

# PRIMER ON TRADE AGREEMENTS FOR SOCIAL PURCHASING<sup>1</sup>

**Provincial, territorial and local government spending across Canada is in excess of \$400 billion annually. And even at these current levels, budgets continue to be squeezed, cut and restricted. Meanwhile social challenges amplify, remaining unmet and driving us to find new solutions.**

One emerging solution is social purchasing. Social purchasing uses existing government spending to create an added social value. For instance, a government can ensure its building maintenance contracts provide employment and training opportunities for people on social assistance. This means government infrastructure investments are simultaneously easing the financial strain facing our social assistance, health, and justice systems.

By targeting existing purchasing for needed services or supplies to social enterprises<sup>2</sup>, government spending can tackle social

challenges without new spending, nor compromising service or product value.

Social purchasing means public spending goes further for our communities. It means our governments get more value out of their spending.

Many government policy makers and purchasers believe Canada’s trade agreements limit, or even prohibit, them from considering social purchasing as an option. However, this is not the case. Canada’s obligations only apply to procurement contracts valued above

certain thresholds and there are specific exemptions that may apply when seeking to implement social purchasing.

**There is room within International and inter-provincial trade agreements specifically allowing procurement from philanthropic institutions, persons with disabilities, and non-profit organizations.**

**This allows cases of direct, non-competitive government purchasing from non-profit Social Enterprises.**

What follows is a brief review of the key trade agreements that influence provincial and municipal procurement discretion, and how they affect social purchasing.

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<sup>1</sup> The information in this document has been compiled by Darcy Penner of the Canadian CED Network and David LePage of Accelerating Social Impact CCC LTD. Factual information related to Manitoba’s obligations under Canada’s domestic and international trade agreements has been reviewed by the Province of Manitoba.

This document is not an endorsement by the Canadian CED Network and / or Accelerating Social Impact CCC LTD. of any trade agreements discussed; rather, it is meant to provide clarity on where social purchasing options stand with the existing and pending agreements.

The government procurement requirements of the North American Free Trade Agreement apply to only Federal government procurement. NAFTA does not apply to procurement measures adopted by a provincial or municipal entity, although there are opportunities for social purchasing within its framework that should be analyzed.

NAFTA is only triggered where the procurement of eligible goods and services rises above a certain value. Where the transaction meets these criteria, the Federal body will be prevented from giving preferential treatment to domestic suppliers. \$50,000 US for contracts for goods, services or any combination thereof, and \$6.5 million US for contracts for construction services.

<sup>2</sup> The Social Enterprise Council of Canada defines social enterprises as “community-based businesses that sell goods or services in the market place to achieve a social, cultural and/or environmental purpose; they reinvest their profits to maximize their social mission.”



## WTO GOVERNMENT PROCUREMENT AGREEMENT<sup>3</sup>

### The WTO Agreement on Government

Procurement (GPA) is the primary plurilateral instrument guaranteeing access for Canadian suppliers to the government procurement markets in the United States, the European Union, Japan, Korea and other important markets.

The GPA contains general rules and obligations, mostly relating to national treatment and non-discrimination, transparency and procedural fairness. The GPA also requires parties to refrain from the use of “offsets” - defined as “any condition or undertaking that encourages local development.” While local development is not defined and there is no WTO jurisprudence in this area, some have understood this to refer to local employment quotas. Parties are permitted to impose measures to protect public morals, order

or safety; to protect human, animal or plant life or health; to protect intellectual property; or relating to goods or services of persons with disabilities, philanthropic institutions or prison labour. Finally, the agreement contains a broad exemption for measures with respect to Aboriginal peoples and a note providing Manitoba with an exemption for “procurement that is intended to contribute to economic development within the province.”

The GPA only applies to contracts worth more than defined threshold values. The agreement covers spending by Government Departments at relatively high threshold levels. For 2014/15 these thresholds are:

- CDN \$548,700 for goods and services
- CDN \$7,700,000 for construction

Under the WTO GPA, parties are not permitted to divide a single procurement into separate procurements or use a particular valuation method for estimating the value of a single procurement with the intention of totally or partially excluding it from the GPA. Further, parties are required to estimate the maximum total value of procurement over its entire duration even if portions are awarded to different suppliers.

The WTO GPA does not preclude any type of local development below threshold values and provinces are still permitted to offer grants, loans or other fiscal incentives to support local development outside of procurement.

## COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT<sup>4</sup> (CETA)

### The language used in the CETA

Government Procurement chapter borrows heavily from the WTO GPA text. As with the WTO GPA, the CETA contains general rules and obligations relating to national treatment and non-discrimination, transparency, procedural fairness and offsets.

When using grants, loans, or fiscal incentives, preference to domestic companies is permitted.

Thresholds for CETA, while marginally lower than those in the WTO GPA are still much higher than those found in the AIT

- For 2013 - \$312,881 for goods and services; \$625,762 for

goods and services procurement by utilities entities; and \$7.8 million for covered construction services.

As with the WTO GPA, in the CETA parties are not permitted to divide procurement into separate procurements or use a particular valuation method for estimating the value of procurement with the intention of total or partial exclusion.

