

NRFP Updates & Trade Treaty Obligations – A Game of Inches

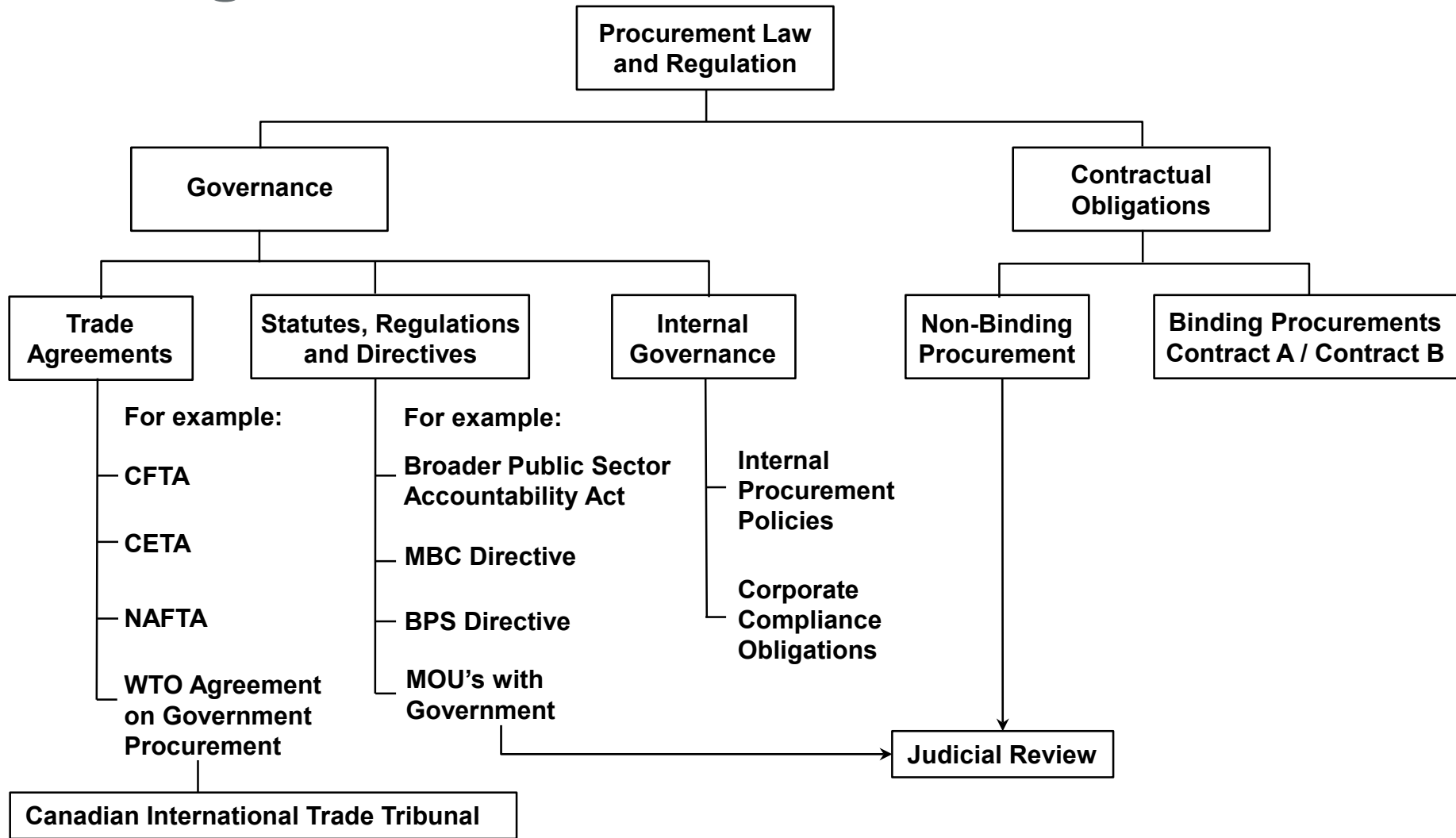
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Overview

1. Overview of Procurement Law and Regulation in Canada
2. NRFP Tenders – Recent Development
3. Trade Treaty Obligation Update – CETA/CFTA/CPTPP
4. Q&A

1. Overview of Procurement Law and Regulation in Canada



2. Binding vs Non-Binding

- ↪ What is a “binding” procurement (i.e. RFP) process?
 - ↪ *The Queen (Ontario) v. Ron Engineering Construction (Eastern) Ltd.* (SCC, 1981)
- ↪ By Common Law, these are procurement processes that are intended to create a binding contractual relationship between the procuring authority and each bidder that submits a compliant bid
- ↪ Binding procurements create a binding “bidding contract” or “Contract A”

Indicators for a Binding RFP

What are indicators that Contract A/bidding contract is intended to come into existence?

