DOES BUYING AMERICAN VIOLATE U.S. TRADE AGREEMENTS?

The "Buy American" provision in the $787 billion American Recovery and Reinvestment Act of 2009—also known as the stimulus package—has created confusion since it became law Feb. 17. The provision mandates, among other things, that ARRA-funded projects for the construction, alteration, maintenance, or repair of public buildings or public works use only iron, steel, and manufactured goods produced in the United States. For U.S. scrap processors, the provision could translate into stronger domestic demand for certain recycled commodities, though it also could have a negative effect on international trade and export demand for scrap. It remains unclear, however, how government entities can comply with both the Buy American provision and U.S. international agreements, particularly those that come out of the World Trade Organization.

As a party to the WTO's Government Procurement Agreement, the United States must give other GPA parties access to this country's procurement markets. Notably, some of the world's major steel producers—including WTO members Brazil, China, India, and Ukraine and non-WTO member Russia—are not GPA parties. The Buy American provision might make it more difficult for these countries to supply products to ARRA-funded projects. What is less clear is how the Buy American provision reconciles U.S. obligations to WTO members that are GPA parties, such as the European Union, Japan, Canada, and South Korea.

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A closer examination of the GPA offers some guidance on where it and the Buy American provision are not in conflict. The GPA does not cover all the procurement activities of the signatory parties; it applies only to procurement contracts above a certain monetary threshold. Also, the GPA concessions apply only to those purchasing entities that the United States has listed in its annexes to the agreement, including several federal government agencies, 37 states, and various other entities.

The many federal agencies that are part of the GPA will be constrained in their ability to procure only U.S. materials without running afoul of the agreement. In some cases, they will have to open procurement contracts to GPA-party countries. In contrast, states that did not sign on to the GPA—most notably Ohio, which is known for its manufacturing base—will be able to follow the Buy American provision when they use ARRA funds.

States that are parties to the GPA may be able to use certain exemptions within it to implement the Buy American provision for purchases of construction-grade steel, motor vehicles, and coal, for example. Other exemptions exist for mass transit, highway, and environmental projects. Further, states may be able to pass the funds to local communities not listed in the GPA annexes, allowing them to apply the Buy American provision.

Overall, individual states that are not parties to the GPA—and states using its exemptions—will still have access to ARRA funds and be able to "buy American." At the same time, some ARRA-funded state projects will have to open their procurement to other GPA countries. This will most likely limit the effect of the provision on sourcing from these countries.

RETALIATION CONCERNS

Expected retaliation from WTO members that are not GPA parties, such as Brazil, China, India, and Ukraine, which will be excluded from these procurements, might overshadow the perceived benefits for the U.S. economy of the Buy American provision. These countries might raise their tariffs, reduce their imports from the United States, or take other WTO-consistent measures. U.S. manufacturers may find they have less access to globally sourced materials, and countries desperate to retain market share may start dumping materials on the U.S. market.

An interim final rule on the Buy American provision, published March 31, offers an opportunity for public comment. Though the interim rule clarifies the Buy American language regarding federal government procurement, future rules will most likely address how it affects local and state agency procurement with money from the stimulus package.

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