

York Region Capital Projects Coordination Workshop

Update Regarding Trade Agreements including CETA and CFTA

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September 26, 2018**



What are Trade Agreements?

- ▶ Agreements that support the exchange of goods and services between different jurisdictions
- ▶ Trade Agreements reduce or eliminate tariffs and other barriers to trade which may prevent the sale of goods and services from one jurisdiction to another
- ▶ Are seen as beneficial because they can increase economic growth and provide businesses with access to other markets
- ▶ Trade Agreements can be negotiated with other countries and between Canadian provinces

Which Trade Agreements are Relevant?

Domestic Trade Agreements:

- ▶ **Canadian Free Trade Agreement (CFTA)**, a Canadian trade agreement that replaced the Agreement on Internal Trade (AIT), and took effect on July 1, 2017
- ▶ **Ontario-Quebec Trade and Cooperation Agreement (OQTCA)**, a comprehensive bi-lateral agreement with the province of Quebec (largely aligns with CFTA) which took effect for municipalities on September 1, 2016

International Trade Agreement:

- ▶ **Canada-European Comprehensive Economic and Trade Agreement (CETA)**, which came into force on September 21, 2017. Chapter 19 deals with government procurement

When Are Trade Agreements Applicable?

Monetary thresholds applicable to municipalities:

PROCUREMENT TYPE	THRESHOLDS (\$CAN)		
	CETA	CFTA	OQTCA
GOODS	\$365,000	\$100,000	\$100,000
SERVICES	\$365,000	\$100,000	\$100,000
CONSTRUCTION	\$9,100,000	\$250,000	\$100,000

- ▶ The CETA thresholds have been converted from Special Drawing Rights, which is the currency of the International Monetary Fund. Thresholds will be reviewed bi-annually
- ▶ Cannot divide a procurement into separate procurements and must include the estimated maximum total value of the procurement over its entire duration including any cost escalation

Scope of Trade Treaties

- ▶ CETA applies to government entities at all levels, including municipalities, across Canada and the European Union, and CFTA applies to all provinces
- ▶ Chapter 19 of CETA deals with government procurement and requires municipal governments to ensure that their procurement activities, in excess of certain monetary values, are conducted in a **nondiscriminatory, impartial, transparent and accountable manner**
- ▶ Applies to “covered procurements” which are procurements, for government purposes, of a good, service or combination thereof, by any contractual means, for which the value exceeds the relevant threshold, subject to certain exclusions

Trade Treaty Exclusions

- ▶ The acquisition or rental of land, existing buildings or other immovable property or the rights thereon
- ▶ Procurement for the production, transmission and distribution of renewable energy, other than hydro-electricity, by the province of Ontario as set out in the Green Energy Act (CETA)
- ▶ Provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water and treatment of wastewater, or the supply of drinking water to such networks (CETA)
- ▶ Services that may only be provided by licensed lawyers or notaries (CFTA)

Non-Discrimination Requirements

Equal Treatment

- ▶ Parties are required to treat the goods of other parties no less favourably than similar, directly competitive or substitutable domestic goods, and these goods cannot be subject to more burdensome conditions such as higher taxes, stricter product regulation, or restrictions on their sale, than for a similar domestic good

Technical Regulations

- ▶ Parties to the treaties will undertake to cooperate, to the greatest extent possible, to ensure that their technical regulations are compatible with one another

Non-Discrimination Requirements

Mutual Recognition of Professionals

- ▶ Parties shall afford each other's recognized professionals treatment no less favourable than that provided to their domestic professionals

Licensing

- ▶ Each party shall ensure that any licensing requirements, qualification requirements, licensing procedures, or qualification procedures it adopts or maintains are based on criteria that preclude the competent authority from exercising its power of assessment in an arbitrary manner

Limited Tendering (Direct Purchases)

- ▶ Cannot use for the purpose of avoiding competition among suppliers or in a manner that discriminates against foreign suppliers or protects domestic suppliers
- ▶ May use limited tendering:
 - if no tenders were submitted or no suppliers requested participation;
 - if no tenders that conform to the essential requirements of the tender documentation were submitted;
 - if no suppliers satisfied the conditions for participation; or
 - if there has been collusion
- ▶ Must ensure that the requirements of the tender are not substantially modified

Limited Tendering – Permitted Uses

- ▶ If the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists for any of the following reasons:
 - the requirement is for a work of art;
 - the protection of patents or copyrights; or
 - due to an absence of competition for technical reasons
- ▶ For additional purchases from the original supplier that were not included in the initial procurement if a change of supplier:
 - cannot be made for economic or technical reasons including interchangeability or interoperability with existing equipment, etc., procured under the initial contract; and
 - would cause significant inconvenience or substantial duplication of costs for the procuring entity

Limited Tendering – Permitted Uses

- ▶ If, for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the goods or services could not be obtained in time using open tendering (**emergency purchases**)
- ▶ If a procuring entity procures a prototype or a first good or service that is developed at its request in the course of, and for, a particular contract for research, experiment, study or original development
- ▶ For purchases made under exceptionally advantageous conditions that only arise in the very short term in the case of unusual disposals such as those arising from liquidation, receivership or bankruptcy, but not for routine purchases from regular suppliers

Limited Tendering

Reporting Obligations

- ▶ A procuring entity shall prepare a report in writing for each contract awarded by limited tendering
- ▶ The report shall include the name of the procuring entity, the value and kind of goods or services procured and a statement indicating the circumstances and conditions that justified the use of limited tendering
- ▶ This information would also need to be included in Council reports for direct purchases

Transparency Requirements

Information on the Procurement System

- ▶ Parties must publish applicable laws, regulations, judicial decisions, and standard contract clauses, in notices or tender documentation, in an electronic or paper medium widely disseminated and accessible to the public

Negotiations

- ▶ A Party may conduct negotiations with suppliers:
 - if the entity has indicated its intent to conduct negotiations in the procurement documents; or
 - if it appears from the evaluation that no tender is obviously the most advantageous in terms of the specific evaluation criteria set out in the notice of intended procurement or tender documentation

Transparency Requirements

Enhanced Debriefings and Justification for Decisions

- ▶ If requested, parties must:
 - Provide unsuccessful suppliers with an explanation of the reasons why they were not selected, and the relative advantages of the successful supplier's tenders
 - Disclose any information necessary to determine whether a procurement was conducted fairly, impartially, and in accordance with CETA, including information on the characteristics and relative advantages of the successful tender.