- ↪ The procurement documents (RFP, tender) describe the bidder's submission as **irrevocable** (usually for a defined period of time);
- ↪ The bidder is obliged to “accept” contractual terms and conditions when it submits a bid or a proposal and the owner is obliged to award the contract;
- ↪ The bidder's submission is an “offer” to carry out work or provide goods rather than a submission to be the preferred proponent to enter into negotiations;
- ↪ The **price** and offer submitted is **irrevocable**

Non-Binding Public Tender Procurements - Negotiable RFP Formats

- ▭ Request for parties to submit proposals that form the basis for negotiations rather than a firm invitation to enter into binding agreement

- ▭ Characterized by:
 - no irrevocable bid, bid validity period or bid security requirements
 - a provision setting out that no Contract A will be formed
 - no liability for bidder who breaches procurement documents

- ▭ Two principle forms:
 - “Rank and Run” Consecutive Negotiations
 - “Best and Final Offer” Concurrent Negotiations or “Dialogue Procurements”

- ▭ Case Example: University of Toronto

Non-Binding Public Tender Procurements – When to use them

- ↪ Consider using a non-binding public tender procurement when:
 - public sector owner wants to reduce its legal risk
 - subject matter of procurement doesn't lend itself to use of industry standard terms and conditions (e.g. there is no clear industry standard and diverse/innovative price and technical solutions are expected)
 - owner has difficulty setting out the scope of the project - proponents' technical submissions will form the basis for the final negotiated contract scope and price (e.g. allows owners to “test the waters”)
 - past binding procurement has failed or was cancelled
 - procurement has no clear commercial end (e.g. procurement for research, study or experimentation)

Non-Binding Public Tender Procurements – Benefits

- ▭ Avoids Common Law obligations applicable to Contract A procurements, significantly simplifying the process
 - may accept a non-compliant bid
 - no duty of fairness
 - no duty to award contract
 - increased flexibility and potential for bidder innovation
 - increased competitive tension
 - allows for bid rectification if desired

- ▭ Without a breach of contract claim – *no claim for lost profits*. Aggrieved bidders only have administrative remedies

Non-Binding Public Tender Procurements – Detriments

- ⌞ No proposal irrevocability/security
- ⌞ Reduced control over process – e.g. proponents can withdraw their bids
 - This risk is mitigated because proponents want to be awarded the contract and putting together a proposal can be a significant undertaking
- ⌞ Owners cannot contractually bind proponents to the terms and conditions of the procurement until a final contract is entered into
- ⌞ Legal risk remains
 - ⌞ Increased chances of administrative law remedies (i.e. judicial review, where the remedy would be setting aside the decision under review)
 - ⌞ Novel approach in Canada, so may have legal challenges – especially in larger and more complex procurements

Non-Binding Public Tender Procurements – Risks & Challenges

- ↯ Relatively new in Canada – though principle has been accepted
- ↯ Some courts may find “Contract A” even when it is expressly disavowed
 - Key is whether the parties intended to enter into contractual relations by the submission of a bid (i.e. in contract law, an offer, acceptance and consideration exists)
 - See Case Studies in Part 4 of this presentation
- ↯ Increased likelihood of judicial review cases
- ↯ Regular contractual duties to avoid “bad faith” continue to apply (*Bhasin v. Hrynew*)

Case Studies

- ↪ *Rapiscan* – the “Stealth” RFP
- ↪ *CG Acquisition Inc. v. P1 Consulting Inc.* – 150 million reasons to use an NRFP
- ↪ *Murray Purcha & Sons Ltd v. Barriere (District)*
- avoiding damages but still reviewable

