INTRODUCING A NEW ERA IN PUBLIC PROCUREMENT

CANADA-EU COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA)

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4th Public Procurement Law
explore leading-edge best practices related to public procurement
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Overview

1. Changing Dynamic in Public Procurement
   "Broadening the Net"
2. “Spaghetti Bowl” of International Agreements
   How CETA fits in
3. Status of CETA
4. CETA Coverage & Thresholds
5. Procurement Obligations under CETA
6. What CETA means to your organization
7. Best practices
1. **Broadening the Net**

- Canada is signing new trade treaties
  - Very high priority on federal government agenda
  - All treaties contain procurement chapter
  - Pressure on Canada to open up procurement practices of all levels of government to foreign competition
    - being fuelled by foreign suppliers who want access to “the entire” Canadian procurement market
    - no longer just federal procurements
      - now drilling down to sub-federal provincial and municipal procurement, crown corps and utilities
  - Why?
    - Significant public purchasing dollars
      - At least $150 billion is spent annually by all governments
1. Broadening the Net

- Canada-EU Comprehensive Economic Trade Agreement (CETA)

  According to the EU, “The public procurement market access offer that Canada has made is the **most ambitious and comprehensive offer** Canada and its Provinces have ever made to any partner, including the US. The outcome regarding the inclusion of provincial and territorial governments, regional and local government entities, including agencies, crown corporations, and the MASH sector is **highly satisfactory**.”

- **Bottom Line:**
  Procurements by provincial/municipal governments/MASH and Crown corporations will become
  - much more competitive
  - more scrutinized
  - more susceptible to challenge
## 2. Spaghetti Bowl: Procurement Agreements

<table>
<thead>
<tr>
<th>Agreement</th>
<th>Jurisdiction</th>
<th>Suppliers</th>
<th>Conditions</th>
</tr>
</thead>
<tbody>
<tr>
<td>NAFTA-Chapter Ten</td>
<td>Federal</td>
<td>US, Canadian and Mexican suppliers</td>
<td>Applies to federal procurements being bid on by US, Canadian and Mexican suppliers. Not applicable to provinces or municipalities. CITT is the bid review mechanism and provides rapid interim measures and remedies.</td>
</tr>
<tr>
<td>WTO Agreement on Government Procurement</td>
<td>Federal</td>
<td>Canadian and foreign suppliers from 37 countries</td>
<td>Applies to federal contracts being bid on by Canadian and foreign suppliers from 37 countries. Not applicable to provinces or municipalities. CITT is bid review mechanism.</td>
</tr>
<tr>
<td>Agreement on Internal Trade (AIT)</td>
<td>Federal, Provincial and Municipal</td>
<td>Canadian suppliers</td>
<td>Applies to federal, provincial and municipal contracts being bid on by Canadian suppliers. CITT is bid review mechanism for federal contracts only. Dispute settlement mechanism for provincial./MASH.</td>
</tr>
<tr>
<td>New West Trade Partnership Agreement (NWPTA)</td>
<td>BC, Alberta, and Saskatchewan provincial and municipal</td>
<td>Suppliers carrying on business in those provinces</td>
<td>Applies to B.C. Alberta and Saskatchewan provincial and municipal procurements being bid on by suppliers carrying on business in those provinces. State to state and private party bid review mechanism.</td>
</tr>
<tr>
<td>Canada-EU Comprehensive Economic and Trade Agreement</td>
<td>Federal, Provincial, Municipal, Crown corporations, MASH and utilities</td>
<td>EU and Canadian suppliers</td>
<td>Will apply to procurements by federal, provincial, municipal, Crown corporations, MASH and utilities being bid on by EU and Canadian suppliers.</td>
</tr>
<tr>
<td>Trans-Pacific Partnership Agreement</td>
<td></td>
<td></td>
<td>Being negotiated among Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, Vietnam.</td>
</tr>
</tbody>
</table>
3. Status of CETA

- CETA text being finalized – all significant negotiations concluded
- Legal text (within next 2 - 6 months)
- **Europe**
  - Final text voted on in the European Council/European Parliament
  - Ratification (2015)
- **Canada**
  - Governor in Council’s approval
  - Federal implementation legislation tabled in House of Commons where it will be debated prior to ratification (late 2014 or early 2015)
  - Provincial implementation legislation
4. CETA Coverage

- Broad coverage
  - Federal
  - Provincial/Territory
  - MASH (Municipal, Academia, School Boards, Hospitals)
    - Unprecedented
  - Crown corporations
- 75% of procurements by public utilities
  - Unprecedented
- Mass transit by provinces
4. CETA Coverage

- Excluded procurements:
  - Procurements for “Health care” services
  - “R&D” procurements
  - “Public-private partnerships” for services and utilities
  - Procurements for national defence and security purposes
  - “In-house” procurements
### 4. CETA Thresholds (CDN$)

