

Use of National Security Exception

In general, the National Security Exception (NSE) is invoked to remove procurements from the obligations of Canada's trade agreements for reasons of national security. The procurement itself must either be indispensable for national security or indispensable for national defence purposes. The rationale for the need to invoke any NSE is considered on a case-by-case basis and is documented in the exchange of letters which, in accordance with the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, occurs at the Assistant Deputy Minister (ADM) level.

In the case of COVID-19, after the World Health Organization (WHO) declared the pandemic, Public Health Agency of Canada (PHAC) made a request on behalf of the federal government that Public Services and Procurement Canada (PSPC) invoke the NSE with respect to the acquisition of goods and services required in order to respond to the COVID-19 pandemic. That invocation is time-limited and applies only until the WHO no longer declares the COVID-19 pandemic a Public Health Emergency of International Concern. It covers a broad range of goods and services and includes but is not limited to:

- personal protection equipment (such as sanitizer, respirator masks, ventilation masks, and gloves)
- ventilators and laboratory equipment
- health care providers and other health related services
- accommodations, including leases (for example, for Canadians under quarantine, as well as for health care providers)
- real property services
- food services
- cleaning and laundry services
- IT support services
- communications and telecommunications services
- food
- clothing and personal items
- transportation, such as the flights that have already brought Canadians home from China
- guard and security services

PHAC and PSPC considered it necessary to remove these procurements from the application of the trade agreements for the following reasons:

- There may be some work that PSPC requires to be performed in Canada. The need to access goods and services domestically, in light of the demand across the world for the same types of goods and services, was considered necessary to respond to the pandemic. Also, further border closures mean that, in some cases, contracting with foreign suppliers might ultimately mean having to cancel

a contract and re-procure, thus impacting Canadians with further delays to access such supplies. Domestic sourcing also reduces transportation problems and shipment delays

- In almost all cases, the acquisitions of these goods and services is urgent. Normal procurement procedures, including publication, posting periods (40 days under the North American Free Trade Agreement (NAFTA)), and formal questions and answers exchanges, would interfere with the real-time contracting required in order to respond to the pandemic

Once invoked, no further decision is required on whether or not to apply the invocation to a specific procurement as it applies to all procurements required in order to respond to the COVID-19 pandemic. However, even when the NSE has been invoked, contracting officers generally try to adhere to the disciplines of the trade agreements to the extent possible and particularly to the fundamental principles of the trade agreements of fairness, transparency and openness. Many of the obligations Canada has undertaken under the trade agreements are also obligations at common law, and PSPC must continue to fulfill those obligations.

This general invocation regarding COVID-19 applies only to procurements conducted by PSPC, and not to procurements conducted by other departments under their own authorities.

As of June 11, 2020, PSPC Acquisitions Program has carried out three NSE invocations related to the COVID-19 pandemic that are separate from the initial NSE invocation requested by PHAC on behalf of the federal government:

- At the request of PHAC, PSPC invoked the NSE with respect to a contract for a long-term, strategic, domestic supply of personal protective equipment, including surgical masks and respiratory masks. The NSE was invoked separately with respect to this procurement because the long-term nature of the contract goes beyond what is necessary to respond to the current pandemic, but was still considered necessary for national security purposes over the longer term
- At the request of Economic and Social Development Canada (ESDC), PSPC invoked the NSE with respect to acquisitions related to its various programs, benefits and services for Canadians during the COVID-19 national crisis. Because the need to provide benefits relating to unemployment, for example, is not a direct response to COVID-19, PSPC determined that the NSE should be invoked separately
- At the request of Canada Border Services Agency (CBSA), PSPC invoked the NSE with respect to the procurement of goods and services, for a three month period, which will allow CBSA personnel to perform their various functions using new low-touch/no-touch processes. As this requirement is not directly related to the initial response to the virus, PSPC invoked this NSE separately