

# PROCUREMENT IN ONTARIO: CURRENT STATE-OF-PLAY

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Every year, Ontario spends about \$29 billion on goods and services.<sup>[1]</sup> In recent years, the Government of Ontario has made efforts to modify the province's procurement practices, but some of these efforts are yet to be finalized. Other initiatives, such as establishing an independent bid challenge mechanism, are yet to be started.

*"Buy Ontario" Procurement Legislation is Still Not In Force*

One such effort is the Building Ontario Business Initiative. Launched in March 2022, the initiative aims to "reduce barriers and provide companies in Ontario with greater access to public procurement opportunities, helping them sell more goods and services, [and] create jobs in their local communities."<sup>[2]</sup>

Last year, on March 3, 2022, the *Building Ontario Business Act, 2022* (the "**Act**") was enacted as the key pillar of this initiative.<sup>[3]</sup> However, a year later, the Act is yet to be proclaimed into force. When in force, the Act would require public sector entities to give Ontario businesses preference when conducting procurements for goods and services.<sup>[4]</sup> This preference for Ontario businesses could have a significant impact; by Ontario's estimate it could result in \$3 billion worth of contracts awarded to Ontario businesses annually by 2026. Beyond this requirement, the Act contains very few details, such as what businesses will qualify as "Ontario businesses", what mechanism will be used to give "preference", and what value the procurement must have to trigger the preference.

In March 2022, Ontario indicated that consultations with stakeholders and business associations were underway.<sup>[5]</sup> Details of the results of consultations have not been released.

While it will be necessary to examine the details of the program to assess its compliance with relevant trade agreements, the requirement to give "preference" to Ontario businesses appears, in principle, to violate non-discrimination obligations for procurements under the *Canadian Free Trade Agreement* ("**CFTA**"), the WTO's *Agreement on Government Procurement*, the *Canada-EU Comprehensive and Economic Trade Agreement* ("**CETA**"), and *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* ("**CPTPP**"). The applicability of the non-discrimination obligation will depend on whether the relevant trade agreement covers the procuring entity and goods and services being procured, and whether the value of those goods and

services is higher than the applicable thresholds contained in those agreements.

#### *Supply Ontario Aims to be Operational by the End of 2023*

A second initiative of the Ontario government is Supply Ontario, a Crown agency established on November 5, 2020 by Ontario regulation *Centralized Supply Chain Ontario*<sup>[6]</sup> under the *Supply Chain Management Act (Government, Broader Public Sector and Health Sector Entities)*, 2019.<sup>[7]</sup>

Supply Ontario is a centralized procurement agency “enabl[ing] the government to buy as one organization, driving greater value and outcomes for Ontarians.”<sup>[8]</sup> Its duties include providing and supporting supply chain management on behalf of government entities, broader public sector entities (including school boards, colleges, universities, and social service organizations) and health care entities in the province.<sup>[9]</sup> They also include collecting supply chain management and vendor performance data from the same entities.<sup>[10]</sup>

In November 2021, Supply Ontario released a progress report indicating it planned to be scaled up and in steady state by this month, March 2023, and to be fully operational by November 2023.<sup>[11]</sup> The most recent update was a December 2022 announcement of the appointment of a new CEO as of January 2023, after a series of leadership updates throughout 2022.<sup>[12]</sup> Few details are available regarding the operations of Supply Ontario as it seems the organization continues to scale up its operations. Once operational, suppliers may find bidding on projects easier because of the centralized body (rather than the current de-centralized approach). Buyers may benefit from supply management services provided by Supply Ontario. However, the full implications for both buyers and suppliers are unclear as the operations of Supply Ontario are yet to be finalized.

#### *Ontario Still Lacks an Independent Bid Challenge Authority*

The third initiative, the development of an independent bid challenge authority, is conspicuously absent.

