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Bill 194

An Act respecting fairness in procurement

The Hon. E. McMahon
President of the Treasury Board

Government Bill

1st Reading February 20, 2018

2nd Reading

3rd Reading

Royal Assent



EXPLANATORY NOTE

The *Fairness in Procurement Act, 2018* is enacted. The Act provides that if, in the Minister's opinion, certain measures have been imposed by purchasers from an American jurisdiction, the Lieutenant Governor in Council may designate the American jurisdiction as an offending American jurisdiction.

The Act provides that the participation of suppliers from offending American jurisdictions in procurement processes initiated by Government entities or broader public sector entities is subject to certain measures, and that each aspect of this requirement is subject to the further details and rules that may be set out in the regulations. The Act permits regulations to be made establishing processes by which exemptions from the Act or the regulations may be obtained. The consequences of contraventions of the Act or regulations are also specified.

An Act respecting fairness in procurement

Preamble

The Government of Ontario values open, fair and competitive procurement. The Government of Ontario is committed to defending the province's economic interests and protecting the interests of Ontarians and Ontario businesses. In the event restrictions are established on Ontario businesses' opportunities to participate in public procurement, the Government of Ontario requires the authority to respond proportionally.

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Definitions

1 In this Act,

“American jurisdiction” means a sub-national jurisdiction of the United States of America, including any state of the United States of America, the District of Columbia, the United States Virgin Islands, any local government, any territory or insular possession subject to the jurisdiction of the United States of America, or any other prescribed sub-national entity subject to the jurisdiction of the United States of America; (“autorité législative américaine”)

“broader public sector entity” includes,

- (a) a hospital within the meaning of the *Public Hospitals Act*,
- (b) the University of Ottawa Heart Institute/Institut de cardiologie de l'Université d'Ottawa,
- (c) a board as defined in subsection 1 (1) of the *Education Act*,
- (d) a post-secondary educational institution in Ontario that receives regular operating funding directly from the Government of Ontario,
- (e) an approved agency designated as a children's aid society under subsection 15 (2) of Part I of the *Child and Family Services Act*,
- (f) a community care access corporation within the meaning of the *Community Care Access Corporations Act, 2001*,
- (g) a corporation controlled by one or more broader public sector entities that exists solely or primarily for the purpose of purchasing goods or services for the broader public sector entity or broader public sector entities, and
- (h) any other persons or entities prescribed for the purposes of this definition; (“entité parapublique”)

“Government entity” means,

- (a) the Crown in right of Ontario, including any ministry of the Government of Ontario,
- (b) a public body designated in regulations made under the *Public Service of Ontario Act, 2006*,
- (c) Independent Electricity System Operator, and
- (d) Ontario Power Generation Inc. and each of its subsidiaries; (“entité gouvernementale”)

“Minister” means the President of the Treasury Board or such other member of the Executive Council to whom responsibility for the administration of this Act may be assigned or transferred under the *Executive Council Act*; (“ministre”)

“offending American jurisdiction” means an American jurisdiction designated by a regulation made under subsection 2 (1); (“autorité législative américaine contrevenante”)

“prescribed” means prescribed by or in the regulations made under this Act; (“prescrit”)

“procurement contract” means a contractual or commercial arrangement for the acquisition by a purchaser of goods or services from a supplier, through purchase, rental, lease or conditional sale, or by otherwise conferring value or a benefit on the supplier; (“contrat d'approvisionnement”)

“procurement process” means a process in which a purchaser selects a supplier with which to enter into a procurement contract, other than a process initiated by a Government entity or broader public sector entity for the procurement of goods and services intended for commercial sale or resale; (“processus d’approvisionnement”)

“supplier” means any sole proprietorship, partnership, business, corporation or other legal entity that offers goods or services for sale or lease or other form of exchange. (“fournisseur”)

Offending American jurisdiction

2 (1) The Lieutenant Governor in Council may make regulations designating an American jurisdiction as an offending American jurisdiction if, in the Minister’s opinion, the government of the American jurisdiction has enacted legislation or otherwise provided direction to entities under its authority to apply requirements, restrictions, policies, sanctions or other measures that may inhibit or prevent Ontario suppliers from participating or succeeding in procurement processes initiated by purchasers from the offending American jurisdiction.

Participation of suppliers from American jurisdictions

(2) The participation of suppliers from offending American jurisdictions in procurement processes initiated by Government entities or broader public sector entities is subject to the requirements, restrictions, policies, sanctions or other measures set out in the regulations, and any affected suppliers, Government entities and broader public sector entities shall comply with the regulations.

Same

(3) Subsection (2) applies in respect of the suppliers, offending American jurisdictions, procurement processes and Government entities or broader public sector entities that are specified in the regulations, and in the circumstances specified in the regulations, unless an exemption is obtained in accordance with a process provided in the regulations.

Enforcement

Contract void

3 (1) A procurement contract entered into by a broader public sector entity is void if the procurement contract or the process by which it was entered into contravenes this Act or a regulation made under this Act, unless the Minister by order validates it.

Funding and other agreements

(2) Every obligation of a broader public sector entity under this Act or the regulations made under this Act is deemed to be an obligation it is required to comply with under the terms of every agreement or other funding arrangement between the broader public sector entity and the Government of Ontario.

Other sanctions

(3) If a broader public sector entity contravenes this Act or a regulation made under this Act or if it enters into a procurement contract that contravenes this Act or a regulation made under this Act, the prescribed sanctions or other measures apply as provided in the regulations.

