



# Trade Agreements Primer

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Buy Social Canada

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## Introduction

Provincial, Territorial, and Local government spending across Canada exceeds \$400 billion annually.<sup>1</sup> 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.

“Social procurement combines the instrumental activity of procurement with the strategic intent of generating social value.”<sup>2</sup>

One solution is social procurement. Social procurement uses existing government spending to create an added social value. Social procurement promotes the key principles of transparency, non-discrimination, fairness and accountability.

Social procurement meets taxpayers’ expectations of financial prudence by leveraging procurement dollars already within the budget to simultaneously fulfill a procurement need as well as contribute to governmental social objectives.

For example, a government can ensure its building maintenance contracts provide employment and training opportunities for people with barriers to employment. This means government infrastructure investments are simultaneously easing the financial strain facing our social assistance, health, and justice systems.<sup>3</sup>

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<sup>1</sup> <https://tradingeconomics.com/canada/government-spending>

<sup>2</sup> Barraket, Keast & Furneaux, Social Procurement and New Public Governance

<sup>3</sup> For examples see Case Studies at <http://www.buysocialcanada.com/sample-documents-and-resources>

# Governing principles of procurement

Government policy makers and purchasers must comply with Canada's trade agreements where they apply to a procurement. The trade agreements are all based on four broad principles: transparency, non-discrimination, fairness and accountability. These are the foundation of the procedural rules that are in our trade agreements. These are also foundational principles of social procurement.

## Do the trade agreements apply to all procurement?

While all procurement is subject to the four key principles of transparency, non-discrimination, fairness and accountability, if the procurement is not covered by trade agreements, then the further requirements of the agreements do not apply.

The process for identifying whether an international trade agreement applies is a four-step process where all conditions must be met:

- 1** The procurement must be undertaken by an entity specifically covered in our trade agreements (whether at the federal, sub-federal (provinces and territories) or other entity level (crown corporations))
- 2** The procurement must be for goods, services or construction services covered in the trade agreements
- 3** The procurement must be above relevant thresholds (thresholds vary according to entity and according to whether the procurement is for goods, services or construction services) Every two years, the thresholds in the free trade agreements are updated and,
- 4** The procurement must not be subject to any of the exceptions of the trade agreements.

What follows is a brief review of the key trade agreements that apply to government procurement and the opportunities that exist for social procurement both outside of and within the trade agreements.<sup>4</sup>

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<sup>4</sup> The content in this document is provided for general information purposes only and does not constitute legal or other professional advice or an opinion of any kind. Buy Social Canada does not warrant or guarantee the quality, accuracy or completeness of any information in this document.

# Requirements and opportunities across trade agreements

Canada's obligations are generally similar from one agreement to another, the differences are to be found in the market access schedules (annexes) adopted by Canada and partner Countries.

There are several commonalities between trade agreements offering opportunities for social procurement.

When a procurement is covered by more than one agreement, all agreements must be complied with at the same time. To accomplish this, the procedures to be followed are the procedures that are considered the most rigorous.

## Social considerations

Social considerations can be applied not only to procurements not covered by trade agreements, but in fact can also be used in procurements covered by trade agreements, as long as these considerations do not discriminate between Canadian and foreign suppliers.

There are general rules and obligations relating to national treatment and non-discrimination. You must not restrict competition.

## Offsets

Offsets are any condition or undertaking that encourages local development, such as the use of domestic content e.g. local goods or services.

Example

- ✗ "We will only contract to local companies"
- ✓ "We are seeking a community benefit outcome from the successful bidder"

e.g. Evaluating bids

Bids for a specific covered procurement could be evaluated against a criteria based on employment of people with disabilities, whether these people are employed in Canada or in a partner country.

Some trade agreements prohibit the inclusion of offsets. Offsets are a grey area in the law.

Offsets restrictions apply only to the limited procurements that are purchased by an entity covered by the trade agreement, are a good or service covered the trade agreement, are above the trade agreement threshold and do not fall within any of the exceptions.<sup>5</sup>

When a procurement is covered only by an inter-provincial trade agreement, Canadian content requirements (a preference for Canadian goods or services) may be applied so long as they do not discriminate between Provinces, Territories, or regions. The CFTA and NWPTA also include exceptions detailed further below.