<table>
<thead>
<tr>
<th>Trade Agreement</th>
<th>Government Entity</th>
<th>Crown Corporations</th>
<th>Utilities</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>Goods</td>
<td>Services</td>
<td>Construction</td>
</tr>
<tr>
<td>Federal</td>
<td>205,000</td>
<td>205,000</td>
<td>7,800,000</td>
</tr>
<tr>
<td>Provincial/ Territory</td>
<td>315,000</td>
<td>315,000</td>
<td>7,800,000</td>
</tr>
<tr>
<td>MASH (Municipal, Academic, School boards, Hospitals)</td>
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### Impact of the Canada-EU Comprehensive Economic and Trade Agreement on Government Contracting in Canada

#### Federal/Provincial/Municipal Thresholds under Trade Agreements (CDN$ January 1, 2012 – December 31, 2013)

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<td>AIT</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Annex 502.1A (Fed/Prov Govt)</td>
<td>25,000</td>
<td>100,000</td>
<td>100,000</td>
</tr>
<tr>
<td>Annex 502.3 (Fed/Prov Monopolies)</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>MASH</td>
<td>100,000</td>
<td>100,000</td>
<td>250,000</td>
</tr>
<tr>
<td>CAN-US GPA (Provincial/Territorial Contracts)</td>
<td>559,125</td>
<td>559,125</td>
<td>7,800,000</td>
</tr>
<tr>
<td>WTO-AGP (Federal Contracts)</td>
<td>205,100</td>
<td>205,100</td>
<td>7,800,000</td>
</tr>
<tr>
<td>NAFTA - Chapter 10 (Federal Contracts)</td>
<td>25,300</td>
<td>78,500</td>
<td>10,200,000</td>
</tr>
<tr>
<td>CETA</td>
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5. Procurement Obligations under CETA

¬ Devil is in the detail: some caution - still have not seen final text

¬ Will apply the WTO Agreement on Government Procurement (GPA/113) 2 April 2012

¬ Nondiscrimination
  ¬ Canadian procuring entities must not discriminate against European (or other Canadian) suppliers in their procurements
  ¬ In law or in fact

¬ Substantive Rules
  ¬ Procurements must be conducted in a “transparent, fair and impartial manner”
  ¬ Predict that this requirement will be basis for vast majority of procurement challenges under CETA
5. Procurement Obligations under CETA

- Offsets are prohibited
  - Offsets are undertakings or conditions imposed on winning bidder that encourage local development or domestic content
  - NAFTA/WTO have similar prohibition; but Federal government still employs them
    - Federal Industrial and Technological Benefits Program
    - Foreign contractors awarded large federal contracts must invest 100% of the value of the contract in technologies that are strategic to Canada and the targeted sectors
    - Primes will now be “weighted and rated”—typically 10% of the value of their bid—based on the value of the technology benefits they propose to bring to Canada
  - Widely used by governments around the world in defence procurement
  - All governments say they disapprove but they all do it
5. Procurement Obligations under CETA

- Tendering Procedural Rules

  - Commitment to create a **single point of electronic access** for ALL procurement opportunities within 5 years of entry into force

  - Procurement by electronic means

  - Must not be applied in a discriminatory manner or **have the effect** of precluding competition (an “effects” test)

  - Detailed requirements for 3 types of tendering procedures
    - Open tendering Procedures – all interested suppliers may bid
    - Selective tendering procedures – only those suppliers invited to bid may do so
    - Limited tendering procedures – sole source
5. Procurement Obligations under CETA

¬ Tendering Procedural Rules (cont’d)

¬ Rules for qualifications of suppliers
  ¬ Must be restricted to those that are “essential” to ensure that the supplier has the legal and financial capacity and the commercial and technical capabilities to undertake the procurement
  ¬ May require relevant “prior experience” but not require that the prior experience be in the territory of the procuring entity

¬ Very detailed rules on Time Periods for Bidders to file bids
  ¬ “Sufficient time” to prepare bids
  ¬ Selective tendering – bid to be submitted not less than 25 days from the date of publication
  ¬ Open tendering – not less than 40 days from publication
  ¬ Exceptions to exceptions
5. Procurement Obligations under CETA

- **Evaluation Criteria**
  - “All evaluation criteria” must be disclosed in the tender documentation including “the relative importance of such criteria”
  - No hidden evaluation criteria and no undisclosed weighting
    - Account for over 50% of CITT cases

- **Rules on Technical Specifications**
  - Prohibit biased technical specifications
  - Cannot used technical specifications to create “unnecessary obstacle to trade”
  - Specifications should be based on functional and performance requirements; and not on a particular design, brand or type
  - If impractical to use general functionality only, then language must allow products that are “equivalent” to the brand described
5. Procurement Obligations under CETA

