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Procurement set-aside programs - Knowledge Deepening and Sharing - Reports and publications

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The Office of the Procurement Ombudsman

The Office of the Procurement Ombudsman (OPO) is a neutral and independent organization of the Government of Canada that works collaboratively with federal organizations and Canadian businesses to promote fairness, openness and transparency in federal procurement. OPO delivers on this mandate by connecting stakeholders, investigating complaints, resolving problems, making recommendations and sharing

best practices.

In 2018, OPO launched a knowledge deepening and sharing (KDS) initiative to better understand key issues in federal procurement. Through the publication of KDS studies, OPO intends to share knowledge and provide meaningful guidance for federal procurement stakeholders.

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Introduction

As social procurement practices continue to gain prominence in the realm of public procurement, procurement set-aside programs have become an area of interest for governments. In 2019-20, OPO published a KDS study titled “[Social Procurement: A Study on Supplier Diversity and Workforce Development Benefits](#),” which explored success factors for organizations seeking to adopt social procurement practices, specifically with regard to increasing supplier diversity and integrating workforce development benefits into their procurement processes.

Procurement set-aside programs are increasingly being adopted by governments as a means of increasing procurement opportunities for

underrepresented and/or groups of diverse and Indigenous suppliers. For the purposes of this study, procurement set-aside programs are defined as mechanisms that “allow contracting officers to reserve a procurement [that is, limit competition] to the businesses specified in the set-aside provision(s) of the applicable trade agreements.”[footnote 1](#)

Through a jurisdictional review, the purpose of this study is to examine the different approaches to procurement set-aside programs in Canada, the United States of America, Australia and the European Union. The study explores some of the considerations and challenges in implementing such programs. The research for this study included a literature review of publicly available policies, guidance, reports, audits and evaluation documents.

This study reveals the following key themes for procurement set-aside programs in Canada and internationally:

1. The first theme relates to trade agreements (both internal/national and international). The authority for a procurement set-aside program to be established is determined based on what restrictions or exclusions are (or are not) included in applicable trade agreements.
2. The second theme relates to the notion of reduced competition and the effectiveness of procurement set-aside programs. For example, while the United States of America (USA) has long adopted set-aside programs, on the contrary, the European Union sees procurement set-aside programs as discriminatory measures and restrictions on full and open competition. There are also concerns about the effectiveness of procurement set-aside programs as preferential treatment for small and medium enterprises (SMEs) can sometimes increase procurement costs.
3. A third theme is the importance of realistic targets, monitoring, and data

collection processes. Establishing realistic targets and key performance indicators is important to demonstrate the effectiveness and overall value (economic, social, etc.) of the procurement set-aside program. Despite its importance, data collection remains a known challenge across all jurisdictions.

4. A fourth theme is the importance of strict certification protocols and compliance mechanisms. Establishing clear eligibility criteria that are consistently applied, and a certification process with strict compliance mechanisms, such as audits or reviews, are critical to maintaining the integrity of the program.

Procurement set-aside programs in Canada

Procurement Strategy for Indigenous Business (formerly the Procurement Strategy for Aboriginal Business)

The Procurement Strategy for Aboriginal Business (PSAB) was created in 1996 and aimed to “increase the number of Aboriginal suppliers bidding for, and winning, federal contracts.”[footnote 2](#) In August 2021, the program underwent a series of comprehensive changes and was renamed the Procurement Strategy for Indigenous Business (PSIB). Among those changes, it was announced that the Government of Canada is implementing a mandatory requirement for federal departments and agencies to ensure a minimum of 5% of the total value of contracts are held by qualified Indigenous businesses.[footnote 3](#)

PSIB is a government-wide program and all federal departments and agencies listed in Schedules I, I.1 and II of the *Financial Administration Act*, (unless otherwise excluded by other acts, regulations, or order-in-council) are subject to its provisions.[footnote 4](#) The *Financial Administration*

Act applies to approximately 90 federal departments and agencies; exceptions include organizations such as the Senate, House of Commons, Canada Security Intelligence Services (CSIS) and Crown Corporations, where PSIB requirements do not apply.[footnote 5](#)

There are 3 distinct types of set asides under PSIB: mandatory, voluntary and conditional. A PSIB set-aside is mandatory in instances where procurements that are destined for an area, community or group in which Indigenous people make up at least 51% of the population and where the Indigenous population will be the recipient of the good, service or construction.[footnote 6](#) This percentage was recently lowered to 51% from 80% to increase opportunities for Indigenous businesses. Contracts can be voluntarily set-aside for Indigenous businesses by federal departments and agencies “if Indigenous business capacity exists [and] if the department or agency can assure that operational requirements, best value, and contract management can be met.”[footnote 7](#) The Indigenous Business Directory is the tool used by procurement officers to determine whether there is Indigenous business capacity for the requirement in question.[footnote 8](#) A conditional set-aside can be used when departments are unsure if there is Indigenous business capacity to fulfill the requirement. The department then opens the procurement to both Indigenous and non-Indigenous businesses. However, as explained by Indigenous Services Canada (ISC), “if 2 or more Indigenous businesses submit a bid, then the procurement is set-aside under PSIB (only the Indigenous firms who submitted a bid would be assessed).”[footnote 7](#)

