

Procurement Restriction Policy (U.S. Businesses): A Guide for Public Sector Buyers

Developed by: Ministry of Public and Business Service Delivery and Procurement

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WARNINGS and DISCLAIMER:

This document contains suggested terms which may be used in procurement documents issued by Ontario. Final terms used in any procurement document or contract may differ. As such, this document is not intended to be interpreted as creating any legal rights or obligations applicable to either Ontario or any of its bidders or contractors. Where such terms are at issue, they will be found exclusively in the procurement document or individual contract specifically governing the particular transaction.

This guide is provided to assist users in fulfilling their obligations under the Procurement Restriction Policy.

Users should always consult with their procurement, business, and legal advisors on proper use of this document and its content.

All questions related to the use or application of the Procurement Restriction Policy to a particular procurement should be directed to doingbusiness@supplyontario.ca.

1. Purpose

This Guide is intended to provide direction to public sector buyers on how to be compliant with the Procurement Restriction Policy when conducting procurements.

2. The Procurement Restriction Policy

The Procurement Restriction Policy is issued under the authority of the *Management Board of Cabinet Act, 1990*, and the *Broader Public Sector Accountability Act, 2010*.

This Procurement Restriction Policy (the “Policy”) was established to restrict public sector buyers from procuring goods and services from U.S. businesses. The Policy was established as part of an Ontario government response to U.S. tariffs on Canadian products and services. If the relevant tariffs are removed, the Policy may be adjusted or rescinded.

Existing procurement direction continues to apply, including rules to support the Building Ontario Businesses Initiative (BOBI). For the OPS, this means all applicable procurement directives, including the OPS Procurement Directive. For the BPS, this means the BPS Procurement Directive.

In the event of any conflict or inconsistency between any applicable procurement directive and the Policy, the Policy prevails to the extent of the conflict or inconsistency.

The Policy does not prevail over legislation.

For any clarification or questions regarding the applicability of the Policy, public sector entities should contact doingbusiness@supplyontario.ca.

EFFECTIVE DATE

The Policy becomes effective on March 4, 2025, for both OPS and BPS organizations.

3. Application and Scope

APPLICATION

The Policy applies to all public sector entities, which means government entities and all designated Broader Public Sector (BPS) organizations, unless otherwise specified.

Government entities:

- all ministries
- all provincial agencies (including any provincial agencies that are Other Included Entities under the OPS Procurement Directive)
- the Ontario Power Generation (OPG)
- the Independent Electricity System Operator (IESO)

Designated BPS Organizations:

- the BPS organizations that are subject to the [BPS Procurement Directive](#)

SCOPE

The Procurement Restriction Policy applies to:

- All **new**¹ procurements of goods and services (consulting and non-consulting services) at any value posted from the day the Policy comes into effect.
- Any procurement method – invitational, open competitive or non-competitive.

The Policy does not apply:

- to any procurement **already in progress** at the time that the Policy is effective, (i.e., a procurement document has already been issued).

¹ For the purpose of the Policy, a new procurement is one that has not yet been posted (e.g., on an electronic tendering system) or has not yet been issued to vendors to submit a response.

- when public sector entities use an existing Vendor of Record arrangement (VOR) or other available arrangements.
- contract extensions included in the original procurement.²
- to unforeseen situations of urgency.
 - for the OPS, refer to section 4.4.6 of the OPS Procurement Directive for direction.
 - for the BPS, refer to section 5 of the BPS Procurement Directive.

Exceptions:

Procuring from a U.S. business is allowed only when **both** of the following conditions are met:

- if the U.S. business is the only viable source for the good/service; **and**
- the procurement cannot be delayed (e.g. risks to public health and safety, etc.).

Process for Exceptions:

1. Seek Guidance:

- If contemplating an exception to the Policy, public sector entities are strongly encouraged to contact Supply Ontario for advice and guidance on procurement design and when considering buying from a U.S. business by submitting a [Procurement Rationale Report Form \(PRRF\)](#) for assessment and advice.

2. Provide rationale:

- In a business case or procurement approval document, explain why a U.S. Business is the only viable option and why the procurement cannot be delayed (e.g. risks to public health and safety, etc.), the PRRF should be included as part of the business case. Please see the [box further below](#) for details about how to determine if a procurement qualifies for an exception.

