



# **New Public Procurement Rules: Transparency and Accountability for Vendors**

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## Disclaimer

- This presentation is for general information only, and is not intended as, nor should it be construed as, legal or professional advice or opinion.
- The application of treaty requirements may vary with circumstances. For specific guidance on legal issues and contractual clauses, you should seek legal or professional advice.

# ▼ Overview

1. Brief Introduction to New Trade Treaties
2. CFTA:
  - Prior Experience / Eligibility Considerations
  - CFTA: Duty to Disclose All Material Information
  - CFTA: Various Notices
  - CFTA: Dispute Resolution
3. CETA: Additional Considerations

# ▼ New Trade Treaties

- *Canadian Free Trade Agreement (CFTA)*
  - in force from July 1, 2017
  - replaces the *Agreement on Internal Trade (AIT)*
  - harmonizes Canada's domestic regime with CETA
  - “negative” list – applies to all goods and services except those listed
- *Canadian-European Union Comprehensive Economic and Trade Agreement (CETA)*
  - in force from September 21, 2017
  - procurement rules only apply to types of services listed in annex (“positive” list) and do not apply to the goods listed in annex (“negative” list)

# ▼ Compliance Landscape

- CFTA / CETA not only source of public procurement rules
- Additional obligations may arise out of:
  - regional domestic trade treaties
    - Ontario – Quebec Trade and Cooperation Agreement
    - New West Partnership Trade Agreement
    - Atlantic Procurement Agreement
  - government procurement directives or policies
- *A purchaser must comply with most stringent requirement that applies to it!*

# ▼ CFTA Procurement Thresholds

- Adjusted every 2 years for inflation
- Departments, ministries, agencies, boards, councils, committees, commissions, and similar agencies:
  - **\$25,300** or more for goods
  - **\$101,100** or more for services
  - **\$101,100** or more for construction

# ▼ CFTA Procurement Thresholds

- Regional, local, district, other forms of municipal government, municipal organizations, school boards, and publicly-funded academic, health, social service entities (and entities they own/control):
  - **\$101,100** or more for goods or services
  - **\$252,700** or more for construction
- Crown corporations, government enterprises, and other entities that are owned or controlled by a government through ownership interest:
  - **\$505,400** or more for goods or services
  - **\$5,053,900** or greater for construction

# ▼ Limit on Prior Experience Requirements

- A requirement for prior experience must be essential to meet the requirements of the procurement
- Must not require suppliers to have previous contract awards from *any* Canadian public sector purchaser
- Must not require prior experience in a particular province or territory



# ▼ No Unnecessary Restrictive Conditions

- Must not evaluate financial capacity and commercial/technical abilities of a supplier based only on its business activities in the province or territory of the procuring entity
- Must not evaluate supplier based on conditions not specified in advance in its tender notices or tender documentation

# ▼ No Local Content Requirements

- Must not use local content or economic benefits criteria that preference the goods and services of a *specific* Canadian province or region – *prohibition now encompasses construction contracts*
- Limited exception: a requirement for *Canadian* value-added elements or a requirement for *Canadian* bidders is permitted if not otherwise contrary to Canada's international trade treaty obligations

# ▼ Bidder Barring / Excluding Suppliers

- CFTA *expressly* permits a supplier to be excluded based on the following grounds (if there is supported evidence):
  - bankruptcy or insolvency
  - false declarations
  - significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts
  - final judgments in respect of serious crimes or other serious offences
  - professional miscon
  - duct or acts or omissions that adversely reflect on the commercial integrity of the supplier
  - failure to pay taxes
- Excluding a supplier on other grounds deviates from the “safe” zone under the treaty, and could be challenged as unfair

# ▼ Duty to Disclose All Material Information

- CFTA codifies the general duty to disclose all material information to prospective bidders
- Specifically requires that tender documentation include all pertinent details about evaluation criteria

# ▼ Evaluation – What to Expect

- Review procurement document to ensure it provides sufficient transparency as to:
  - the evaluation process
  - the evaluation criteria
  - the weighting of criteria
  - sub-scores (i.e., no large blocks of points)
  - how tied scores are broken
  - how references, presentations, site visits are evaluated
- Question if any material information or above evaluation information is not clear/provided

# Contract Negotiation

- CFTA defers to each government party to set its own rules regarding whether negotiation is permitted during a procurement process
- Otherwise, CFTA permits procuring entities to negotiate with suppliers if:
  - negotiation is stated in the tender notice, or
  - the procuring entity determines that no tender is obviously the most advantageous in light of the evaluation criteria set out in the tender documentation
- Consider whether the procurement document clearly states that negotiation will/may occur – if not, then negotiation either cannot occur at all, or must occur with multiple vendors as a sort of tie-break process

# ▼ Tender Notice (Single-Point-of-Access)

- CFTA recognizes that the Government of Canada will develop an electronic Canada-wide single-point-of-access to tender notices to meet its international obligations
- Once developed, the single-point-of-access will be the required portal for publishing all tender notices required by CFTA

# ▼ Award Notice (to Unsuccessful Bidders)

- Suppliers who participated in a procurement process must be informed of contract award decisions under that process.
- If requested, an unsuccessful supplier must be given an explanation of the reasons why it was not selected.