Businesses that are at least 51% owned and controlled by Indigenous peoples (First Nations, Inuit or Métis and ordinarily resident in Canada) are eligible for PSIB.[footnote 9](#) Joint ventures between an eligible Indigenous business partner and non-Indigenous business are

permissible, as long as “it can be demonstrated that 33% of the value of the work is performed by the Indigenous business.”[footnote 10](#) Eligible businesses can register themselves in the federal Indigenous Businesses Directory.[footnote 10](#)

It is important to note that although changes to the PSIB policy did occur in August 2021, at the time of writing this report, the previous definition of an Indigenous business used under the PSAB will continue to be used in Modern Treaty and Self-Government areas until rights-holders have been consulted.”[footnote 11](#)

Businesses that submit a bid or proposal under the PSIB program are required to provide an attestation stating that they meet the definition of an Indigenous business, according to the definition provided, on the date that the bid/offer/arrangement was submitted, and a commitment that the business will continue to meet this definition throughout the life of the contract.[footnote 12](#) A bidder/offeror/supplier's certification that it is Indigenous is subject to audit, both before and after contract award as well as on a random basis.[footnote 12](#)

Procurements under PSIB do not have a dollar threshold, and are exempt from the obligations of Canada's free trade agreements.[footnote 13](#)

Therefore, if a procurement has been successfully set aside under PSIB, the Canadian International Trade Tribunal (CITT) would not have the jurisdiction to review a complaint from a supplier regarding the procurement process.[footnote 14](#) The Procurement Ombudsman is also unable to review complaints related to procurements set-aside under PSIB. In the Procurement Ombudsman's comments at the House of Commons Standing Committee on Government Operations and Estimates (OGGO) in February 2022, he indicated that complaints arising under the

program would be outside the jurisdiction of both OPO and the Canadian International Trade Tribunal, which is a systemic barrier that must be removed so that Indigenous bidders would have an avenue of recourse for complaints. OPO's mandate requires the complaint relates to a contract that would otherwise be subject to the Canadian Free Trade Agreement (CFTA), if not for its dollar value.^{[footnote 15](#)} As the CFTA does not apply to procurements set-aside under PSIB, a formal complaint is currently outside of OPO's jurisdiction.

The lack of recourse mechanisms for Indigenous or minority owned small business set-aside contracts was once again highlighted in a December 2021 statement of reasons issued by the CITT. This issue was first flagged in the mid nineteen-nineties. The CITT noted:

Indigenous peoples and businesses who participate in government procurement opportunities [...] do not currently have access to the Tribunal's bid challenge mechanism and can only turn to the courts when seeking a formal and impartial recourse mechanism whenever an aboriginal or minority small business set-aside is invoked. As a result, Indigenous suppliers currently have less rights of access to justice than non-indigenous Canadians, and foreign suppliers, who can access the Tribunal when the trade agreements are applicable.^{[footnote 16](#)}

The future of procurement set-asides in Canada beyond PSIB

The possibility of establishing procurement set-asides for small and medium enterprises, including set-asides for women-owned businesses, was raised by the OGGO Committee in their June 2018 report on "Modernizing Federal Procurement For Small and Medium Enterprises, Women-Owned and Indigenous Businesses."^{[footnote 17](#)}

All of Canada's trade agreements include provisions allowing for

Indigenous procurement set-aside programs.^{[footnote 13](#)} However, as explained in the above-noted OGGO report, Canada had been previously restricted on the use of set-asides for SME's because the former Agreement on Internal Trade (AIT) did not allow them.^{[footnote 18](#)} Under the CFTA that came into force in July 2017 (which replaced the AIT), "set-asides for SME's are now permitted, provided that they are part of a small business set-aside program and that they are fair, open, and transparent."^{[footnote 18](#)}

Set-asides for minority businesses are permitted in 7 trade agreements to which Canada is a party.^{[footnote i](#),[footnote 19](#)} The only trade agreements that do not allow for any set-asides for either SME's or minority businesses are the Canada-UK Trade Continuity Agreement (Canada-UK TCA) and the Canada European Union Comprehensive Economic and Trade Agreement (CETA).^{[footnote 19](#)} This results in Canada being unable to utilize the benefits of procurement set-aside programs for either SME's or minority businesses when such agreements are applicable.