There are, however, exemptions to CETA's rules and obligations for the following:

#### Government interests:

- National security and measures necessary to protect public morals, order or safety;

- Human, animal or plant life or health;
- Measures relating to goods or services of persons with disabilities, philanthropic institutions or prison labour;
- Aboriginal businesses – Canada has a broad exemption for any measure adopted or maintained with respect to Aboriginal peoples that applies to any procurement between the parties.

#### Exempt Areas:

- Health care and other public services

<sup>3</sup> <http://treaty-accord.gc.ca/text-texte.aspx?id=105249&lang=eng>

<sup>4</sup> <http://international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/understanding-comprendre/technical-technique.aspx?lang=eng#p4>

- Set-asides for Aboriginal businesses
- Regional economic development exclusion for Manitoba, Newfoundland and Labrador, Nova Scotia, Northwest Territories, Nunavut, Prince Edward Island, New Brunswick and Yukon:
- for procurement contracts of \$1 million or less or as a maximum value within a larger procurement

contract and intended to support small firms or employment opportunities in non-urban areas and

- no more than 10 times per province or territory per year
- not available for procurement funded by the federal government”

Further, the ability to include social and environmental criteria is maintained.

It should be noted that EU procurement directives allow for the inclusion of social and environmental criteria in procurement contracts provided they are not discriminatory and the criteria for the award of the contract enables tenders to be compared and assessed objectively. EU social criteria can include integration or reintegration of persons with disabilities, on-site vocational training and the employment of people experiencing particular difficulty in achieving integration.

## PROVINCIAL AGREEMENT ON INTERNAL TRADE<sup>5</sup>

Provinces have obligations to openly tender procurement opportunities under the Agreement on Internal Trade (AIT). However, the AIT has exemptions for procurement from:

- Philanthropic institutions,
- Prison labour or persons with disabilities, as well as
- Contracts with a public body or a non-profit organization.

Under the AIT, procurements below thresholds may be exempt from the obligations. For example, local governments, school districts and other broader public sector agencies are permitted to have local preference policies for contracts under \$100,000 in goods and services or \$250,000 in construction.

In addition, “legitimate objectives” that may be considered as valid reasons for exempting a procurement contract from the agreement include:

- Public security and safety
- Public order

- Protection of human, animal or plant life or health, and
- Protection of the environment.

In the case of the procurement by local governments, school boards and publicly funded academic, health and social service entities, legitimate objectives include:

- Consumer protection
- Protection of the health, safety and well-being of workers or
- Affirmative action programs for disadvantaged groups.

However, any exemption for a “legitimate objective” must also meet the following conditions: it must not impair unduly the access of persons, goods, services or investment of another Party to the Agreement; it must not be more trade restrictive than necessary; and it must not create a disguised restriction on trade.

In the case of crown entities, contracts with a public body or non-profit organization are excluded.

In “exceptional circumstances,” a procurement can be exempted for regional economic development purposes, as long as it does not impair unduly the access of persons, goods, services or investment of another Party to the Agreement, is not more trade restrictive than necessary, notice is provided, and the discriminatory effects of exclusion are minimized.

<sup>5</sup> [http://www.ait-aci.ca/en/ait/ait\\_en.pdf](http://www.ait-aci.ca/en/ait/ait_en.pdf)

## OTHER RESOURCES

**The Canadian Community Economic Development Network**, [www.ccednet-rcdec.ca](http://www.ccednet-rcdec.ca)

**Buying Local: Tools for Forward-Thinking Institutions**, by Anthony Pringle. Published by Columbia Institute, LOCO BC, and ISIS Research Centre at the Sauder School of Business, Dec. 2013.

<http://locobc.com/wp-content/uploads/FINAL-Buying-Local-LowRes.pdf>

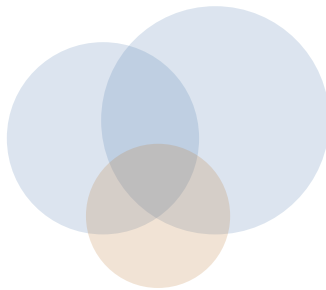
**Buy Social Canada**, [www.buysocialcanada.ca](http://www.buysocialcanada.ca)

**Enterprising Non-Profits**, [www.socialenterprisecanada.ca](http://www.socialenterprisecanada.ca)

**Exploring Social Procurement**, by David LePage. Published by Accelerating Social Impact CCC, Ltd., March 2014.

[http://buysocialcanada.ca/files/2014/05/Exploring-Social-Procurement\\_ASI-CCC-Report.pdf](http://buysocialcanada.ca/files/2014/05/Exploring-Social-Procurement_ASI-CCC-Report.pdf)

**Making Sense of the CETA: An Analysis of the Final Text of the Canada-European Union Comprehensive Economic and Trade Agreement**, edited by Scott Sinclair, Stuart Trew and Hadrian Mertins-Kirkwood. Published by the Canadian Centre for Policy Alternatives, Sept. 2014. <https://www.policyalternatives.ca/publications/reports/making-sense-ceta>



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