

Making Sense of the CETA

An Analysis of the Final Text of the
Canada-European Union Comprehensive
Economic and Trade Agreement

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Public Procurement

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Key Points

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- Government procurement – the public purchasing of goods and services of all kinds – can be an important economic development tool, especially when used to encourage broader policy goals such as a transition to green energy. These purchases make up a significant portion of public budgets. The WTO estimates government purchasing at from 10 to 15% of GDP in developed countries,¹² which translates into an estimated \$130–\$200 billion annually in Canada. Typically, governments are the single largest purchasers of goods and services in the economy. The large amount of public money involved is one reason why government procurement is an important issue.

- Public procurement in Canada by all levels of government is already open, transparent and fair, with recourse for companies who feel they have been treated unfairly. Few if any jurisdictions in Canada prohibit foreign firms from bidding on goods, services or construction projects. Similarly, Canadian firms with a market presence in Europe must legally be treated the same as European firms under the EU procurement directives. It is highly misleading to suggest the CETA will create significant new opportunities for Canadian companies to bid on and win public contracts in the EU since nothing is currently prohibiting them from doing so.
- The real objective of EU negotiators in the CETA with respect to procurement was not to achieve non-discriminatory access at all levels of government, which exists already for EU companies in Canada. EU negotiators sought “unconditional access,” which is something quite different. In this respect, the EU won handily while Canadian firms operating in Europe picked up few new opportunities. In other words, on procurement, Canada made unilateral concessions to the EU that will mostly affect municipal governments and other provincial entities previously excluded from trade deals.
- The procurement commitments that Canada has agreed to in the CETA are extensive and will substantially restrict the vast majority of provincial and municipal government bodies from using public spending as a catalyst for achieving other societal goals, from creating good jobs to supporting local farmers to addressing the climate crisis. There are some notable exclusions, for example Infrastructure Ontario, NALCOR and parts of Manitoba Hydro’s procurement. With the exception of Ontario’s local hydro utilities and procurement of transit vehicles in Ontario and Québec, all municipal government procurement will be covered for the first time by an international procurement agreement. Notably, even these exceptions have been watered down and are weaker than the government portrays (see section on Procurement of Mass Transit Vehicles by Angelo DiCaro). Canada’s provincial commitments have also been expanded far beyond existing commitments under the World Trade Organization’s Agreement on Government Procurement (GPA) to include most utilities, Crown corporations, and the broader MASH sector (municipalities academic institutes, school boards and hospitals).

- For all goods and services contracts above 200 SDRs (about \$328,000 on September 9), or 400,000 SDR for utilities (\$657,000), and all construction projects above 5,000,000 SDRs (about \$8.2 million), municipal governments, utilities and MASH sector entities will be prohibited from adopting minimum local content requirements, insisting on local training quotas, or applying any other “offsets,” which are defined in the CETA as “any condition or undertaking that encourages local development.” These prohibitions will almost certainly threaten increasingly popular “buy local” food programs at provincial hospitals, school boards and other public institutions (see section on Local Food Support Programs by Amy Wood). They will certainly outlaw programs like the *Green Energy Act* in Ontario, which required significant local content in solar and wind projects in order for public and private energy producers to benefit from generous feed-in-tariff rates designed to encourage more renewable power generation.¹³
- According to Province of Ontario officials, the thresholds mentioned above will cover roughly 80% of the *value* of all government procurement in the province, notably large infrastructure projects where minimum local content rules would have the most economic development impact. The CETA procurement rules are absolute, meaning they will apply equally to European and Canadian firms. Again, here we see the real meaning of “unconditional” access versus simple non-discrimination.
- Canada and the provinces made these commitments on behalf of municipal governments despite widespread local resistance and even opposition in communities across the country. Since 2010, more than 50 municipalities, including Toronto, Hamilton and Victoria, have passed motions requesting an exemption for local governments from the CETA procurement restrictions.
- Canada has made these extensive procurement commitments for municipal governments at a time when local governments in Europe are demanding more space to use public spending as a catalyst for social and economic development. There is little credible evidence that such “buy local” programs significantly affect global trade patterns, while restricting them undeniably diminishes local democratic authority.

- The CETA requires provincial governments to establish a new process through which European and Canadian companies can dispute procurement decisions made by covered government entities on contracts above the thresholds already mentioned. It also requires that notices of intended procurement must be directly accessible. In the August 1 text of the Government Procurement chapter, it was still unclear whether this would involve the creation of a single point of electronic access to all covered Canadian and European procurements, as requested by the EU.
- It is certainly feasible to implement innovative procurement policies that ensure financial responsibility and transparency while at the same time directing public purchases towards suppliers who contribute the most to goals such as affirmative action, local economic development, environmental protection, job creation and respect for human rights. In fact, assessing the overall benefits of a proposal in terms of local job creation, increased taxes, opportunities for marginalised groups, and environmental benefits provides a more accurate cost accounting and superior value for money than simply going with the lowest bid without considering local spin-offs and community impacts.