Two recent policy changes in the federal procurement community have begun to lay the groundwork for further action in this area. Public Services and Procurement Canada (PSPC) approved its first departmental *Policy on Social Procurement* in May 2021.^{[footnote 20](#)} It applies to any procurement including, "standing offer, supply arrangement, contract or other instrument that is issued by PWGSC's^{[footnote ii](#)} Acquisitions Program" and "its application will operate within the current policy, regulatory and legal frameworks, and trade agreements."^{[footnote 21](#)} The Treasury Board *Directive on the Management of Procurement*, which was implemented on May 13, 2022, puts a greater emphasis on socio-economic objectives as a component of "best value" than did the former

Contracting Policy.^{[footnote 22](#)} It also puts greater responsibility on the contracting authority for “collaborating with business owners to ensure that any appropriate socio-economic and environmental requirements are achievable and measurable.”^{[footnote 23](#)} With regard to procurement with Indigenous businesses and to assist with the implementation of the 5% mandatory target, the Directive also includes an Appendix which specifically outlines the mandatory procedures for contracts awarded to Indigenous businesses.^{[footnote 24](#)} It also “includes procedures for public disclosure of contracts awarded to Indigenous businesses and reporting on procurement planning and performance against the mandatory minimum target, including its calculation.”^{[footnote 24](#)}

For example, in December 2021, two Request for Information (RFI) questionnaires were posted on [Government Electronic Tendering Service \(GETS\)](#)^{[footnote iii](#)} targeting businesses owned or led by persons with disabilities as well as from Canadian LGBTQ2+ owned or led businesses.^{[footnote 25](#)} These RFIs seek to better understand the barriers faced by these groups in order to increase their participation in federal procurement.^{[footnote 25](#)} As noted during a May 2021 meeting of the OGGO Committee, these RFIs are incredibly important as they will give the federal government baseline data regarding participation, meaning how many companies from underrepresented groups are looking at opportunities, downloading opportunities, submitting proposals and then ultimately obtaining federal contracts. That information will allow federal officials to understand which areas the government needs to “focus on in terms of diversifying our supplier base.”^{[footnote 26](#)}

Federal departments have also started implementing their own social procurement pilots and programs. For example, *ScaleUp* is an initiative

led by Shared Services Canada in collaboration with Technation that targets micro and small businesses that are either Indigenous or owned or led by underrepresented groups.^{[footnote 27](#)} *ScaleUp* seeks to procure IT-related goods, services and solutions valued up to \$238,000.^{[footnote 28](#)} For example, in December 2021, a solicitation was set aside under this initiative on [Government Electronic Tendering Service](#) for a gamification expert.^{[footnote 29](#)}

Jurisdictions with procurement set-aside programs

United States of America

The Small Business Administration (SBA) was created in 1953 to “aid, council, assist and protect the interests of small business concerns, preserve free competitive enterprise and maintain and strengthen the overall economy of [the] nation.”^{[footnote 30](#)} The agency primarily assists small businesses in the form of loans but has evolved to develop a number of different programs, including procurement set-aside programs, and to create an environment for maximum participation for small businesses, disadvantaged, and women-owned businesses in federal government procurement.^{[footnote 31](#)}

The Act that governs competition in federal procurement in the United States is the *Competition in Contracting Act* (CICA). It “requires that contracts be entered into after full and open competition through the use of competitive procedures, unless certain circumstances exist that would permit agencies to use non-competitive procedures.”^{[footnote 32](#)}

In the CICA, Section 644 focuses on set-asides for small businesses, among other things. As long as all responsible businesses are permitted to compete, then the set-asides are competitive.^{[footnote 33](#)} Under the

Stafford Act, set-asides can also be used for local firms during natural disasters or emergencies.[footnote 34](#)

The USA is not subject to any internal trade restrictions, which allows it to employ SME set-asides on a much larger scale.[footnote 35](#) With regard to international free trade agreement obligations, the USA is a party to 14 Free Trade Agreement (FTA)'s with 20 countries.[footnote 36](#) Among these agreements is the U.S.-Mexico-Canada Agreement (USMCA), referred to in Canada as the Canada-United States-Mexico Agreement (CUSMA), which replaced the North American Free Trade Agreement (NAFTA) on July 1, 2020.[footnote iv](#) The new USMCA is consistent with the former NAFTA in which it provides specific support for small and medium-sized businesses. Article 13.20 of the USMCA notes that:

1. The Parties recognize the important contribution that SMEs can make to economic growth and employment and the importance of facilitating the participation of SMEs in government procurement.
2. If a Party maintains a measure that provides preferential treatment for SMEs, the Party shall ensure that the measure, including the criteria for eligibility, is transparent.[footnote 37](#)

The *Small Business Act* speaks to set-asides for small businesses generally, but identifies specific target groups: “women-owned, service-disabled veteran-owned and Historically Underutilized Business Zone (HUBZone) small businesses; and small businesses owned and controlled by socially and economically disadvantaged individuals that are participating in the Business Development Program under Section 8(a) of the act.”[footnote 38](#)