Under CETA,<sup>[13]</sup> the CPTPP,<sup>[14]</sup> and the CFTA,<sup>[15]</sup> Ontario is required to have an independent bid challenge authority. In the 2022 decision *Thales DIS Canada Inc. v Ontario*, the concurring judgment of Justice Corbett of the Ontario Divisional Court stated that “Ontario is in breach of [the CETA]” in two ways.<sup>[16]</sup> First, in failing “to designate at least one impartial administrative or judicial authority that is independent of its procuring entities” and second, by failing “to ensure the supplier may appeal” a decision of the decision-maker.<sup>[17]</sup>

Currently, when bidders have a complaint concerning an Ontario government procurement, they can file the complaint, which will then undergo a formal review by the Director, Program and Policy Enablement Branch, Supply Chain Ontario, Ontario Shared Services, Ministry of Public and Business Service Delivery. This is the process that the applicant challenged as in breach of CETA and the CFTA to the Ministry of Transportation and was referred to by Justice Corbett in *Thales*.<sup>[18]</sup> This procedure differs substantially from the more formal bid

challenge body at the federal level, the Canadian International Trade Tribunal (CITT, which took over the functions of the federal Procurement Review Board in 1994). A bid challenge review body which is more independent than a review by a governmental department may be required as a result of trade obligations and court decisions.

Notably, the procurement chapters of both the CFTA<sup>[19]</sup> and CETA<sup>[20]</sup> apply to Ontario's MASH entities (Municipalities, Academic Institutions, Schools, and Hospitals), and therefore suppliers of these entities may be similarly affected by not having an independent provincial-level authority to which complaints may be filed.<sup>[21]</sup>

The absence of a bid challenge or review authority in Ontario, modelled on the CITT, contrasts with the New West Partnership Trade Agreement, an agreement between the Governments of British Columbia, Alberta, Saskatchewan and Manitoba<sup>[22]</sup>, which arguably contains an independent bid protest mechanism; another example is the Québec Autorité des marchés publics, an independent public body that oversees public procurements in Quebec. It should be noted that not all provinces currently have a separate review body.

### *Conclusion*

Significant changes are in the works for Ontario's procurement landscape. McMillan's procurement group will continue to monitor for updates. For any questions or specific advice regarding these issues please contact the authors.

[1] Doing Business with the [Government of Ontario](#).

[2] Ontario Government and Consumer Services, "[Province Launches Building Ontario Businesses Initiative](#)", News Release, March 9, 2022.

[3] S.O. 2022, c. 2, Sched 2.

[4] *Building Ontario Business Act, 2022*, S.O. 2022, c. 2, Sched 2.

[5] Ontario Government and Consumer Services, "[Building Ontario Business Initiative](#)", Backgrounder, March 9, 2022.

[6] O. Reg. 612/20.

[7] S.O. 2019, c. 15, Sched 37.

[8] Government of Ontario, Supply Ontario, [online](#).

[9] O. Reg. 612/20, s. 3(1).

[10] O. Reg. 612/20, s. 3(1).

[11] Supply Ontario, [Our Progress: Establishing our operations and developing the foundations for a multi-year transformation](#), November 25, 2021.

[12] Supply Ontario, "[Jamie Wallace appointed Chief Executive Officer of Supply Ontario](#)," December 23, 2022.

[13] CETA, Articles 19.17.4 and 19.17.5.

[14] CPTPP, Article 15.19.

[15] CFTA, Article 518.

[16] *Thales DIS Canada Inc. v. Ontario*, 2022 ONSC 3166, para 172.

[17] *Thales DIS Canada Inc. v. Ontario*, 2022 ONSC 3166, para 172.

[18] *Thales DIS Canada Inc. v. Ontario*, 2022 ONSC 3166, paras 26-34, 37 and 168-178.

[19] CFTA, Article 504.3(b) and Schedule of Ontario.

[20] CETA, Annex 19-2.9 Ontario.

[21] The WTO's Agreement on Government Procurement and the CPTPP only cover Ministries of the Province and 14 listed Agencies. See CPTPP, Annex 15-A Schedule of Canada, Section B; WTO GPA, Canada's Annex 2.

[22] [New West Partnership Trade Agreement](#), 2022 (see also [Bid Protest Mechanism](#)); [Autorité des marchés publics](#). (see also [Porter plainte dans le cadre d'un contrat public](#)).

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#### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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