Analysis of Key Provisions

Non-discrimination

- Article IV.2 states:

With respect to any measure regarding covered procurement, a Party, including its procuring entities, shall not:

(a) treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; or

(b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of the other Party.

- The language in Article IV.2, taken from the WTO GPA, applies standard free-trade rules on non-discrimination to public procurement in a way that the GATT does not. In fact, most countries have not agreed to be bound by the GPA because they understand that pub-

lic spending can be a valuable tool for supporting small business or domestic start-up industries, for example renewable energy. The GPA is therefore a plurilateral (voluntary) WTO agreement with few active members, and even among these only a small subset have committed municipal governments under the GPA rules.¹⁴ Many U.S. states also refuse to be bound by GPA- and CETA-like procurement restrictions prohibiting domestic support through public spending.

- We can see in part (b) of these non-discrimination rules why the EU feels it has achieved substantial “unconditional” access to Canadian procurement through the CETA, since covered public institutions will not be able to prefer one bid over another based on the amount of local content each firm would meet. Under the CETA, Canadian municipal governments would be prohibited from considering local content, or establishing a premium on local content at the outset in the request for proposals, while U.S. communities will continue to profit from the flexibility and job-creation potential this gives them.

Prohibition on offsets

- Article IV.6 states: “With regard to covered procurement, a Party, including its procuring entities, shall not seek, take account of, impose or enforce any offset.” Like the WTO GPA, the CETA defines offsets as: “any condition or undertaking that encourages local development or improves a Party’s balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade and similar action or requirement.”
- This clause combines with the rules on non-discrimination to significantly constrain how municipal governments and other covered institutions spend public money. In the United States, for example, many states and cities put aside a portion of public contracts for minority-owned businesses or social enterprises. Under both the NAFTA and the WTO-AGP Canada protected the right to set aside a portion of contracts for minority or small businesses. In the CETA, however, Canada has given up this right. Canada reserved the right to use offsets to benefit Aboriginal companies and communities but for all other purposes, for example requiring a firm building a new transit line to train people from disadvantaged groups, or hire from communities along the route, will be prohibited.

Regional development exemption

- The general notes on Canada’s procurement offer include a clarification on procurement for regional economic development. Canadian provinces and municipalities retained space in the Agreement on Internal Trade (AIT) to use public spending to encourage development in depressed or under-developed regions. Canadian negotiators attempted but largely failed to retain this space in the CETA.
- Under the General Notes to Canada’s procurement offer (GP Market Access–Canadian Offer, Annex X-07), it explains the provinces and territories of Manitoba, Newfoundland and Labrador, New Brunswick, Nova Scotia, Northwest Territories, Nunavut, Prince Edward Island and Yukon “may derogate from the procurement chapter in order to promote regional economic development, without providing undue support to monopolistic activities.” However, each province may only do this a maximum of 10 times annually, where the total value of each procurement does not exceed \$1 million, is only used to support small firms or employment in *non-urban* areas, and where there is no federal funding involved in the procured project. The regional development carve-out is therefore highly exclusive, cutting off potentially beneficial partnerships between various levels of government and any projects within struggling urban centres.

Valuation and local food programs

- Article II.6 of the procurement chapter, under the Valuation rules, prohibits municipalities and any other covered public entity from dividing up a proposed contract into separate procurements with the intention of excluding the contract from the CETA procurement rules. This appears to be reasonable on the surface, but in Article II.7 the logic is expanded to collect any “recurring contracts” into single purchases for the purposes of applying the CETA procurement rules. So when any public purchase is recurring, the calculation of the estimated maximum total value is to be based on:

(a) the value of recurring contracts of the same type of good or service awarded during the preceding 12 months or the procuring entity’s preceding fiscal year, adjusted, where possible, to take into account anticipated changes in the quantity or value of the good or service being procured over the following 12 months; or

(b) the estimated value of recurring contracts of the same type of good or service to be awarded during the 12 months following the initial contract award or the procuring entity's fiscal year.

- It is easy to see how “buy local” food policies in schools, hospitals or other municipal institutions, which the federal government has claimed to be safe, could easily surpass the threshold for goods and services purchases, making them vulnerable to challenge from private catering companies that could increase their profits by lowering the amount of local food they purchased. A general exception in the CETA “in respect of agricultural goods made in furtherance of agricultural support programs or human feeding programs” would not seem to apply to preferences at the local level for local food (see section on Local Food Support Programs by Amy Wood).

Procurement of Mass Transit Vehicles

Angelo DiCaro, Unifor

Key Points

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- The federal government is claiming that existing rules regarding domestic content in procurement of mass transit equipment have been grandfathered in the CETA. This claim is clearly false. No province outside of Ontario and Québec is now permitted to implement domestic content provisions in transit equipment procurement. The meaning and effect of the Ontario and Québec provisions is significantly downgraded, especially by the broad interpretation now given to the “total value” of those contracts, allowing inclusion of maintenance and service functions, and other non-manufacturing inputs. The “ratchet effect” specified in the CETA text ensures that domestic content rules can only move one way in the future: down.