In the USA, government contracts under \$150,000 are automatically set

aside for small businesses, with a few exceptions.[footnote 39](#) Both competitive and sole-source contracts are permitted.[footnote 40](#) A competitive process is carried out “when at least two small businesses could perform the work or provide the products being purchases.”[footnote 39](#) A sole source process can be used “when only a single business can fulfill the requirement of a contract.”[footnote 41](#) However, depending on the solicitation, sole-source opportunities are publicly advertised and identified with the intention to sole source the requirement.[footnote 41](#) Potential vendors are able to view and bid on the contracts and if multiple bids are received, the intent for sole-sourcing can be withdrawn.[footnote 41](#) In the Canadian context, this is similar to an Advance Contract Award Notice (ACAN). This is a public notice indicating to the supplier community that a department or agency intends to award a good, service or construction contract to a pre-identified supplier, believed to be the only one capable of performing the work, thereby allowing other suppliers to signal their interest in bidding by submitting a statement of capabilities. If no other supplier submits a statement of capabilities that meets the requirements set out in the ACAN, the contracting officer may then proceed with awarding the contract to the pre-identified supplier.[footnote 42](#)

For a small business to be eligible for government set-aside contracts, the business must meet the size requirements set by the SBA, and be a registered business.[footnote 43](#) Size standards vary by industry and are generally based on the number of employees or the amount of annual receipts the business has.[footnote 44](#) In order to access government procurement opportunities, businesses must register in the federal government’s System for Award Management (SAM), which is the database that government agencies search to find contractors.[footnote 44](#)

In the system, suppliers can certify that their business is eligible for contracts that are reserved for small businesses and can also indicate whether they are a women-owned, service-disabled veteran-owned or HUBZone small businesses; or small businesses owned and controlled by socially and economically disadvantaged individuals.[footnote 43](#) There are different certification requirements depending on the specific SBA contracting program, for some programs suppliers can self-certify, for others, suppliers will have to apply for certification.[footnote 45](#) Further details pertaining to certification are presented later in this report.

Australia

The Indigenous Procurement Policy (IPP) was introduced in 2015 by the National Indigenous Australians Agency and is intended to provide Indigenous Australians with more opportunities to participate in the economy and increase the rate of purchasing from Indigenous enterprises.[footnote 46](#) The policy defines Indigenous enterprises (a company, incorporated association or trust that is operating a business) as being at least 50% owned by Indigenous people.[footnote 47](#) Joint ventures are permitted but “must register with Supply Nation,[footnote v](#) be at least 50% owned by Indigenous people, and demonstrate at least 50% control of the joint venture.”[footnote 47](#)

The IPP sets annual targets for each portfolio (similar to Canada’s federal departments and agencies) for the volume and value of contracts awarded to Indigenous enterprises and identifies mandatory minimum requirements in high-value contracts (\$7.5 million AUD or more in specified industry categories) delivered in Australia.[footnote 46](#) A key component of the IPP is the mandatory set-aside of certain Commonwealth contracts.

The mandatory set-aside applies to “all remote procurements^{[footnote vi](#)} and all other procurement wholly delivered in Australia where the estimated value of the procurement is between \$80,000 and \$200,000 AUD (inclusive of goods and services tax).”^{[footnote 48](#)} When the mandatory set-aside is applicable, the procuring official “must first determine whether an Indigenous SME could deliver the required good or service on a value for money basis”.^{[footnote 48](#)}

Using the Supply Nation’s directory of Indigenous enterprises, procuring officials must perform a search to determine if there are Indigenous business who could perform the work.^{[footnote 48](#)} In instances where “a suitable Indigenous SME is identified and if value for money is determined, the entity must purchase the required good or service from the Indigenous SME.”^{[footnote 48](#)} If procurements are valued at or above the relevant threshold, the procurement can be done using exemptions in the Commonwealth Procurement Rules.^{[footnote 48](#)}

If multiple “suitable Indigenous SMEs are identified the procuring official must assess these in a manner commensurate to the scale, scope and risk of the procurement, and award the contract to the Indigenous SME that represents best value for money.”^{[footnote 48](#)} If no suitable Indigenous SME is identified, procuring officials must document the outcomes of that search and follow the regular procurement practices to award the contract.^{[footnote 48](#)}

Similar to the U.S., Australia is not subjected to any internal Free Trade Agreement. There are currently 15 international Free Trade Agreements in force, 3 others that are not currently in force, and 7 others currently under negotiation.^{[footnote 49](#)} The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) came in force in

December 2018 and includes exceptions for “set-asides to benefit micro, small and medium-sized enterprises, measures adopted or maintained with respect to Aboriginal peoples.”[footnote 50](#) The Australia-United States Free Trade Agreement (AUSFTA) is another bilateral Free Trade Agreement between the U.S. and Australia, which entered into force in January 2005.[footnote 51](#) In both of the schedules of Australia and the U.S., “any form of preference to benefit small and medium enterprises” and “set asides on behalf of small or minority businesses” are excluded.[footnote 51](#)

European Union

In the European Union (EU), public procurement is harmonized across “the 27 member states [who] must follow common rules and procedures to purchases... above a certain threshold.”[footnote 52](#) The common rules “are based on the principles of equal treatment, transparency and competition as well as other EU Treaty provisions and principles to ensure all bidders have equal access to contracts.”[footnote 52](#) This emphasis on competition in the EU legal framework has meant that historically, there has been minimal uptake of the set-asides programs in this region.[footnote 53](#)