² The Policy **does** apply to contract term extensions beyond the original agreement, as they are considered new non-competitive procurements.

- Include details of any due diligence, market research, risk assessment, or compliance checks conducted.
- Note any advice from Supply Ontario.

3. **Obtain Approvals:**

- **Government Entities:** Get approval from the Deputy Minister, Deputy Minister equivalent, or CEO, unless a higher level of approval is required by the OPS Procurement Directive.
- **Designated BPS Organizations:** Obtain a similar level of approval.

How to determine if a procurement qualifies for an exception

Both conditions noted above must be met and each situation must be assessed on its own merits, on a case-by-case basis.

For the purpose of the Policy, the term '**only viable source**' is intended to mean that obtaining the necessary goods or services from any other source is not feasible. This could be due to various factors, such as:

- The supplier has unique skills or technology that no other supplier possesses.
- The supplier holds exclusive rights or patents, making them the sole provider.
- The supplier is the only one available in a specific area or at the time of the procurement.
- Laws or regulations strictly require using that specific supplier.
- Confidentiality obligations.
- Health and safety considerations.

When deciding if a '**procurement cannot be delayed**,' public sector buyers should consider the following:

- Is the procurement essential for business continuity or to deliver key programs.
- Are there critical health or safety concerns that this procurement addresses.
- How critical is it to obtain this good/service from a U.S. business at this time.

Note:

- The situations listed are not exhaustive; other scenarios may also justify procuring from a U.S. business.

4. U.S. Business Definition

“U.S. business” means a supplier, manufacturer, or distributor of any business structure (includes a sole proprietorship, partnership, corporation, or other business structure) that:

1. has its headquarters or main office located in the U.S., **and**
2. has fewer than 250 full-time employees in Canada at the time of the applicable procurement process.

If a bidder or vendor is a subsidiary of another corporation, part 1 of the definition above is met if that bidder or vendor is controlled by a corporation that has its headquarters or main office located in the U.S.

5. Impacts to the Procurement Process

OVERVIEW

The Procurement Restriction Policy applies to all new procurements posted from the day the Policy comes into effect at any value and includes invitational, open competitive and non-competitive procurements. A public sector entity and a designated Broader Public sector organization are restricted from procuring goods and services from U.S. businesses.

INVITATIONAL

An invitational competitive procurement is achieved by requesting a minimum of three (3) qualified vendors to submit a written proposal in response to the public sector buyers' requirements.

Invitational competitive procurement thresholds³:

Type	OPS	BPS
Goods	<\$30,300	<\$121,200
Services	<\$121,200	<\$121,200

How to Apply the Restriction

- When conducting an invitational competitive procurement, buyers must not include businesses that meet the definition of a U.S. business. Where feasible, buyers should ensure that these vendors are excluded before issuing an invitation to any vendor.
- Additionally, to support the restriction of U.S. businesses participating in Ontario's procurement opportunities, at the above procurement values buyers should avoid inviting U.S. businesses to submit bids or otherwise respond to the procurement opportunity.

OPEN COMPETITIVE

An open competitive procurement process typically involves posting a request for bids on an electronic tendering system (e.g., Ontario Tenders Portal, MERX, etc.). This allows any qualified supplier or contractor to submit a bid, providing all interested parties with an equal opportunity to compete.

Open competitive procurement threshold:

Type	OPS	BPS
Goods	>\$30,300	>\$121,200
Services	>\$121,200	>\$121,200

³ An open competitive procurement must be conducted for competitive procurements exceeding the values listed in this table.

How to Apply the Restriction

- When conducting an open competitive process, public sector entities must restrict U.S. businesses (as defined in the Policy) from participating in the procurement. This restriction can be achieved in many ways.
- When drafting procurement document(s), buyers should include:
 - A definition of 'U.S. business' consistent with the Policy and this guidance.
 - a requirement that each bidder represent whether or not they are a U.S. business when submitting a bid.
 - Note: A public sector entity may rely on a business's representation that it is **not** a 'U.S. business'.
 - Clear language that sets out the restriction (See Appendix A.1 for sample language).

