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As US-Canada Trade Tensions Persist Ontario Continues to Restrict US Businesses from Provincial Government Contracts

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Ongoing trade tensions between the US administration and Canada have led some provinces to introduce measures to restrict access by US suppliers to provincial government contracts.

The Government of Ontario's recent introduction of its Procurement Restriction Policy (Policy)[1] imposes a broad obligation on Government Entities[2] and Broader Public Sector (BPS) Organizations[3] to exclude US businesses from participating in all new procurements of goods and services (consulting and non-consulting) at any value.[4]

An entity will be considered a US business and subject to the Policy if it has its headquarters or main office located in the US and has fewer than 250 full-time employees in all of Canada at the time of the applicable procurement process. If the entity is a subsidiary of another corporation, the first part of the test is met if that bidder or vendor is controlled by a corporation that has its headquarters or main office located in the US.

The Policy is broad in application and includes a limited exemption for situations where the US business is the only viable source for the good or service, and where the procurement cannot be delayed (the FAQs address the interpretation of "only viable source" and "the procurement cannot be delayed"). Even then, the decision must be approved at a specified level of authority, in many cases a deputy minister or the CEO, regardless of the procurement value.

Conclusion

Imposing such restrictions based on the jurisdiction of a supplier are generally inconsistent with Canada's international procurement obligations under the *World Trade Organization Agreement on Government Procurement* (WTO-AGP) World Trade Organization Agreement on Government Procurement (WTO-AGP) which are designed to ensure non-discriminatory treatment of suppliers from different jurisdictions. While the Ford administration has indicated that the Policy will stay in effect pending the resolution of the tariff issues, the US administration may nonetheless choose to pursue a possible challenge of the Policy under the dispute resolution provisions of the WTO-AGP.

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In the interim, we recommend that US entities seeking to bid on Ontario government contracts obtain confirmation from the applicable contracting authority whether they are excluded from participation in the procurement.

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[1] The Policy is issued under the authority of the *Management Board of Cabinet Act* and the *Broader Public Sector Accountability Act, 2010*.

[2] Government Entities are defined to include provincial ministries, entities covered by the Ontario Public Service (OPS) Procurement Directive, Ontario Power Generation (OPG), and the Independent Electricity System Operator (IESO), and Ontario Crown agencies and Crown Corporations.

[3] BPS Organizations are those subject to the Ontario Broader Public Sector Directive including hospitals, school boards, universities and colleges, and shared services and group purchasing organizations.

[4] The Policy does not apply to the ongoing use of existing Vendors of Record or other available arrangements.