The EU adopted the EU Public Procurement Directive in 2004, which first introduced the possibility of set-asides. New directives were introduced in 2014, in which the EU sought “to ensure greater inclusion of common societal goals in the procurement process.”[footnote 54](#) Social considerations, such as sustainable procurement and strategic procurement became more prominent topics and this was an indication that the EU seemingly accepted the notion that public procurement is “about more than just saving money”.[footnote 54](#) The Directives also introduced specific set-asides to resolve the unemployment of disabled

workers and disadvantaged groups.[footnote 55](#) The EU has taken steps to increase the feasibility of implementing set-aside programs at the prime contracting level, namely in the area of Research & Development (R&D).[footnote 56](#)

Over the past few decades, the importance of overarching environmental and societal goals has been more widely recognized by the EU, which begs the question of whether such set-aside programs will soon gain more popularity. The EU Scientific and Technical Research Committee observed that EU rules also "provide for SME preferences in the context of state aid," which could "be similarly applied to public procurement."[footnote 57](#)

Key themes and challenges

Overcoming the criticism of reduced competition and effectiveness

An important consideration in the use of procurement set-aside programs is the principle of competition. SMEs and diverse and Indigenous-owned businesses can face disadvantages and barriers to entry in federal procurement that other businesses do not. This has led some governments, such as the USA, to intervene on their behalf with SME-targeted support. The widespread adoption of set-asides in the USA is driven by the recognition that small businesses have historically been considered the backbone of American culture. In the USA, the use of set-asides are deemed competitive provided that all eligible businesses are permitted to compete.

Despite this, one of the most commonly cited criticisms of such programs is the adverse effect on competition.[footnote 58](#) The EU has historically opposed the use of procurement set-aside programs as they were seen

as discriminatory measures and a restriction to full and open competition.

[footnote 59](#) More recently, the Organisation for Economic Co-operation and Development (OECD) has recognized that “for an SME, participation represents a consumption of resources that is proportionally higher than for larger businesses.”[footnote 60](#) The OECD has encouraged greater adoption of measures aimed at levelling the playing field for SME’s (such as set-asides), however noting that it is integral for policy-makers to “balance the use of these types of support with a desire to maintain open competition through a level playing field for all suppliers, and also with other SME policy areas.”[footnote 61](#)

Other concerns have been raised regarding the effectiveness of procurement set-aside programs, which has been debated in the academic realm. A rationale often used for the adoption of social procurement measures is the need to reframe the concept of value for money.

In their study *Canadian Federal Procurement As A Policy Lever To Support Innovation And SME Growth*, researchers D. Liao, B. Orser, A. Ridding et al. explored various considerations around preferential procurement policies in the academic realm. One argument presented in the study in favour of adopting a more inclusive approach to assessing value for money is that set-aside programs help to “promote supplier diversity involving less-competitive bidders and create employment opportunities for workers who are generally excluded from the labor market,” such as disadvantaged groups or minorities.[footnote 62](#) Another argument is that “public set-asides not only improve equity between large and small firms, but also save public funds, reasoning that increased competition among SMEs overcompensates for production inefficiency, leading to lower procurement costs.”[footnote 63](#) On the other hand, others

have argued that “preferential treatment for SMEs can, however, increase procurement costs due to competitive pressures exerted by favoured bidders”; governments do not always receive the lowest price by awarding a contract to a preferential group. However, according to scholarly findings, “there is little evidence that set-asides are more costly.”[footnote 63](#)

The establishment of realistic targets, monitoring and data collection

In each of the national examples above, percentage-based targets were established to measure the effectiveness of the program, albeit in different ways. Despite this, data collection remained a common challenge across jurisdictions, despite differing levels of maturity in their procurement set-aside programs.

Canada

In 2018, more than \$170 million in contracts were awarded to Indigenous businesses under the PSAB, now renamed the PSIB, across 31 federal departments or agencies.[footnote 64](#) This figure, while substantial, represents a mere 1.03% of the total value of contracts awarded by the federal government that year, which was nearly \$16.5 billion.[footnote 65](#) These values do not include sub-contracts or low dollar value purchases. If these were included, the overall value of work awarded to Indigenous businesses would be higher, however at the time of reporting, ISC did not have a mechanism to capture this information and is now working toward a process to capture this data.[footnote 66](#)

The new mandatory requirement under PSIB requires federal departments and agencies to ensure that a minimum of 5% of the total value of all contracts be awarded to Indigenous businesses. PSIB also includes a requirement to publicly report on progress in achieving this

target, which is being phased in over 3 years, beginning in 2021, with full implementation expected by 2024.^{[footnote 3](#)} This replaces a previously disjointed approach in which federal organizations set their own targets and there was no minimum threshold or consistency across organizations. Rather than report solely on contracts awarded to businesses registered in the federal Indigenous Business Directory, PSIB requires federal organizations to report on contracts awarded to businesses under the broadened definition of Indigenous business, including those in Modern Treaty and Self-Government Agreement areas.