Even when trade agreements apply, social considerations can be still be applied as long as these considerations do not discriminate between Canadian and foreign (if a FTA applies) or Provincial/Territorial/Regional (for Inter-Provincial trade agreements) suppliers.

More details about thresholds and exceptions are below.

## Thresholds

Trade agreements only apply to contracts above a threshold. Purchasing below the threshold level allows for cases of direct, non- competitive government purchasing.

“Below the defined threshold amounts allows low dollar value procurement to bypass competitive tendering.”

This means that in practice, for example, you could source catering (usually a small dollar amount contract) for many of your events directly from social enterprises without a requirement for competitive bidding.

Every two years, the thresholds in the free trade agreements are updated.<sup>6</sup>

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<sup>5</sup> More information about offsets can be found in Chapter 19 and Annex 19 of CETA.

<sup>6</sup> See current thresholds at <https://www.canada.ca/en/treasury-board-secretariat/services/policy-notice/2017-6.html>. Note that under the Canada-Chile, Canada-Colombia, and Canada-Ukraine FTAs, there are “extended transparency” commitments to provide suppliers with information regarding procurements for which they are not eligible to bid but where (1) an open-tendering process is used, and (2) the procurement value exceeds CAN \$124,000 for Chile and Ukraine and CAN \$150,000 for Colombia.

# Trade Agreement Exceptions

Canada's trade agreements have exceptions or exemptions to the trade agreement requirements. These exceptions may be in the form of "non-application" i.e. the trade agreement does not apply or "set-asides" i.e. the trade agreements allow for the government to create a set-aside programme in which case the trade agreement will not apply.

## Non-application

Many trade agreements contain non-application clauses. These mean that the trade agreements do not apply to contracts issued to these groups.

Most trade agreements do not apply to procurement of goods or services from:

- Philanthropic institutions
- Prison Labour
- Persons with disabilities
- And many trade agreements (including CFTA and NWPTA) also do not apply to procurement of goods or services from non-profits

This may be an option for direct procurement from a social enterprise that meets these criteria, see examples below.

## Examples

### **CFTA Article 504 (11)(i)(v)**

[the CFTA does not apply to procurement of goods or services]  
"from philanthropic institutions, non-profit organizations, prison labour, or natural persons with disabilities"

### **NWPTA Part V C (2)**

[the NWPTA does not apply to procurement of goods or services]  
a) from philanthropic institutions, prison labour or persons with disabilities;  
b) from a public body or a non-profit organization;

# Regional economic development

CETA, the CFTA and NWPTA (New West Partnership) include an exception for the enabling of Regional Economic Development.

## Examples

### **NWPTA Part V F**

1. Regional economic development measures, provided that such measures:
- (a) are only adopted or maintained under exceptional circumstances;
  - (b) are not more trade restrictive than necessary to achieve their specific objective;
  - (c) do not operate to unduly harm the economic interests of persons, goods, services or investments of the other Party;
  - (d) minimize the discriminatory effects and impacts on trade, investment and labour mobility; and
  - (e) are consistent with Article 12(1).

### **CETA Note 4, Annex 19-7**

- a. the provinces and territories of Manitoba, Newfoundland and Labrador, New Brunswick, Nova Scotia, Northwest Territories, Nunavut, Prince Edward Island, or Yukon may derogate from this Chapter in order to promote regional economic development, without providing undue support to monopolistic activities.
- b. any procurement qualifying for a derogation pursuant to this Note shall:
  - i. be of a total value estimated at CAD\$ one million, or less; and
  - ii. support small firms or employment opportunities in non-urban areas.
- c. if the procurement meets the requirement of paragraph (b)(ii) but its total value exceeds CAD\$ one million, the value of the part of the contract that would be affected by the derogation would not exceed CAD\$ one million.
- d. each province or territory listed under paragraph (a) may not derogate pursuant to this Note more than ten times per year.
- e. a procurement shall not qualify for a derogation pursuant to this Note if it is funded by the federal government.
- f. a procurement qualifying for a derogation pursuant to this Note shall be notified at least 30 days prior to the signing of a procurement contract, accompanied by:
  - i. the details of the circumstances justifying a derogation pursuant to this Note;
  - ii. the information regarding the area where the procurement is expected to provide regional economic benefits, and, if made available, the name of the supplier; and an explanation of the conformity of the procurement with the requirements of this Note.



