

1. The World Trade Organization (WTO) Agreement on Government Procurement (GPA) was signed in Marrakesh on April 15, 1994 and entered into force on January 1, 1996. It is a plurilateral agreement, meaning that not all WTO members are parties to the GPA. There are currently 14 Parties to the GPA, and 19 Observers. Canada is the only Party with sub-federal governments that has not offered sub-federal coverage in the GPA.

2. GPA commitments are based on the principles of openness, transparency and non-discrimination, which apply to procurement covered by the Agreement. The text of the Agreement includes specific rules implementing those principles. The GPA guarantees that Party will guarantee access to specific government procurement opportunities to the other Parties to the Agreement, unless otherwise specified. For example, because Canada does not currently include sub-federal procurement in the GPA, the U.S., the European Union, Japan, etc, do not extend the benefits of their sub-federal coverage to Canadian suppliers.

3. The market access annexes for each country of the GPA define the parameters of each country's government procurement that is open to suppliers of other Parties. More specifically, the market access annexes identify the government entities that are covered in the GPA and the conditions that apply to individual procurements as well as any exclusions to the Agreement. Generally, the commitments include the purchase of goods, services and construction (e.g., computers, furniture, cars, etc) that are not intended for commercial sale or resale or for use in the production or supply of goods or services for commercial sale or resale. Defence-related products (e.g., guns, ammunition, etc.) are generally excluded.

4. The 1994 GPA is the primary instrument guaranteeing access for Canadian suppliers to important government procurement markets such as the United States, the European Union (EU), Japan, South Korea and others. The 1994 GPA includes a commitment that Parties undertake, no later than the end of the third year from the date of entry into force, further negotiations with a view to improving the text and achieving the greatest extension possible of coverage. In December 2006 a revised text was provisionally agreed pending the outcome of the market access negotiations. The current Canadian mandate for the GPA negotiations includes provisions to add provincial/territorial commitments and make a limited number of improvements to the federal coverage that goes beyond the North American Free Trade Agreement (NAFTA).

5. At the federal level, Canada and the United States have commitments to each other under the GPA and the NAFTA Chapter 10; however, provinces/territories and their municipalities have never before taken on international government procurement obligations. Provinces/territories did not make sub-federal commitments under GPA or NAFTA Chapter 10 namely because of concerns regarding the U.S. carve-out for mass transit and highway projects (the Buy America provisions of the *Surface Transportation Assistance Act* of 1982) and U.S. federal set-asides for small and minority business, both of which impede predictable Canadian access to U.S.

procurement opportunities.

6. The *American Recovery and Reinvestment Act of 2009 (Recovery Act)* was enacted in February 2009. It requires that all iron, steel and manufactured goods used for infrastructure construction projects funded by the *Recovery Act* be produced in the United States. This requirement must be applied in a manner consistent with United States obligations under international agreements. The Buy American requirements of the *Recovery Act* are more stringent than previous existing restrictions.

7. Prior to the introduction of the *Recovery Act*, Canada and the U.S. enjoyed relatively open trade in sub-federal procurement despite the lack of formal commitments. However, the expansion of Buy American provisions has upset this balance and has brought to the surface the need for Canada to address, not only the immediate impact of the *Recovery Act*, but also long-standing trade irritants in the area of procurement.

8. Following an extensive advocacy campaign, it became clear that a negotiated solution would be the only way to seriously engage the U.S. if Canada was to obtain relief for Canadian business from the Buy American provisions of the *Recovery Act*. Consultations with the provinces/territories began in June 2009 and extensive work between the federal-provincial/territorial to develop a proposal to the United States continued through July and August 2009.

9. The initial Canadian proposal was provided to the U.S. on August 20, 2009. It included interim of provincial/territorial and municipal procurement commitments in exchange for a Canadian exemption from the Buy American provisions of the *Recovery Act* and a provision for longer term negotiations to deepen procurement commitments on a reciprocal basis.

10. At the October 1st lead negotiators meeting, the U.S. clarified that they needed to work within the context of international obligations, through the GPA in particular. As this was a significant change of direction, a new set of extensive consultations was held with the provinces and territories, which resulted in a new proposal to the U.S. in late October 2009. Lead negotiators met again on October 29th to continue discussions, at which time Canada advised the U.S. that we could work with the U.S. proposal – i.e., binding commitments through the GPA. Technical discussions continued until November 25, 2009 when Canada indicated to the U.S. that no new concessions on the Canadian offer would be made until the U.S. provided the scope and number of program exemptions it would offer Canada. This list was provided on January 22nd, 2010, and lead negotiators resumed their discussions on January 26, 2010.

11. Negotiations with the U.S. essentially concluded on February 3, 2010. The proposed Agreement with the U.S. has three parts:

- 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 (37 states);
- temporary¹ Canadian procurement commitments for construction projects only for some provincial/territorial agencies not included in the GPA and a significant number of municipalities in exchange for the U.S. exempting Canada from the Buy American provisions of the *Recovery Act* for seven (7) programs of interest that receive funding from *Recovery Act*; and
- a commitment 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.

12. The importance this Agreement to Canada:

- Canadian companies will have the right to participate in a number of infrastructure programs funded under the *American Recovery and Reinvestment Act*;
- Using the WTO GPA, Canada and the United States have agreed to offer each other permanent market access at the sub-federal level. This means that Canadian suppliers will have guaranteed access to U.S. sub-federal procurement and U.S. suppliers will have guaranteed access to provincial procurement in accordance with undertakings under the GPA;
- The Agreement provides Canadian companies with preferential market access in a number of programs that are not accessible to others, such as certain programs of the Department of Energy and the Environmental Protection Agency;
- Both countries have agreed to establish a fast-track consultation process should similar Buy American provisions be applied to future funding programs;
- Although this Agreement provides no guarantees for the future; it sets an important precedent and the value of this cannot be underestimated; and
- This Agreement is an important first step and represents an important opportunity to continue sit down with our most important trading partner to begin finding potential solutions to long-standing trade irritants in the area of procurement.

¹ The temporary Canadian procurement offer was scaled-back to constructions services only to counter the effect of the time delay in reaching agreement with the U.S. on the scope of *Recovery Act* program exemptions and that, in some of the programs, a significant portion of the contract dollars have already been issued.