In a June 2021 appearance before the OGGO Parliamentary Committee, Mr. Shannin Metatawabin, Chief Executive Officer, National Aboriginal Capital Corporations Association, noted that while “setting a target of 5% across departments was a crucial first step, [...] it will exist only on paper unless the monitoring and supports needed are also introduced.”^{[footnote 67](#)} He called on the federal government to improve on its data collection, reporting and governance of the process to drive results.^{[footnote 68](#)} At the time of writing this report, PSPC, ISC and Treasury Board of Canada Secretariat were in the process of “working through how this target will be put in place and are undertaking significant outreach with various Indigenous organizations to ensure that [...] both the opportunities and the potential challenges of having more participation by Indigenous businesses in federal procurement [are understood].”^{[footnote 69](#)} It is also unclear which key performance indicators (KPIs) will be used for reporting purposes.

Australia

The Australian government has identified two sets of targets for procurements from Indigenous businesses (a volume target and a value

target) and publishes annual data on the results of its Indigenous procurement outcomes.[footnote 70](#) The National Indigenous Australians Agency (NIAA) is the responsible entity for monitoring and reviewing the effectiveness of the program.[footnote 71](#)

The annual volume target (i.e., number of eligible procurements) is to award 3% of eligible procurements to Indigenous businesses each fiscal year. With regard to the value target, the government has set yearly increments for eligible procurements awarded to Indigenous enterprises started from 1% in July 2019-20 to 3% in July 2027-28.[footnote 71](#)

Since 2015, the program has generated over \$3.5 billion in contracting opportunities for Indigenous businesses which has resulted in over 24,470 contracts being awarded to nearly 2,140 Indigenous businesses.[footnote 71](#) Specifically in 2020-21, the NIAA reported that “over 943 Indigenous businesses secured more than 10,920 Commonwealth contracts [...] valued in total at \$1.09 billion AUD”.[footnote 72](#) It was also reported that all Australian Portfolios (Canadian equivalent of department or agency) “exceeded their 2020-21 targets of 3 per cent of the number and 1.25 per cent of the value of accessible contracts being awarded to Indigenous businesses”.[footnote 73](#) Since the implementation of the mandatory set-aside, Australia has reported that Indigenous businesses continue to win more contracts under this program, including in remote areas.[footnote 73](#)

The Australian government has experienced some challenges with regard to data, but most issues are related to data sharing rather than data collection. This is partially owing to a lack of coordination or sharing of data between state and federal governments, which makes it difficult to analyze progress in areas where the programs overlap with different levels of government.[footnote 73](#) Issues pertaining to data collection are

mostly in the case of remote procurements, as the Australian government recognizes that data is underreported because it relies on manual reporting. The [NIAA](#) noted that it is actively working with partners to develop and implement better systems to collect this data.[footnote 73](#)

United States of America

The [USA](#) has set more ambitious overall targets as well as targets for specific underrepresented groups. These include an overall target of 23% of federal government contracts for small business, as well as specific targets of 5% for women-owned small business, 5% for small disadvantage business, 3% for [HUBZone](#) small businesses and 3% for service-disabled veteran-owned small businesses.[footnote 74](#)

Results in achieving its established targets are published annually. In July 2021, the [SBA](#) announced that the “federal government exceeded its small business contracting goal, awarding 26.01% or \$145.7 billion in federal contracts to small businesses, a \$13 billion dollar increase from the previous fiscal year.”[footnote 75](#) The federal government also exceeded its goals for service disabled veteran-owned small businesses, and small disadvantaged businesses.[footnote 75](#) Where the federal government fell short, however was in meeting the goal established by Congress for women-owned small businesses and [HUBZone](#) businesses.[footnote 75](#) The [SBA](#) also noted that “despite the increase in the value of the small business awards, the number of small businesses awarded a contract with the federal government decreased.”[footnote 76](#) It is unclear why there was an increase in the value of small business award and a subsequent decrease in the volume of contracts awarded.

The importance of strict certification protocols and compliance

mechanisms

Establishing a certification protocol that is accompanied by an oversight mechanism to verify eligibility is a key success factor in ensuring the transparency and fairness of the program. Canada and the USA have seemingly adopted an internal to government system for ensuring its suppliers under the procurement meet the eligibility criteria of the set-aside programs. Conversely, Australia has elected to utilize the services of an external entity for the certification of its Indigenous suppliers.[footnote 76](#)

Regardless of the approach, the establishment of strong compliance mechanisms is critical to maintaining the legitimacy of the set-aside program and avoiding fraudulent activities.

Canada

Under the PSIB, Canada requires businesses (including joint ventures and partnerships) to self-certify that they meet the definition of an Aboriginal business and the eligibility criteria for the program. This certification may be subjected to audit by ISC at any time.[footnote 77](#) These audits may include verifying compliance with eligibility criteria by utilizing third party auditors to assess the integrity of the program.[footnote 78](#) These audits can be carried out at any point in the contracting process, including pre-award, post-award and random audits to ensure that the business meets the criteria and requirements for a PSIB set-aside.[footnote 78](#) From 2015-2018, “ISC completed 25 pre-award audits, 16 post-award audits and 88 random audits for a total of 129 audits.”[footnote 79](#) Under the revamped PSIB program, it is unclear whether the federal government will be revising its certification process for Indigenous businesses.