Limitations on remedies

4 (1) No cause of action arises against the Crown, members of the Executive Council, a Government entity or a broader public sector entity or against agents, appointees or employees of the Crown, the Executive Council, a Government entity or broader public sector entity, as a direct or indirect result of,

- (a) the enactment or repeal of any provision of this Act;
- (b) the making or revocation of any provision of a regulation or order made under this Act; or
- (c) anything done or not done in accordance with this Act or a regulation or order made under this Act.

No compensation

(2) Despite any other Act or law, no person is entitled to any compensation for any loss or damages, including loss of revenues or loss of profit, arising from the enactment, repeal or application of this Act, the making, revocation or application of any regulation or order made under this Act or anything done or not done in accordance with this Act or a regulation or order made under this Act.

Same

(3) Without limiting the generality of subsection (1), that subsection applies to an action or other proceeding claiming any remedy or relief, including specific performance, injunction, declaratory relief, any form of compensation or damages, including loss of revenue and loss of profit, or any other remedy or relief.

Proceedings barred

(4) No proceeding, including but not limited to any proceeding in contract, restitution, tort, trust, fiduciary obligation or otherwise, that is directly or indirectly based on or related to anything referred to in clause (1) (a), (b) or (c) may be brought or maintained against the Crown, members of the Executive Council, a Government entity or a broader public sector entity or against agents, appointees or employees of the Crown, the Executive Council, a Government entity or broader public sector entity.

Rights preserved

(5) Subsections (1), (2), (3) and (4) do not prevent the Attorney General from bringing an application or commencing proceedings to require a person or entity subject to this Act to comply with this Act and the regulations made under this Act.

Regulations

5 (1) The Lieutenant Governor in Council may make regulations for carrying out the purposes and provisions of this Act.

Same

- (2) Without restricting the generality of subsection (1), the Lieutenant Governor in Council may make regulations,
- (a) prescribing sub-national entities for the purposes of the definition of “American jurisdiction”;
 - (b) prescribing persons or entities for the purposes of clause (h) of the definition of “broader public sector entity”;
 - (c) governing when a purchaser or supplier is considered to be from Ontario or from an offending American jurisdiction;
 - (d) governing whether subsection 2 (2) applies in respect of suppliers, offending American jurisdictions, procurement processes, Government entities or broader public sector entities, and specifying and governing circumstances for the purposes of subsection 2 (3);
 - (e) prescribing and governing requirements, restrictions, policies, sanctions or other measures that may be imposed on suppliers, Government entities or broader public sector entities for the purposes of subsection 2 (2), including,
 - (i) excluding suppliers from offending American jurisdictions from participating in procurement processes or being awarded procurement contracts,
 - (ii) requiring suppliers from offending American jurisdictions to provide additional information to Government entities or broader public sector entities or meet additional requirements when participating in procurement processes,
 - (iii) evaluating proposals for procurement contracts from offending American jurisdictions according to additional or more stringent criteria than applies to other proposals, and
 - (iv) requiring Government entities or broader public sector entities to impose requirements, restrictions, policies, sanctions or other measures described in subclauses (i), (ii) and (iii) on suppliers;
 - (f) requiring Government entities and broader public sector entities to provide information to the Minister regarding their compliance with this Act and regulations made under this Act;
 - (g) prescribing and governing sanctions or other measures for the purposes of subsection 3 (3); and
 - (h) establishing and governing processes by which Government entities or broader public sector entities may obtain exemptions from provisions of this Act or regulations made under this Act in respect of particular suppliers, offending American jurisdictions or procurement processes.

Same

(3) A regulation made under clause (2) (h) may delegate the authority to approve an exemption to any person or entity.

Review of regulations

6 (1) Before a regulation is made under this Act, the Minister may consult, in the manner that the Minister considers appropriate, with any persons or bodies that the Minister considers appropriate given the content of the proposed regulation, including any potentially affected Government entities or broader public sector entities.

Same

(2) The Minister must review every regulation made under this Act at least once every four years after it is made until it is revoked.

Conflict

7 (1) The provisions of this Act and the regulations made under this Act prevail over the provisions of any other Act and any regulation made under any other Act, irrespective of when the other Act is enacted or the regulation is made under the other Act.

Exception

(2) Subsection (1) does not apply if the other Act referred to in subsection (1) expressly states that a provision of that Act or of a regulation made under it prevails over the provisions of this Act.

Amendments to this Act

8 (1) Clause (e) of the definition of “broader public sector entity” in section 1 of this Act is repealed and the following substituted:

(e) an agency designated as a children’s aid society under subsection 34 (1) of the *Child, Youth and Family Services Act, 2017*,

(2) Clause (f) of the definition of “broader public sector entity” in section 1 of this Act is repealed.

Commencement

9 (1) Subject to subsections (2) and (3), this Act comes into force on a day to be named by proclamation of the Lieutenant Governor.

(2) Subsection 8 (1) comes into force on the later of the day section 1 of this Act comes into force and the day subsection 34 (1) of Schedule 1 to the *Supporting Children, Youth and Families Act, 2017* comes into force.

(3) Subsection 8 (2) comes into force on the later of the day section 1 of this Act comes into force and the day section 34 of the *Patients First Act, 2016* comes into force.

Short title

10 The short title of this Act is the *Fairness in Procurement Act, 2018*.