

CANADA-U.S. PROCUREMENT AGREEMENT

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Thank you for the invitation to appear today and for the opportunity to discuss the February 2010 Canada-U.S. Government Procurement Agreement.

The Canada-U.S. Government Procurement Agreement (the Agreement) fails to provide a meaningful exemption for Canadian suppliers from the Buy American provisions employed in the Feb. 2009 U.S. stimulus package (the American Recovery and Reinvestment Act).

The Agreement has three main elements:

1. An exchange of permanent commitments under the WTO Agreement on Government Procurement (GPA).
2. A temporary agreement, lasting until September 2011, providing mutual access to certain state, provincial and municipal infrastructure projects;
3. A pledge to explore the scope for further negotiations over increased market access in procurement and agreement to expedited consultations regarding future procurement-related matters.

In the time allotted, I will briefly discuss each element.

Permanent Commitments under the GPA

Under the Agreement, Canada will bind, for the first time, certain provincial government procurement under the WTO GPA, while, in exchange, the U.S. will extend its 1994 GPA commitments at the sub-federal level to Canada.

Thirty-seven U.S. states have varying levels of commitments under the GPA.

Until now, Canadian suppliers have not had the right to challenge decisions to exclude them from bidding on contracts covered by the 37 U.S. states which have signed on to the GPA. The U.S. has amended its schedule to give Canadian suppliers access to bid challenge processes for covered sub-federal contracts.

It is difficult to estimate the quantity of state-level procurement covered by the U.S. under the GPA. Despite obligations to do so, the U.S. government does not report detailed statistics on covered procurement at the state level to the WTO Committee on Government Procurement.

The quality of the U.S. GPA commitments at the sub-federal level, however, is poor.

- The U.S. has exceptions to its GPA commitments that allow it to continue to apply buy-local procurement preferences, most notably Buy America restrictions attached to federally-funded mass transit and highway projects, as well as small-business and minority set-asides.
- Public utility contracts, such as electricity or telecommunications are excluded.
- Canadian suppliers will not have access to contracts by the 13 states which have made no GPA commitments.
- In many of the 37 states that have signed on to the GPA, Canadian suppliers will not be allowed to supply construction-grade steel, vehicles, coal or printing services.
- Canadian suppliers are currently denied access to the 23% of U.S. federal procurement dollars set-aside for small businesses and minority-owned businesses. Comparable set-aside programs at the state level are also fully exempted from the U.S. GPA commitments.
- Municipal governments are not covered by U.S. GPA commitments and will not be obliged to consider bids from Canadian companies.
- Municipal procurement that is funded by transfers from state or federal governments to U.S. municipalities is also excluded from the U.S. GPA commitments.

In 1996, the Canadian representative to the WTO Committee on Government Procurement summed up Canada's response to the U.S. GPA sub-federal offer: "It was Canada's position that, in providing increased and secure market access to its trading partners, it was not unreasonable to expect the same degree of reciprocal market access in return. In the context of the present offers, this circumstance simply did not exist." ¹ That assessment is still valid today.

For their part, Canadian provinces have agreed to cover a range of goods, services and procurement, mainly by government ministries.

This is the first time that Canadian sub-national government procurement has been committed under an international agreement.

Canadian provincial governments have excluded a range of procurement programs, entities (such as crown corporations) and sectors (such as renewable energy and mass transit) from Canada's GPA commitments.

Canadian municipal government procurement is not covered under the permanent GPA commitments.

Initially, Canada's new commitments under the GPA will only apply to American suppliers. But Canada will be expected, in due course, to make the same commitments available to suppliers from all WTO GPA signatories.

GPA rules prohibit governments from negotiating or considering any form of local content or “any condition or undertaking that encourages local development”, even if the procurement contract is open on a non-discriminatory basis to foreign bidders.

To sum up, the GPA commitments will curtail Canadian provincial governments’ ability to prefer Canadian goods or suppliers and from using government purchasing as an economic development tool, while leaving existing U.S. Buy American preference policies almost fully intact.

Temporary commitments under the Agreement

The second main element of the Agreement is an arrangement, lasting until September 30 2011, providing mutual access to certain infrastructure and construction projects, not otherwise covered by the GPA commitments.

It is difficult to obtain precise numbers regarding the value of the temporary commitments, but the best available estimates show that this part of the Agreement greatly favours the U.S.