Organizations, such as Women Business Enterprise Canada (WBE

Canada), have called on the federal government to “recognize the third-party certification model across the federal government that defines a diverse supplier as a for-profit entity owned, operated, and controlled by 51% or more of a given underrepresented group.”[footnote 80](#) At the time of writing this report, PSPC is looking at the various approaches to the certification of suppliers while developing its new program on social procurement, which is slated to be completed in winter 2022.[footnote 81](#)

Australia

The Australian government uses the external entity, Supply Nation, to manage the certification of Indigenous businesses. In 2015, procurement teams were directed to use its Indigenous Business Direct to search for Indigenous businesses, which is now Australia’s largest national directory of Indigenous businesses.[footnote 76](#) There is no cost to suppliers to register their businesses in the directory and become certified and it usually takes 4 working days from the point of application to the business profile being made public.[footnote 82](#) For an Indigenous business to register with Supply Nation, it must undergo a five-step verification process.[footnote 82](#) Some of the requirements include (but are not limited to) assessing online applications for accuracy, checking ownership documents, verifying owners and confirming Aboriginality documents and reviewing the Australian Business Number for company name and current registration. In some instances, a certification interview or a site visit is conducted to confirm the accuracy of the submission.[footnote 83](#)

Similarly to PSIB, Indigenous businesses registered with Supply Nation may also be subject to random audits at any time.[footnote 84](#) These registrants are also regularly audited for changes in company structure

and ownership to ensure continued eligibility.^{[footnote 84](#)} Furthermore, if Supply Nation is notified a business is suspected of falsely identifying as an eligible Indigenous business, they are immediately placed under review and investigated.^{[footnote 85](#)} Supply Nation also has the capacity to consider legal proceedings and referrals to police and/or other relevant statutory authorities if instances of fraud are determined.^{[footnote 86](#)}

United States of America

The USA recently moved away from a self-certification/attestation approach in October 2020 for the Women-Owned Small Business Program.^{[footnote 86](#)} The SBA has now implemented its own free certification process via certify.sba.gov.^{[footnote 87](#)} Businesses that had previously self-certified are required to complete the updated certification process if they wish to compete for contracts under the Women Owned Small Business set-aside program.^{[footnote 88](#)} To maintain their certification, the SBA requires eligible businesses to annually attest that they meet program requirements.^{[footnote 88](#)} Eligible businesses have the option to attain this certification via another an approved third-party certifying body at their own cost.^{[footnote 88](#)} This allows the public to have access to the broadest range of certification options while ensuring that consistent program eligibility requirements are met. As noted by the SBA, it “shares the view that certification requirements must be fair and consistently applied. To ensure this consistency, SBA is the final authority for all of the certification processes.”^{[footnote 89](#)}

A similar approach is currently being used for the SBA’s other set-aside programs. For the SBA 8(a) program and the HUBZone program, businesses are to submit an application and upload supporting

documentation to an online portal, where it is verified by the SBA.[footnote 90](#)

[90](#) To ensure continued eligibility in the program, each business shall certify on an annual basis, that it meets statutory and regulatory requirements and “must annually submit specific information to their servicing SBA District Office.”[footnote 91](#)

A 2014 audit conducted by the U.S. Government Accountability Office (GAO) shed some light on potential loopholes and fraud risks within the Women Owned Small Business (WOSB) set-aside program. It was discovered that “about 40% of the certified WOSB in its audit sample were ineligible for the program [...] [and also raised that] the SBA cannot provide reasonable assurance that WOSB program requirements are being met and that the program is meeting its goals.”[footnote 91](#) In its report, the GAO recommended that the SBA “establish and implement procedures to monitor certifiers and improve annual eligibility examinations, including by analyzing examination results.”[footnote 92](#) As a result, the SBA made changes in 2020 to strengthen the oversight and the integrity of the certification processes for each of its set-aside programs.[footnote 93](#) One of those changes is SBA’s implementation of the “statutory mandate to provide certification, to accept certification from certain identified government entities, and to allow certification by SBA-approved third-party certifiers.”[footnote 94](#) As part of this rule, SBA adjusted the economic disadvantage thresholds, which will be used for “assessing the economic disadvantage of applicants to the 8(a) Business Development (BD) Program, as well as applicants seeking [Economically Disadvantaged Women-Owned Small Business Concerns] EDWOSB status.”[footnote 95](#)