# Set-asides

## **Aboriginal Businesses**

All international trade agreements provide for set-asides for Aboriginal businesses.

## **Small and minority owned businesses**

Many of the trade agreements contain a set-aside opportunity for small businesses.

## **Examples**

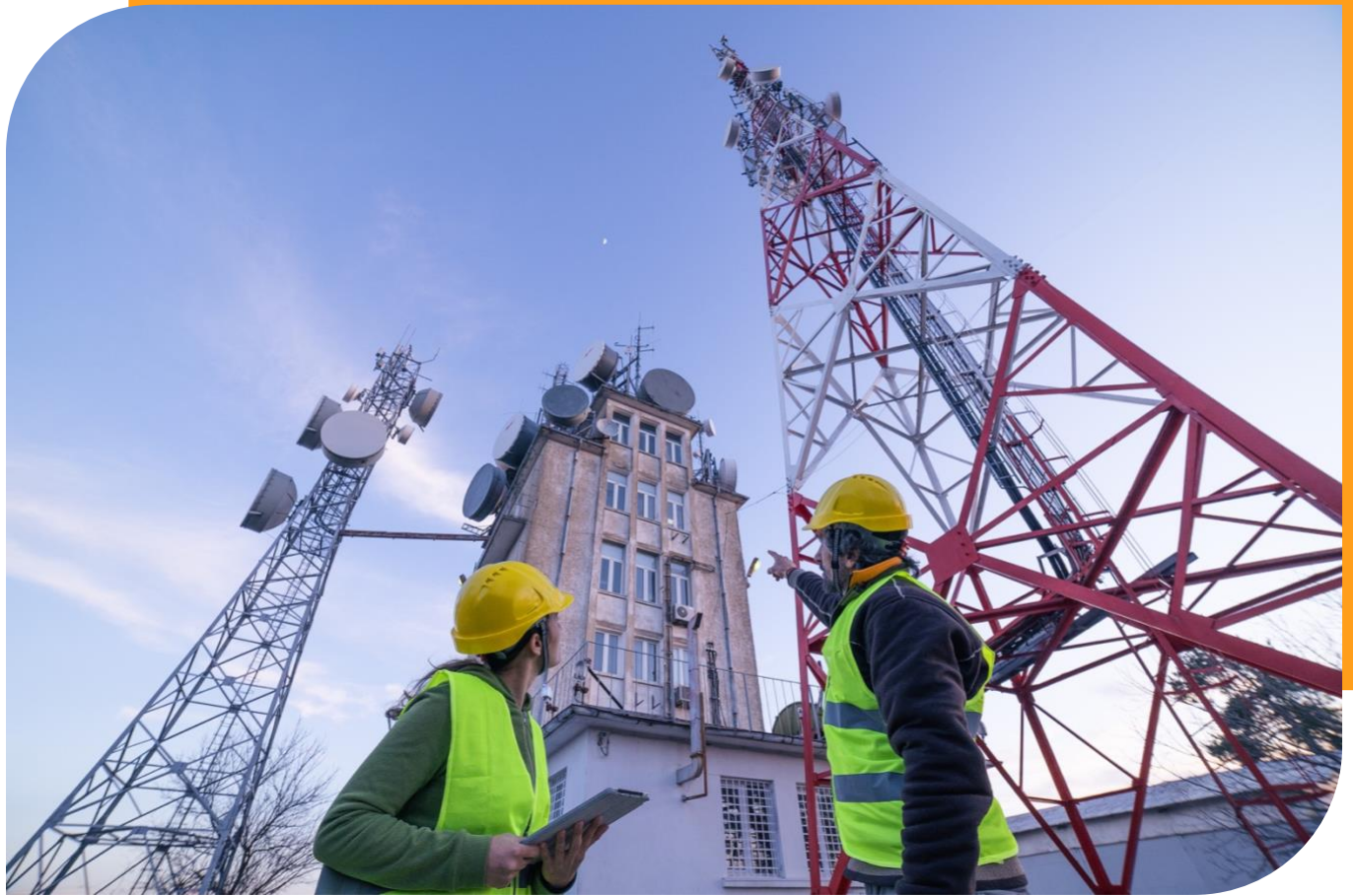
### **CFTA Article 504 (13)**

“This Chapter does not apply to procurement that is part of a small business set-aside program provided that the program is fair, open, transparent, and does not discriminate on the basis of origin or location within Canada of goods, services, or suppliers.”

### **WTO GPA Note 2, Annex 7**

“2 This Agreement does not apply to set asides for small and minority owned businesses.”

Note that CETA does not contain an exception for small and minority owned businesses set asides.



## Exceptions in practice

### Manitoba Housing trade agreement exception: Direct Award to a non-profit

“In 2008, we started doing energy and water retrofits for Manitoba Housing. And then, we were approached by some provincial officials who were involved with a program called Housing First. Housing First was a partly federally funded program that took people off the streets and gave them housing first, and then resources alongside it. They knew that a lot of these apartments were going to be trashed on an annual basis—as much as 50% or more. A lot of money was going to be spent fixing up apartment suites. And they said, can you guys at BUILD do these apartment renovations? And we set up Manitoba Green Retrofit to do that work.” – [BUILD Inc.](#)

Manitoba Housing now awards contracts to six social enterprises: BUILD Inc., Manitoba Green Retrofit, North End Community Renewal Corporation, New Directions’ Genesis, Inner City Renovations, and the Brandon Neighbourhood Renewal Corporation’s BEEP.

# International Trade Agreements<sup>7</sup>

<u>Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)</u>	Australia, Brunei Darussalam, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam
<u>Canada-European Free Trade Association (EFTA) Free Trade Agreement</u>	European Free Trade Association (EFTA): Iceland, Liechtenstein, Norway, Switzerland
<u>North American Free Trade Agreement (NAFTA)<sup>8</sup></u>	North America: Mexico, United States of America
<u>Canada-European Union: Comprehensive Economic and Trade Agreement (CETA)</u>	European Union (EU): Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom
<u>Canada-Chile Free Trade Agreement</u>	Chile
<u>Canada-Colombia Free Trade Agreement</u>	Colombia
<u>Canada-Costa Rica Free Trade Agreement<sup>9</sup></u>	Costa Rica
<u>Canada-Honduras Free Trade Agreement</u>	Honduras
<u>Canada-Israel Free Trade Agreement (CIFTA)<sup>9</sup></u>	Israel
<u>Canada-Jordan Free Trade Agreement<sup>9</sup></u>	Jordan
<u>Canada-Korea Free Trade Agreement (CKFTA)</u>	Korea
<u>Canada-Panama Free Trade Agreement</u>	Panama
<u>Canada-Peru Free Trade Agreement</u>	Peru
<u>Canada-Ukraine Free Trade Agreement (CUFTA)</u>	Ukraine

<sup>7</sup> <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng>

<sup>8</sup> The Canada-United States-Mexico Agreement (CUSMA) replaces NAFTA once implemented. See up to date information regarding CUSMA at [www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/](https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/)

<sup>9</sup> Does not contain a chapter on Government Procurement

# Inter-provincial Trade Agreements

<u>Canadian Free Trade Agreement</u>	Canada
<u>New West Partnership Trade Agreement</u>	British Columbia, Alberta, Saskatchewan and Manitoba



**Social  
Procurement  
Leaders**

## **Get in Touch**

Have some questions or need information on how you can be involved or how our services can support your social enterprise or social procurement efforts? Reach out and connect with us.

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