- Proactive use of domestic procurement rules has been an important policy tool in the development of key high-value manufacturing operations in Canada — from the Bombardier passenger car facility in Thunder Bay to bus factories in Manitoba and Québec to many segments of our aerospace industry. The CETA abandons that policy tool, restricts the procurement decisions of provincial and local governments (for the first time in an international trade agreement), and threatens the future of those key industries in Canada.

Background on government procurement and transit investments

- Government procurement of goods and services is a lucrative market in Canada, pegged at \$100–\$200 billion annually in some estimates.¹⁵ These purchases range from small office supplies to complex infrastructure projects, including schools, roads and transit systems.
- It is not uncommon for governments to utilize public spending power to extract value for their home economy, often by spurring local demand for labour. This guiding principle underpins long-standing U.S. government purchasing policies like the Buy American Act (requiring strong domestic content in goods used in certain publicly funded projects) as well as Buy-American provisions in the Surface Transportation Assistance Act (requiring all iron/steel inputs for surface transport projects to be sourced from the United States). Domestic (or local) purchasing policies have also been utilized in Canada for major public purchases of ships,¹⁶ aerospace and defence products,¹⁷ as well as transit vehicles and rolling stock, among others.
- These policies continue to be established (and enforced) despite the existence of various WTO agreements covering government procurement, as well as trade agreements like the NAFTA. However, restrictions embedded in the CETA appear to limit and in some cases, weaken or prohibit the use of buy-domestic transit policies at all levels of government, including at the provincial and municipal level. The application of free trade restrictions on purchasing by lower levels of government in Canada is an unprecedented development.
- Transit, including equipment such as buses, subways, light rail and other rolling stock, represents a significant portion of total annual government spending.¹⁸ In fact, Canada’s transit infrastructure needs continue to grow alongside greater urban density, traffic con-

gestion, population growth and environmental concerns. The Canadian Urban Transit Association pegs national transit system infrastructure needs at \$53.5 billion.¹⁹

- Over the past 10 years, major transit expansion and renewal projects have been undertaken across Canada, including:
 - Canada Line (or SkyTrain) system in Metro Vancouver
 - Calgary’s CTrain light rail transit system expansion
 - Montreal subway car replacement
 - Toronto light rail Transit City project, streetcar replacement
- The value of these four projects alone represents upwards of \$4.5 billion. Many more transit expansion projects are being considered or are currently underway in cities and towns across Canada.
- Two provinces (Ontario and Québec) have established “buy-domestic” policies to guide the public purchase of rolling stock equipment in recent years.
- In Québec, the provincial government, in coordination with the Montreal transit authority (Société de transport de Montréal), issued a requirement in 2008 that 60% of rolling stock content must be supplied by Canadian sources, as well as a requirement for domestic final assembly. This policy guided the STM’s procurement of more than 300 MR-63 subway cars. There have been additional reports of similar domestic content requirements issued by the government on a project-by-project basis.
- In Ontario, the Ministry of Transportation issued its *Canadian Content for Transit Vehicle Procurement Policy* in September 2008 in the wake of a proposed multi-billion dollar light rail transit procurement issued by the City of Toronto, partially funded by the province. The policy requires that all transit vehicles procured with provincial funding must have at least 25% Canadian content (with some exemptions), in the spirit of promoting “job retention and creation,” “economic development,” “value for taxpayers’ dollars,” and protecting “skilled manufacturing jobs.”

Analysis of Key Provisions

Limitations on local content for mass transit

- The CETA explicitly covers mass transit procurement issued by all provinces and territories, bound by the terms and conditions expressed in its Procurement chapter, with two specific exemptions listed in Annex X-04. Under the CETA, no provincial or territorial government will be allowed to institute new local content requirements on transit purchases.
- In the *Technical Summary of Final Negotiated Outcomes* released in October 2013, following the announcement of an “agreement-in-principle,” the federal government claimed that negotiators had *retained* “a 25% Canadian value for the procurement of public transit vehicles (rolling stock)” in Ontario and Québec. The summary also explains that Québec retains Canadian final assembly requirements (the Ontario policy is silent on final assembly conditions).
- The CETA will prohibit the implementation of any new domestic content provisions in the other eight Canadian provinces.
- While the Québec and Ontario transit procurement policies may have been maintained, significant concessions were made, including in their interpretation and application.
- In Québec, Canadian content requirements for mass transit, reported as high as 60% in certain projects, are now limited to 25%, which represents a significant departure from past provincial practice.
- In both Ontario and Québec, that 25% Canadian-content threshold becomes the *new maximum* in mass transit procurement – another significant concession. Annex X-04 (3) states the following:

*Procuring entities in the provinces of Ontario and Québec, when purchasing mass transit vehicles, may, in accordance with the terms of this agreement, require that the successful bidder contracts **up to 25%** of the contract value in Canada.*

- In Ontario’s transit procurement policy, the 25% threshold was expressly understood as a minimum requirement with municipalities granted the ability to raise the threshold as deemed appropriate. The