Under the Service-Disabled Veteran-Owned Small Business (VOSB)

program, the certification approach appears to differ according to which agency is issuing the contract. For nearly all federal agencies, the SBA accepts a self-certification from the respective business as long as it meets the eligibility requirements of the program.[footnote 95](#) However, this self-certification is not accepted by the Department of Veterans Affairs and the Federal Aviation Administration.[footnote 96](#) For these departments, formal verification is required in order to compete for set-aside contracts at the Department of Veterans Affairs (VA).[footnote 96](#) Instead of being self-certified, a formal verification requires eligible small businesses to receive their “VOSB certification through Veteran Affairs Center for Verification and Evaluation (CVE).”[footnote 96](#) The verification will “address Veteran eligibility, ownership, and control.”[footnote 96](#)

Other potential lessons learned, considerations and risks

The Australian IPP example highlights the benefit of having an evergreen procurement set-aside program; by constantly adjusting and bringing forth new ideas, the program has managed to evolve to meet the needs of disadvantaged suppliers and Indigenous communities. Governments should also actively engage with the community or groups involved in the procurement to maintain trust and develop a strong relationship.

The EU example demonstrated the importance of defining key terms at the onset can alleviate obstacles in the interpretation of vague wording that may prove challenging during program implementation. Terms like “disabled persons,” “disadvantaged persons,” “sheltered workshop” should be defined with more specificity.[footnote 97](#)

An important component in ensuring the success of a procurement set-aside program is providing training to procurement officers. Providing

training to procurement officers is a crucial component to ensure the success of procurement set-aside programs. This was recognized by Canadian officials when changes to the PSIB were announced. Training for procurement officers on PSIB was previously done on a voluntary basis, however new mandatory training will be developed for the federal procurement community on Modern Treaty and Self-Government Agreement implementation of procurement obligations and to also ensure such training is integrated into the regular curriculum.

“Engaging with the community or groups involved in the procurement is an important factor. Maintaining trust and a relationship between all players including community groups, developers, contractors and government is important for programs and policies.”[footnote 98](#) Key stakeholders should be engaged in the development of clauses related to community benefits as well as establish realistic targets and monitoring enforcement of agreements.”[footnote 99](#) In 2018, the OGGO recommended “the Government of Canada develop procurement strategies that will support small and medium enterprises through consultation with small and medium enterprises and relevant experts.”[footnote 100](#) In addition, OGGO recommended “the Government of Canada increase the participation of Indigenous business in federal procurement contracts by taking into account the culture of Indigenous communities and by developing strong relationships and partnerships through more in-person interactions.”[footnote 101](#)

Conclusion

As social procurement practices continue to gain prominence in the realm of public procurement, procurement set-aside programs have become an area of growing interest for governments. This study sought to assess

existing procurement set-aside programs in Canada and internationally to understand their different approaches and identify lessons learned.

One of the biggest takeaways from the research relates to trade agreements (both internal/national and international). The rules that govern procurement set-aside programs and their existence stem from the restrictions and exclusions that are (or are not) included in applicable trade agreements. In order for more procurement set-aside programs to be established, further flexibilities should be included in current and future trade agreements.

In reviewing the programs established in Canada, Australia, the United States of America and the [EU](#), it is clear that each have created their programs with the common goal of increasing procurement opportunities for underrepresented suppliers. Despite each having their own unique set-aside programs, several themes emerged across these approaches.

Overcoming the criticism of reduced competition and effectiveness

The second takeaway relates to the concept of reduced competition and effectiveness of procurement set-aside programs. There are also concerns about the effectiveness of the procurement set-aside programs as sometimes preferential treatment for [SMEs](#) can increase procurement costs.

Governments have different approaches to implementing social procurement set-aside programs based on their unique history. For example, while the [USA](#) has long adopted set-aside programs, the European Union has traditionally seen them as discriminatory measures and restrictions on full and open competition. Therefore, when implementing a procurement set-aside program, one must be prepared for this potential pushback with regard to fairness and competition.

Furthermore, there may be concerns regarding the effectiveness of such programs and whether they achieve their intended outcomes of diversifying the supply chain and providing opportunities to underrepresented suppliers.

The establishment of realistic targets, monitoring and data collection

A third takeaway is the importance of realistic targets, monitoring, and data collection processes.

In order to demonstrate the effectiveness and overall value of the social procurement set-aside programs, it is important to establish baselines, realistic targets and key performance indicators. To ensure accountability and transparency, results should be publicly reported on an annual basis. However, in all cases, it appears that challenges still remain with regard to data collection and public reporting.

The importance of strict certification protocols and compliance mechanisms and other lessons learned

To ensure the transparency and fairness of the program, and avoid fraudulent activities, a certification protocol accompanied by an oversight mechanism must be established. While Canada and the United States have developed internal to government processes to validate the eligibility of suppliers, Australia has outsourced this responsibility to an external partner. Periodic audits and reviews should be conducted on the eligibility of suppliers, both randomly and in response to complaints, as well as on other aspects of the program such as the award of contracts. The absence of a functioning oversight mechanism can lead to instances of fraud and corruption that can erode public confidence and the effectiveness of the program.

It is also important that social procurement set-aside programs and their

respective accompanying policies remain evergreen and responsive to the evolving needs of underrepresented suppliers.

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