Rapiscan – Stealth Contract A

Rapiscan Systems, Inc. v. Canada (Attorney General), 2014 FC 68

- ↪ CATSA issued non-Contract A solicitation for airport screening equipment in 2010
- ↪ Contract Review Committee created and published a Request For Information, followed by a Request for Submissions
 - Request for Submissions specifically stated that a response to the Request for Submissions did not constitute the formation of Contract A.
 - Also stated that CATSA was not obliged to follow a competitive bid process, and that it reserved the right to accept submissions that failed to meet any of the stated requirements
- ↪ Rapiscan and Smiths made submissions.
- ↪ Committee drafted a briefing note and presented it to the Board. The briefing note stated that Smiths rated the highest in all categories
 - However, the Smiths model was not certified by the American Transportation Safety Administration, a known minimum requirement
 - This information was not before the Board at the time of their decision
- ↪ Rapiscan's submission was eliminated because it did not provide the required "three views"
 - However, the "three views" requirement was (a) not known to the bidders and (b) was a weighted requirement, not a minimum requirement; which could not be properly applied to remove the Rapiscan submission from the Board's consideration
 - price of the Rapiscan submission was not put before the Board for consideration
- ↪ Board voted and decided to award the contract to Smiths
- ↪ Rapiscan brought an application for judicial review of CATSA's decision

Rapiscan – Stealth Contract A

- ↪ The court found that CATSA was subject to judicial review and owed an administrative law duty of procedural fairness
- ↪ Court also found that the manner in which the procurement was conducted violated this standard
- ↪ A key component to the decision was the closing off of the Contract A remedies – which court implied created a *de facto* unfairness to bidders procedurally
- ↪ No monetary award for lost profits – administrative remedy only

CATSA appealed: *Rapiscan Systems, Inc. v. Canada (Attorney General)*, 2015 FCA 96

- ↪ Court of Appeal upheld the lower court decision on more limited grounds
 - ↪ Disagreed with the lower court that CATSA had acted in bad faith or that the mere elimination of Contract A created unfairness
 - ↪ However, CATSA had published rules on how it was going to conduct procurements, including requirement for an open process
 - ↪ Reliance on criteria without disclosure violated that published process without notice to CATSA board or bidders by management

CG Acquisition – 150 Million Reasons

***CG Acquisition Inc. v. P1 Consulting Inc.*, 2018 ONSC 4089, aff'd 2019 ONCA 745**

- ↪ Solicitation conducted by the LCBO together with Infrastructure Ontario
 - ↪ The solicitation was structured as an NRFP which expressly disclaimed the existence of Contract A.
 - ↪ CG Acquisition submitted a bid, and was disqualified
 - ↪ Wanted to raise a breach of Duty of Fairness – PROBLEM: the NRFP format
 - ↪ Claim that there was a freestanding duty outside that of the Contract A framework
 - ↪ Claimed this breach resulted in a claim of \$150M in lost profit damages.
-
- ↪ **So what happened?**

CG Acquisition – 150 Million Reasons

- ↪ The court flatly rejected the concept of a “free standing” duty of fairness.
- ↪ Cited an evolution in the law since *Martel* that has clarified two decades of uncertainty
- ↪ Namely – if you do not make Contract A, then the courts shouldn’t impugn its obligations onto you as a purchaser.
- ↪ One note – the court distinguished from an NRFP that **was** successfully challenged, as that, like *Rapiscan* was an administrative application.

Murray Purcha & Son – avoided Contract A like a Boss

↪ *Murray Purcha & Son Ltd v. Barriere (District)*, 2019 BCCA 4

↪ Winter Road Maintenance Services contract

↪ Court reviewed a fairly “standard” clause to vitiate Contract A:

- ↪ This RFP is not a call for tenders or a request for binding offers and no contractual or other legal obligations shall arise between the District and any Proponent as a result of the issuance of this RFP or the submission of any Proposal in response to this RFP, until and unless the District and a Proponent enter into a contract for the services sought by the District under this RFP. For clarity and without limiting the foregoing, this RFP does not commit the District in any way to treat Proponents in any particular manner, to select a Proponent, to proceed to negotiations with any Proponent or to enter into any contract and the District may reject any and all Proposals, re-issue a new RFP or end this RFP process at any time, at its sole discretion.

↪ However – note that the court continued to analyze the situation against public law duties.