# ▼ Award Notice (to Public)

- Must publish a general award notice within 72 days of a contract award on one of the tendering websites or systems designated by the procuring entity's government – and posted for a reasonable period of time
- General award notice must contain the following information:
  - a description of the goods or services procured
  - the name and address of the procuring entity
  - the name and address of the successful supplier
  - the value of the successful tender
  - the date of award
  - *if limited tendering was used, the conditions and circumstances described in Article 513 that justified its use*

# ▼ Prequalification Notices

- If an RFSQ is to create a list of prequalified suppliers that will be valid for more than 3 years:
  - in each year, a request for prequalification must be published in a tender notice on one of the tendering websites or systems designated by its government
  - the tender notice must include:
    - the criteria that will be used to prequalify suppliers
    - a statement that only the suppliers on the prequalified list will receive further notices of procurements covered by that list
    - the period of validity of the list

# ▼ Prequalification Notices

- If an RFSQ is to create a list of prequalified suppliers that will be valid for 3 years or less:
  - a procuring entity may instead publish the request for prequalification only once (i.e., at the outset) containing the required information

## ▼ Second Stage Competition

- A prequalification process presupposes a second stage process
- CFTA requires that **all** prequalified suppliers be eligible to participate in any second stage process **unless** the original request for prequalification specified limits or criteria that restricted eligibility for the second stage

# ▼ Electronic Auctions

- Prior to any auction, CFTA requires each participant to be provided with:
  - automatic evaluation method, including the mathematical formula, that is based on the evaluation criteria set out in the tender documentation that will be used in the automatic ranking or re-ranking during the auction
  - results of any initial evaluation of the elements of its tender, if the contract is to be awarded on the basis of the most advantageous tender
  - any other relevant information relating to conduct of auction

# ▼ New Dispute Resolution Regime

1. CFTA requires procuring entity and supplier to seek to resolve a complaint through consultations
2. Procuring entity must be impartial and timely in responding to a complaint, so as not to prejudice the supplier's participation in any ongoing or future procurement, or its right to seek corrective measures under the (to be developed) administrative or judicial review procedure.
3. CFTA requires that each government that signed the treaty perform a number of actions – Ontario's was expected in summer 2018

# ▼ New Dispute Resolution Regime

- Each government must:
  - establish written procedures through which a Canadian supplier may challenge a breach of CFTA procurement chapter
  - designate an impartial administrative or judicial authority that is independent of any procuring entity who will receive and review these supplier challenges

# ▼ New Dispute Resolution Regime

- ensure that a review body that is not a court is subject to judicial review
- develop rapid interim measures to preserve the supplier's opportunity to participate in the procurement pending the resolution of the dispute



# ▼ New Dispute Resolution Regime

- Interim measures pending resolution of the dispute may result in the postponement or suspension of the procurement process, depending on the circumstances.
- Final remedies for breaches of CFTA procurement chapter may include:
  - corrective action
  - compensation for the loss or damages suffered
- Compensation may be limited to either costs for preparation of the tender, the costs relating to the challenge, or both



## ▼ Notable Differences – CETA

- CFTA was negotiated so that it imposes substantially similar requirements as CETA – most of the previous slides apply
- Notable differences to be aware of:
  - open competitive thresholds are higher
  - scope of goods/services is narrower
  - timelines for submitting bids may need to be longer
  - prequalification lists are open



## ▼ CETA: Longer Posting Period

- CETA requires a minimum posting of 40 days as a default
- There are a number of exceptions which can reduce the requirement, in certain circumstances, to 10 days

# ▼ CETA: Prequalification List

- CETA requires procuring entities to allow suppliers to apply at any time for inclusion on a prequalification list
- If a supplier that is not on a prequalification list submits a request for participation in a second-stage competitive process based on that list, the procuring entity must *consider* the request (except in exceptional cases, e.g., complexity, urgency)
- Barring exceptional circumstances, the procuring entity cannot exclude the supplier from consideration on the grounds that the entity has insufficient time to examine the request



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