CETA – Transparency Requirements

Reporting Requirements and Records Retention

- ▶ Award information must be published no later than 72 days after award
- ▶ Annual reports, covering one year of procurement activity (including number of procurements and aggregate value), must be provided to the Committee on Government Procurement within two years of the end of the reporting period
- ▶ For at least 3 years after award, parties must maintain the documents and reports of tendering procedures, contract awards, and data to ensure traceability.

Impartiality Requirements

Time Periods

- ▶ A procuring entity shall provide sufficient time for suppliers to prepare and submit requests for participation and responsive tenders, taking into account:
 - the nature and complexity of the procurement;
 - the extent of subcontracting anticipated;
 - and the time necessary to transmit tenders by non-electronic means from foreign and domestic points
- ▶ Within 5 years all entities must post their bid opportunities electronically at a single point of access

Impartiality Requirements

Time Periods

- ▶ CETA states that open procurements must be posted for a minimum of **40 calendar days**
- ▶ The 40 day period can be reduced as follows:
 - 5 days if bids are posted electronically
 - 5 days if tender documents are available electronically
 - 5 days if bids are received electronically
- ▶ Can reduce period to not less than 10 days if a “notice of planned procurement” was published at least 40 days and not more than 12 months in advance of publication of the notice of intended procurement, as long as the notice includes certain details

Impartiality Requirements

Conditions for Participation

- ▶ Any conditions for participation in a procurement are limited to those that are essential to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the relevant procurement
- ▶ Parties cannot impose the condition that the supplier must have previously been awarded one or more contracts by a procuring entity
- ▶ Parties shall not require prior experience in the territory of the party, but may require relevant prior experience if essential to meet the requirements of procurement.

Specifications – Article 19.9 of CETA

- ▶ Cannot prepare, adopt or apply any technical specification or prescribe any conformity assessment procedure with the purpose or the effect of creating unnecessary obstacles to international trade.
- ▶ In prescribing the technical specifications for the goods or services being procured, a procuring entity shall:
 - set out the technical specification in terms of performance and functional requirements, rather than design or descriptive characteristics; and
 - base the technical specification on international standards, if they exist; otherwise, on national technical regulations, recognized national standards or building codes.
- ▶ If design or descriptive characteristics are used in the technical specifications, should consider equivalent goods or services that demonstrably fulfil the requirements of the procurement by including words such as "or equivalent"

Specifications – Article 19.9 of CETA

- ▶ A procuring entity shall not prescribe technical specifications that refer to a particular trademark or trade name, patent, copyright, design, type, specific origin, producer or supplier, unless there is no other sufficiently precise or intelligible way of describing the procurement requirements and provided that, in such cases, the entity includes words such as "or equivalent"
- ▶ A procuring entity shall not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification for a specific procurement from a person that may have a commercial interest in the procurement.
- ▶ A procuring entity may include technical specifications to promote the conservation of natural resources or protect the environment, provided that it does so in accordance with Article 19.9.

Pre-Qualifications (Selective Tendering)

Rosters (known as Multi-Use Lists)

- ▶ Parties may maintain a multi-use list of suppliers, provided that a notice inviting interested suppliers to apply for inclusion on the list is published annually
- ▶ A multi-use list will be valid for a maximum of three years
- ▶ Parties shall allow suppliers to apply at any time for inclusion on a multi-use list and shall include on the list all qualified suppliers within a reasonably short time.
- ▶ If a supplier that is not included on a multi-use list submits a request for participation in a procurement based on a multi-use list along with all required documents, a procuring entity shall consider the request.

Impartiality Requirements

Excluding Bidders

- ▶ If supporting evidence is provided, a party may exclude a supplier on the following grounds:
 - Bankruptcy
 - 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 misconduct or acts or omissions that adversely reflect on the commercial integrity of the supplier; or
 - Failure to pay taxes.

Accountability Requirements

Bid Challenge Procedures

- ▶ Parties shall provide a timely, effective, transparent and non-discriminatory administrative or judicial review procedure through which a supplier may challenge procurement decisions
- ▶ Parties shall establish or designate an impartial administrative or judicial authority that is independent of its procuring entities to receive and review a challenge by a supplier arising in the context of a covered procurement
- ▶ Process must allow for rapid interim measures to preserve a supplier's opportunity to participate, and corrective action and compensation which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, or both

What Happens if we violate a Trade Treaty?

Powers of the Trade Tribunal or Courts

- ▶ A trade tribunal will be created to oversee the enforcement of the trade treaties. Until the tribunal is created, the courts will have the power to enforce trade treaties
- ▶ The types of remedies available to the tribunal will be much more far reaching than we are used to, and include:
 - Ability to cancel an award
 - Ability to direct the award to another bidder
 - Ability to cancel a procurement
 - Ability to order a new procurement
 - Ability to modify or ‘read down’ specifications
 - Ability to change evaluation scores or criteria
 - Ability to award damages

QUESTIONS?