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INTERNATIONAL TRADE ALERT

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Buy American - Is It Backfiring?

The American Recovery and Reinvestment Act of 2009 (the Recovery Act) contains Buy American requirements for companies interested in accessing federal funds which appear to be backfiring with our trading partners and causing lots of domestic complications. The Recovery Act holds that, so long as the bidder sources inputs from a country that is a signatory to the World Trade Organization's Government Procurement Agreement or qualifies the foreign input under a free trade agreement (except the specifically excluded Caribbean FTA), the end product is treated as qualifying for Buy American status under the Recovery Act.

The U.S. and other G20 countries pledged that stimulus measures would "refrain from raising new barriers to investment or to trade in goods and services" and would "rectify promptly any such measures." This included a promise to "minimize any negative impact on trade and investment of our domestic policy actions, including fiscal policy." Is that happening? It appears not. Keep in mind there are Buy American provisions which are those administered by the federal government, and then there are Buy America provisions which are administered by the states and localities. That duality is one of the major headaches, but there are many others.

Canadian provinces and localities have asserted lost opportunities due to the Buy American requirements. The Federation of Canadian Municipalities recently passed a resolution calling on "local infrastructure projects, including environmental projects such as water and wastewater treatment projects, [to] procure goods and materials required for the projects only from companies whose countries of origin do not impose trade restrictions against goods and materials manufactured in Canada."

The Associated General Contractors of America has come out in opposition to Buy American provisions, citing as an example water treatment facilities which involve materials either made only overseas or which cost considerably less. Contractors are finding it challenging to obtain certifications from subcontractors that all inputs are of American origin. Given the current economy, everyone is looking to keep employees on the payroll and busy. However, the circumstances are forcing contractors to chose between accepting stimulus funds and paying more for domestically made parts, or opting out of the assistance provided by the Recovery Act. While 100% American content is not required when dealing with federal funds for the WTO GPA and FTA reasons stated above, state and local infrastructure projects may have different requirements, and therein lies the rub, but there remains confusion as to the federal standards. We hear about Canadian pipes being pulled out of the ground at Camp Pendleton to be replaced by American pipes and an Indiana town that refused Canadian sewage pumps.

China recently determined that domestic supplies are to be used whenever possible. Australian Trade Minister Simon Crean reacted swiftly saying in a Dow Jones article: "This reported move by the Chinese underscores the danger of retaliation and a tit-for-tat trade war."

Nevertheless, Congress has included Buy American provisions in two new bills: the "Water Quality Investment Act of 2009" and the "21st Century Green High-Performing Public School Facilities Act," which also involve billions of dollars in spending. The U.S. Chamber of Commerce has written to Congress suggesting the federal government needs to instruct the states and localities to administer the stimulus money in accord with the federal requirements. Is that likely to happen?

The U.S. Chamber of Commerce has also written to the General Services Administration and recommended that a series of changes and clarifications are needed if the Recovery Act is to maximize its benefits, such as a de minimus standard, defining components (so that on-site steps are not treated differently than production off-site), enhancements to the use of commercial products, clarification as to what constitutes U.S. manufacturing (substantial transformation versus the 51% test), the exemption of small dollar contracts (those under the Simplified Acquisition Threshold), and clarification about how funding works for projects which are funded in part by Recovery Act funds and in part from other sources.

There are three arguments which are typically used to defend Buy American provisions. One is that most other countries have those provisions. But, since when did the fact that lots of folks do something make it right? Second, that taxpayer money should not be spent on foreign products. Third, that using American inputs supports American jobs. Certainly we all want to see full employment, but there are four industries that the U.S. has historically protected through high tariffs and nontariff barriers (such as quotas) - automobiles, wearing apparel and textile products, footwear, and steel and steel products. How many of them are competitive in today's world market?

As to spending taxpayer money for these infrastructure projects, shouldn't the goal be to get the best return on our investment? All things being equal, including the safety and efficacy of the finished product, shouldn't we use the cheapest inputs, even if they are foreign? Doesn't the government have a fiduciary duty to get the best bang for the taxpayer buck?

Conversely, the U.S. has opened its borders to investors (plus spouses and children under age 21) from nearly any country through the EB-5 "Immigrant Investor Program" which offers permanent resident status (commonly known as a "green card") to foreigners who invest significant sums in "troubled businesses," thereby preserving the jobs of U.S. workers. For more information, please view the MS&K Immigration Alert.

These are complicated issues and challenging times. We want foreign money, but seemingly not foreign products. Can this apparent contradiction be reconciled? Where are the Business Roundtable and others in explaining how international trade is good for America and supports American workers? At the same time, Buy American again offers astute international traders the opportunity to qualify their foreign-made inputs, if they do their homework and properly document their transactions.

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