- **Rules on Debriefing**
  - Must provide an explanation of
    - the reasons why bid was not selected; **and**
    - the relative advantages of the successful supplier’s tender
  - Similar requirement under NAFTA
  - Requires disclosure of score of winning bidder and value of contract
  - Evaluation team guidelines, instructions
  - Raw scoring sheets of evaluators & notes & consensus scoring sheets
  - Purpose is
    - to allow loser to improve its bid for next time; **and**
    - to understand whether the procuring entity has breached its procurement obligations under the Agreement
5. **Procurement Obligations under CETA**

- **Sole Sourcing**
  - **Must meet 2-part test**
    1. Must not be done to avoid competition or in a manner that discriminates against EU suppliers **and**
    2. For one of the following reasons:
       1. Goods/services can only be provided by one supplier and no reasonable alternative or substitute exists due to
          1. Protection of patents copyrights or other exclusive rights, or
          2. Due to an absence of competition for technical reasons
       2. For additional deliveries by the original supplier that were not included in the initial procurement where a change of supplier
          1. Cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, software, services or installations procured under the initial procurement; **and**
          2. Would cause significant inconvenience or substantial duplication of costs of the procuring entity
       3. As is strictly necessary where for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the goods/services cannot be obtained in time using open tendering procedures
5. Procurement Obligations under CETA

- Sole Sourcing (cont’d)
  - If sole source used, procuring entity must prepare a report and publish it
    - outlining the value and kind of goods/services sole sourced
    - indicating the circumstances and conditions that justified the sole source award
  - Prudent approach would be to publish intention to sole source in advance and ask for comments
    - Similar to federal Advance Contract Award Notices (ACANs)
5. Procurement Obligations under CETA

- Domestic Review Procedures
  - Province must introduce “timely, effective, transparent and non-discriminatory” administrative or judicial review procedure to allow disappointed supplier to challenge a contract award or the process
  
  - Procedural rules for challenge must be in writing and easily available
  
  - Suppliers should have “sufficient time” to submit a challenge which cannot be less than 10 days from when the basis of the challenge became known or reasonably should have become known to the supplier
  
  - Must have Independent administrative or judicial authority to hear challenge
    - Federal Contracts – this is CITT
  
  - Must introduce “rapid interim measures” to preserve the ability of the supplier’s opportunity to participate
    - Suspension of procurement process pending outcome of dispute
5. Procurement Obligations under CETA

- Domestic Review Procedures (cont’d)
  
  - If breach, reviewing authority must be able to impose remedies on procuring entity for corrective action or compensation for the loss or damages suffered
    - Bid preparation costs
    - Costs of challenge
    - Lost profit award
    - Setting aside contract award and awarding to applicant
    - Reevaluation of the tender
5. Procurement Obligations under CETA

- Canadian International Trade Tribunal
  - Federal bid review mechanism for complaints filed under NAFTA, WTO GPA and AIT
  - May award the complainant
    - Costs incurred in filing and proceeding with a complaint
    - Bid preparation costs
    - Such remedy as it considers appropriate, including
      - the re-solicitation of the designated contract,
      - that the designated contract be terminated and that the contract be awarded to the complainant.
      - that the complainant be compensated for the loss of the contract or for the opportunity it lost (lost profits)
6. WHAT DOES THIS MEAN FOR YOUR ORGANIZATION?

- Will make it more difficult for procuring entity to use procurement
  - as a tool for local economic/social development
  - unless under thresholds or non-designated entity/contract

- Will require procuring entity to shoulder the administrative costs associated with:
  - providing information about procurements practices
  - publishing detailed notices of intended procurements
  - issuing RFPs and contract awards in accordance with CETA rules
  - providing substantive debriefings
  - defending action, if challenged before bid review mechanism

- Put procuring entities in jeopardy of their procurement processes being slowed or derailed by having to
  - deal with an order suspending the procurement pending the resolution of a complaint
  - implementing remedy of review body

- New and not new - all of this already happens at the federal government level which has been subject to international trade agreements since 1994
  - trade Agreements are now reaching down further to sub-federal entities
7. BEST PRACTICES

- If you are a **procuring entity or supplier**: 
  - Identify *which* Agreement(s) applies to a proposed procurement  
    May be more than one
  - Understand what your obligations are under that Agreement, if you are the procuring entity  
    *or*
  - Understand what duties are owed to you by the procuring entity, if you are a supplier
  - Understand the *recourses* and *remedies* which are available to you, if you are a supplier
  - If you are the procuring entity, understand the exposure to your procurement if it is subject to challenge and take steps early on to mitigate risk
Questions?

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