Recommendations

- ↪ **Be reasonable** - Contracting out of Contract A should be a shield, not a sword. Best practice is to try to act as though bound by Contract A if possible
- ↪ Where possible, frame your solicitations as performance based rather than outcome based, which also allows for creative solutions
- ↪ Leave latitude for negotiations in your solicitations
- ↪ Be aware of existing rules and policies of particular government entities and applicable law

3. Trade Treaty Compliance

- Major Treaties impacting AB/BC Entities
 - Canada-European Union Comprehensive Economic and Trade Agreement (“CETA”)
 - Canadian Free Trade Agreement (“CFTA”)
 - NWPTA
- Strong procurement chapters – includes coverage of provincial and municipal entities
- Imposes significant obligations on those entities that meet or exceed rigor of Contract A
- **HOWEVER**, allow for Negotiable Formats

CFTA & CETA - Overview

- Provide a “statutory backbone” for procurement that is common in other regions.
- Incorporated by reference through regulation and government policy directives/MOUs with crown entities.

Procurement Under CETA/CFTA

Broadening the Net

▸ **Public Procurement**

- Canada: over \$200 billion annually
- BC: over \$6 billion annually (heavily sourced from small and medium-sized firms)

▸ **CETA**

- Creates one for the largest free trade areas in the world
- As of Sep 21, 2017, sub-federal entities/MASH sector:
 - Must **comply** with open and fair government **procurement requirements**
 - Are **open** to procurement **competition** from companies across Canada and from 28 EU countries

Procurement Trade Agreements

Spaghetti Bowl

New West Trade Partnership Agreement	BC, Alberta, Saskatchewan (Manitoba as of Jan 2019) provincial and MASH sector procurement being bid on by suppliers from these provinces	-	State to state, and private party dispute resolution
Canadian Free Trade Agreement (“CFTA”)	Federal, provincial and MASH sector procurement being bid on by Canadian suppliers and commenced on or after July 1, 2017	-	CITT (federal contracts) Provincial mechanisms (other contracts)
Canada-U.S. Agreement on Gov. Procurement	Provincial procurement (except Nunavut) being bid on by US suppliers	Crown corporations	Provincial mechanism
NAFTA	Federal contracts being bid on by US, Canadian and Mexican suppliers	Sub-federal entities	CITT
WTO Agreement on Gov. Procurement	Federal contracts being bid on by Canadian and foreign suppliers from 17 countries and the EU	Sub-federal entities, MASH sector	CITT
Trans-Pacific Partnership Agreement (“TPP”)	Some “sub-central” government entities’ procurement being bid on by Canadian and foreign suppliers from 13 countries (<i>future of TPP uncertain</i>)	Municipalities, MASH sector	CITT (federal contracts)
CETA	Federal, provincial, municipal, Crown corporations, MASH sector and utility providers procurement being bid on by EU and Canadian suppliers	-	CITT (federal contracts) Other contracts: TBD

CETA/CFTA Obligations

Key Procurement Principles

- ↪ **Non-discrimination:** must treat domestic and EU suppliers equally favourably
 - ↪ May not discriminate against local suppliers based on foreign ownership or foreign ties
 - ↪ May not use “offsets”
 - ↪  cannot accord a preference for Canadian value-added or limit tendering to Canadian goods, services, or suppliers
- ↪ **Transparency:** must publicly publish individual procurement opportunities and contract awards
- ↪ **Impartiality:** must conduct procurement and treat complaints in an impartial manner

CETA/CFTA Applicability

Covered Entities

Who?
What?
How much?

- ▭ Broad coverage of:
 - ▭ Federal entities
 - ▭ Provincial entities (with narrow exceptions)
 - ▭ **Unprecedented**: All publicly-funded MASH entities
 - ▭ **M**unicipalities
 - ▭ **A**cademic institutions (incl. universities, colleges)
 - ▭ **S**chool boards
 - ▭ **H**ealth and social services agencies (incl. hospitals, health units)
 - ▭ Crown corporations (incl. OLG, LCBO, Hydro One)

CETA/CFTA Applicability

Procurement Covered

Who?
What?
How much?

- ▭ **All goods**, with narrow exceptions:
 - ▭ Procurement for public order and national defense
 - ▭ Mass transit vehicles (exception allows Ont. and Que. to require 25% be allocated to Canadian content)
- ▭ **Services specified** in annex 19-5 for CETA. While CFTA copied CETA's obligations, it did NOT include an Annex – so prima facie everything is covered.
- ▭ Procured by **any contractual means**
 - ▭ Purchase, lease, with or without option to buy
- ▭ Exemption for aboriginal businesses

CETA Applicability *Value Thresholds*

Who?
What?
How much?