The Agreement gives Canadian suppliers an opportunity to bid on the remaining contracts under seven specific federally funded U.S. stimulus programs.

While the overall budget for the seven programs totals \$US 18 billion², by Dec. 31, 2009 two-thirds of Recovery Act “grants, loans and contracts” had already been allocated.³

Canadian suppliers will therefore have an opportunity to compete for *no more than* an estimated \$US 6 billion of federally funded stimulus projects, representing just 2% of the approximately \$US 275 billion of procurement funded under the Recovery Act. The rest falls outside the scope of this Agreement.

The amount actually open to Canadian suppliers will be considerably less than \$US 6 billion, because further funds have been allocated by the Feb. 16 entry into force of the Agreement. Furthermore, Canadian suppliers’ access will be restricted to contracts above the thresholds.⁴

For example, the US Environmental Protection Agency (EPA) reports that by Feb. 15, 2010 over \$US 3.5 billion of the \$US 4 billion allocated under the Recovery Act to the Clean Water State Revolving Fund was already under contract. Similarly, by Feb. 15, 2010 over \$US 1.8 billion of the \$US 2 billion allocated to the Drinking Water State Revolving Fund was already under contract.⁵

In a February 16 briefing on the Agreement for Quebec labour groups, a senior Quebec Ministry of Economic Development official stated that the ministry estimated the value of the unallocated funds under the seven U.S. programs at \$US 1.3 billion.

Given how long the negotiations have taken, the fact that only a sliver of total Recovery Act-funded projects are covered, and that most of these monies have already been allocated, Canadian suppliers can expect to see very little practical benefit from the temporary commitments.

In return, Canada has guaranteed U.S. suppliers access to a range of municipal and crown corporation construction projects until September 2011, when the U.S. stimulus package expires.

The value of these contracts can be roughly estimated at more than \$CAD 25 billion.⁶ U.S. suppliers will have the opportunity to bid on the full amount of these contracts right up until the September 2011 deadline.

In sum, the temporary commitments are remarkably lop-sided, with the bulk of the benefits going to the U.S.

Future negotiations and “fast-track” consultative mechanism

A key demand of Canadian governments when they first entered negotiations with the U.S. in the summer of 2009 was that any deal should protect Canada against Buy American rules in future U.S. legislation.

The Agreement did not achieve this objective. Instead, it provides for expedited consultations, at the request of either party, “on any matter related to government procurement.”

Such consultations must begin within ten days of the request, but the Agreement provides no legal safeguards or guarantees to protect Canada from Buy American preferences in future U.S. legislation.

Several pending U.S. bills, including the \$US 100-billion US “Jobs for Main Street” legislation, contain Buy American preferences.⁷

In addition, the Agreement provides for Canada and the U.S. to, within one year, “enter into discussions to explore an agreement that would expand, on a reciprocal basis, commitments with respect to market access for procurement.”

It is difficult to say what the outcome of such talks might be. But the unbalanced nature of the current Agreement and the fact that, despite paying a steep price, Canada was unable to gain any lasting or meaningful relief from the Buy American preferences in the Recovery Act are not good omens for any future negotiations.

Thank you

Notes

1 World Trade Organization, GPA/IC/M/5, 6 December 1995. "Interim Committee on Government Procurement, Minutes of the meeting held On 25 October 1995."

2 "In a statement today, U.S. Trade Representative Ron Kirk said that the value to U.S. firms from the provinces and territories signing on to the GPA will be 'tens of billions of dollars.' By contrast, the extent of the benefits for Canada under the tentative agreement is limited, according to a U.S. trade official. This official said that Canadian firms will, under the deal, only have immediate access to seven programs funded by the stimulus totaling \$18 billion, or about 2 percent of the total stimulus funding. However, access to these programs for Canadian firms will be restricted to only projects above \$7.8 million in value and only projects in which contracts have not yet been awarded, the official stressed. '[O]bviously, as we enter into the second year of the Recovery Act funding, much of the funding has already been awarded in contracts,' the official said." From World Trade Online, February 5, 2010. Available at www.insidetrade.com (subscription required).

3 The official US government web site tracking Recovery Act spending reports that, as of Dec. 31, 2009, \$183 billion (66.5%) US of a total of 275 B. of "contracts, loans, and grants" under the Recovery Act had already been allocated. Source: Recovery.Gov, www.recovery.gov, accessed March 15, 2009.

