Final Guidance Issued by the Office of Management & Budget (Buy American Provisions in the ARRA) | [PDF](#) (140 Kb)

[Recovery.gov](#): The U.S. government's official website on ARRA spending

Buy American Primer | [PDF](#) (111 Kb)

Annex 1: Federal Procurement: Interim Rule Amending the Federal Acquisition Regulation | [PDF](#) (87 Kb)

Annex 2: Sub-federal Procurement: Interim Final Guidance on Federal Financial Assistance | [PDF](#) (83 Kb)

Disclaimer: Information included on this webpage underwent review to ensure accuracy and currency at the time it was originally prepared for the Government of Canada (April 2010). Users are advised to consult other sources to confirm information included in this Guide. The Government of Canada and the Canadian Embassy do not assume responsibility for omissions or inaccuracies in information included in this Guide nor for any consequences resulting from the use of this information.

^[1] Figures excerpted from [Recovery.gov](#) (accessed April 2010).

^[2] Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New York, Nebraska, New Hampshire, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming.

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