NON-COMPETITIVE PROCUREMENT

Non-competitive procurements involve acquiring goods or services from either a single source, where multiple suppliers exist but only one is chosen, or a sole source, where only one supplier is available.

For government entities, all non-competitive procurements must follow the approvals outlined in Section 4.5.1 of the OPS Procurement Directive. Additionally, certain non-competitive procurements may require an Advance Contract Award Notice (ACAN) as specified in Section 4.4.4.1 of the OPS Procurement Directive.

BPS must conduct their non-competitive procurements in accordance with section 7.2.21 of the BPS Procurement Directive.

How to Apply the Restriction

When conducting a non-competitive procurement, public sector buyers must not procure from or contract with a U.S. business unless prior approval is sought as set out in the Policy.

6. Reporting and Information Requests

General Information Requests

As set out in the Policy, public sector buyers must provide information to Supply Ontario, the Ministry of Public and Business Service Delivery and Procurement (MBPSDP), and the Treasury Board Secretariat (TBS) if and when requested.

Any request would outline what information is required and who the information should be provided to.

Public sector buyers are encouraged to maintain records related to procurements conducted while the Policy is in effect, including when the Policy was applied, when exceptions were made, procurement value, etc.

Exception Requests

Public sector buyers must notify Supply Ontario of their final Deputy Minister (or equivalent) decision for all exception requests including the associated PRRF number, regardless of the outcome by sending them to SCO.Reporting@supplyontario.ca each week.

7. Appendix

Given that each public sector entity may use different procurement documents, the sample language below for procurement contracts should be adjusted as appropriate and reviewed with legal counsel.

This language is not mandatory and is only provided to assist buyers in fulfilling their obligations under the Procurement Restriction Policy. As always, buyers should consult with their procurement, business, and legal advisors on proper usage of this sample language.

A.1. SAMPLE LANGUAGE INDICATING THE RESTRICTION

A bid submitted by a U.S. business (as defined in the Policy) will be considered non-compliant and not evaluated if it does not satisfy the eligibility requirements set out in the procurement document(s). Buyers should consider including the following requirement in their procurement document:

*A Bidder's eligibility must be demonstrated before a Bid may be accepted. The Bidder must not be a U.S. business, where 'U.S. business' means a supplier, manufacturer, or distributor of any business structure (including a sole proprietorship, partnership, corporation, or other business structure) that (i) has its headquarters or main office located in the U.S., **and** (ii) has fewer than 250 full-time employees in Canada.*

If a Bidder is a subsidiary of another corporation, part 1 of the definition above is met if that Bidder is controlled by a corporation that has its headquarters or main office located in the U.S.

A.2. SAMPLE ELIGIBILITY REQUIREMENT

Buyers should consider including a mandatory eligibility requirement in their procurement document (e.g., in the eRFB/RFP). An eligibility requirement can be framed in the positive or negative. For example:

*The Bidder is **not** a U.S. business, where 'U.S. business' means a supplier, manufacturer, or distributor of any business structure (including a sole proprietorship, partnership, corporation, or other business structure) that (i) has its headquarters or main office located in the U.S., and (ii) has fewer than 250 full-time employees in Canada at the time of the applicable procurement process.*

If a Bidder is a subsidiary of another corporation, part 1 of the definition above is met if that Bidder is controlled by a corporation that has its headquarters or main office located in the U.S.

☐ Yes

☐ No

If the Bidder has not demonstrated eligibility with a "Yes" response, the Ministry reserves the right to disqualify the Bidder.

A.3. SAMPLE RESERVED RIGHT

Buyers should consider including the following reserved right in their procurement document:

(x) disqualify any Bidder that is a 'U.S. business' as that term is defined in the RFB/RFP.

A.4. SAMPLE REPRESENTATION FOR THE FORM OF AGREEMENT (OR EQUIVALENT CONTRACTUAL DOCUMENT)

Buyers should consider including a representation in the form of agreement or equivalent contractual document that is entered into between the vendor and the procuring entity. Buyers should work with legal counsel when including a representation in their procurement agreements. The following sample representation can be structured as a standalone representation or modified as necessary and added to an article within an agreement containing other representations and warranties.

Vendor Representation Regarding Eligibility:

The Vendor represents that it is not a 'U.S. business' as that term is defined in the [RFB/RFP/Agreement.]