4 The threshold for goods and services is 355,000 SDR (US\$ 543,000), and for construction services 5 million SDRs (\$US 7.67 million) for U.S. sub-federal entities covered by the GPA.

5 U.S. Environmental Protection Agency, "SRF Progress Toward ARRA goals," available at epa.gov/ow/ep-arecovery/, accessed March 15, 2010.

6 The Federation of Canadian Municipalities (FCM) estimates that "Canadian municipalities collectively purchase more than \$98 billion annually in goods and services." This estimate was prepared for the FCM by the Canadian Intergovernmental Committee on Urban and Regional Research and is based on Statistics Canada data.

In 2007–2008, provincial and territorial governments (the figures do not include crown corporations or the MASH sector) reported procurement spending of just over \$17 billion, of which approximately \$6 billion (or 35%) was for construction services. Assuming the same proportion of construction to other goods and services holds, municipal construction services would account for just over \$34 billion annually. Of this \$34 billion, approximately 80% would be covered under the Agreement (which covers procurement by towns and cities with populations greater than 50,000 persons.)

These estimates are conservative. They do not include construction spending by crown corporations (which some provinces have covered under the temporary commitments), nor do they reflect that the temporary commitments will remain in place for more than 1 year (from February 16, 2010 until September, 30, 2011.)

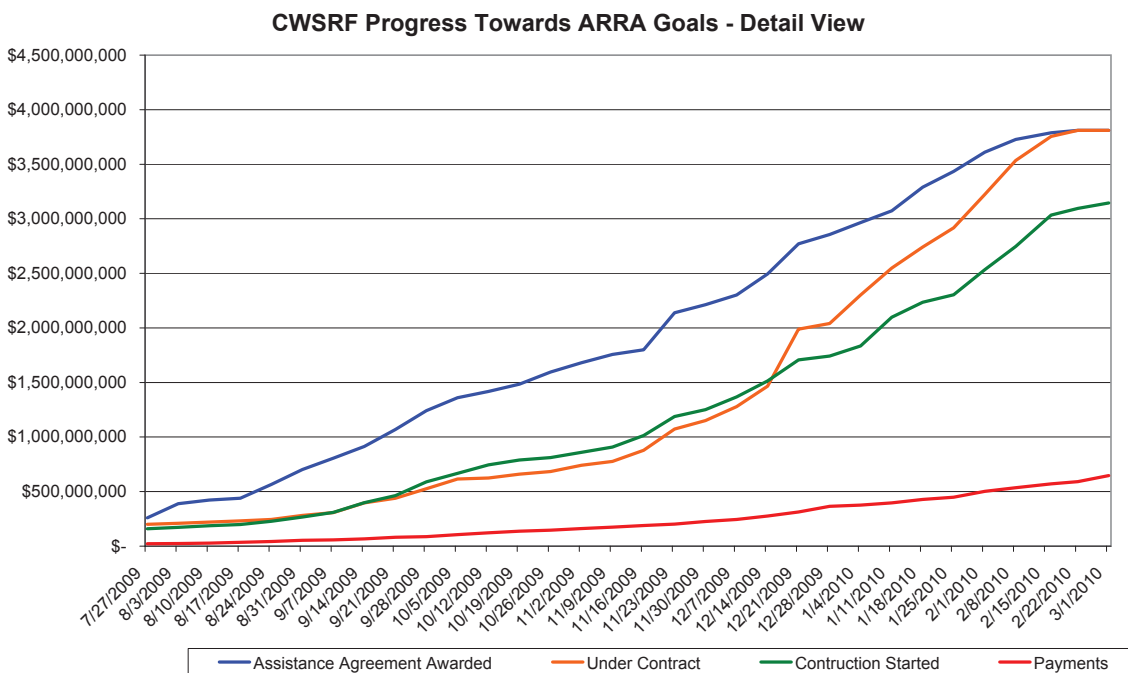
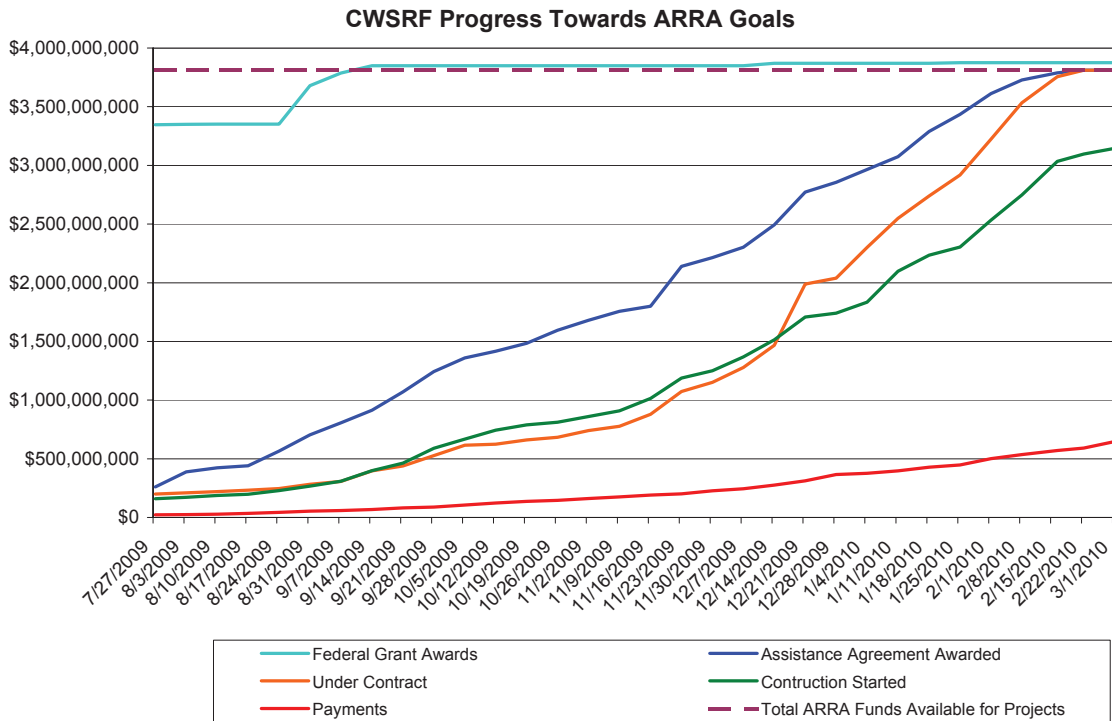


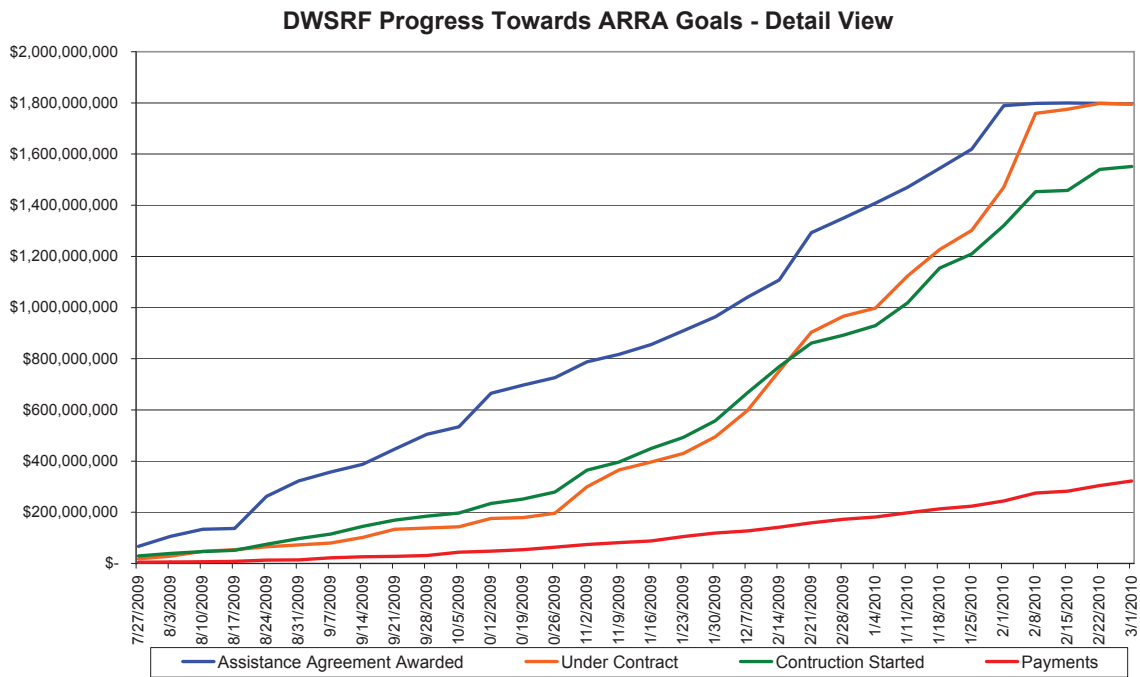
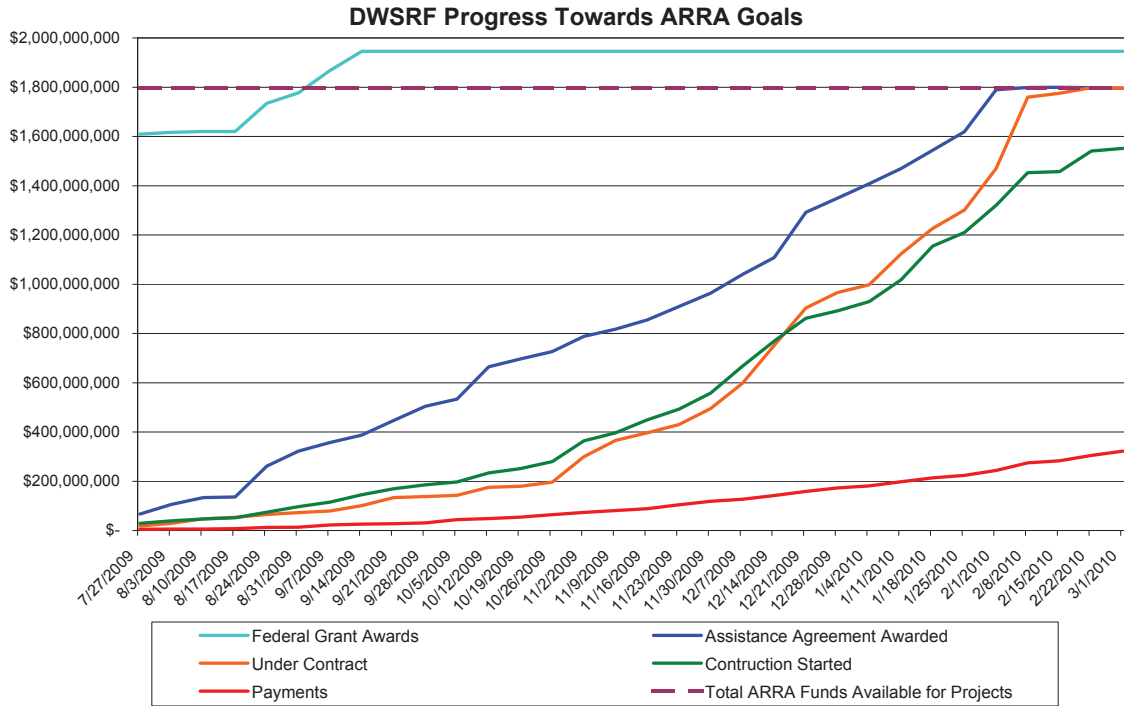
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Appendix

The following pages are taken from: U.S. Environmental Protection Agency, "SRF Progress Toward ARRA goals," available at: epa.gov/ow/eparecovery/, accessed March 15, 2010.





Definition of Terms

Federal Grant Awards: American Recovery and Reinvestment Act (ARRA) funds awarded to the CWSRF programs in the 50 U.S. states and Puerto Rico in the form of capitalization grants.

Assistance Agreement Awarded: A loan or grant agreement was made to a local recipient by the state SRF for the construction of an ARRA project.

Under Contract: A project is listed as “under contract” once the last contract funded from the ARRA assistance is fully executed.

Construction Started: A project is listed as “construction started” once work has started for the first contract funded with ARRA dollars. Because some projects have multiple contracts, a project may be listed as “construction started” before it is “under contract.”

Payments: ARRA funds drawn down from the ARRA capitalization grant and paid to the SRF assistance recipient to reimburse the costs of the project.

Total ARRA Funds Available for Projects: The total amount of ARRA funds that can be used to make assistance agreements to local entities for projects. This amount does not equal the total amount of ARRA funds allocated to the state SRF programs, because states reserve the right to use up to 4% of their capitalization grant for administration of the SRF program.