	SDR ¹	\$CDN (2017)	SDR	\$CDN (2017)
Federal government	130,000	\$241,800	5,000,000	\$9,300,000
Provincial ministry/agency, and MASH entities	200,000	\$372,000	5,000,000	\$9,300,000
Crown corporations, provincial or municipal entities of a commercial or industrial nature	355,000	\$666,300	5,000,000	\$9,300,000

¹ 1 Special Drawing Rights (“SDR”) : \$1.86 CDN (adjusted over time)

CETA/CFTA Applicability *Valuation*

Who?

What?

How much?

- ↪ **DO NOT:**
 - ↪ Divide procurement
 - ↪ Intentionally underestimate value
- ↪ **DO** consider the **MAXIMUM** total value of the procurement:
 - ↪ Over its entire duration
 - ↪ Whether awarded to one or more suppliers
 - ↪ Including premiums, fees, commissions, interests
 - ↪ Including the total value of options

Tendering Procedural Rules

CETA/CFTA 101

Take note of:

1. Rules on **tendering procedure type**
2. Rules on **disclosure**
3. Rules on **supplier qualifications**
4. Rules on **technical specifications**
5. Rules on **bid evaluations** and **contract awards**
6. Rules on **bid challenges** and **disputes**

Tendering Procedural Rules

CETA/CFTA101

- ↪ **Three types** of tendering procedures = **Three sets of rules** to remember
 - ↪ **Open** tendering procedure (all suppliers may apply)
 - ↪ **Selective** tendering procedure (only suppliers invited)
 - ↪ **Limited** tendering procedure (sole-sourced contracts)
 - ↪ Must publish a report justifying **every** limited tender process
 - ↪ Only available in limited circumstances
 - ↪ Prudent approach: publish intention to sole source in advance and ask for comments (similar to federal ACANs)

Tendering Procedural Rules

CETA/CFTA 101

- **Two-part test** to determine the availability of limited tendering
- 1. **Purpose** is not avoid competition or to discriminate against suppliers based on origin; **AND**,
- 2. **Specific exemption** applies, such as:
 1. Previous, substantially unmodified tenders were unsuccessful
 2. Only one supplier can provide the goods/services and no reasonable alternatives/substitutes exist
 3. Tender is for additional deliveries by an original supplier, who cannot be changed
 4. Extreme urgency

Tendering Procedural Rules

CETA/CFTA 101

- ↪ **“Sufficient” time** must be given to prospective suppliers to participate in tenders
- ↪ Function of:
 - ↪ Nature and complexity of procurement
 - ↪ Extent of subcontracting anticipated
 - ↪ Time to transmit tenders (if non-electronic process)
- ↪ Specific rules with respect to bidding periods:
 - ↪ Commercial goods or services
 - ↪ Mutual agreement with qualified suppliers (limited circumstances)

Tendering Procedural Rules

CETA 101

Time Is Ticking

	General Rule		Possible Abridgments	
	<i>Open Tendering Process</i>	<i>Selective Tendering Process</i>	<i>Time Credits for Electronic Tendering</i>	<i>Other</i>
Requests for participation	N/A	25 days from the date of publication of the notice of intended procurement	No	May be reduced to no less than 10 days if an urgency is duly substantiated
Submission of tenders	40 days from the date of publication of the notice of intended procurement	40 days from the date of notification to suppliers that they will be invited to bid	5-days credit if tendering process is conducted electronically	May be reduced to no less than 10 days if, e.g.: (i) entity has published a notice of planned procurement in the past 12 months; or (ii) urgency is duly substantiated

Tendering Procedural Rules

CETA/CFTA 101

↪ **Extensive** disclosure obligations

1. Notices of **intended procurement**

- ↪ Required for every tender that is not sole-sourced
- ↪ Accessible electronically via single point of access (next 5 years)
- ↪ Detailed content requirements, in addition to a summary and disclosure of intention to negotiate

2. Publication of **awards**

- ↪ Must be published no later than 72 days after every contract award
- ↪ Must maintain records for every contract for 3 years after its award

3. Notices of **planned procurement** (*yearly*)

- ↪ Not mandatory but advantageous (see “Time Is Ticking” slide)

Tendering Procedural Rules

CETA/CFTA 101

▭ Suppliers Qualifications

- ▭ Any restrictions must be **limited** and “**essential**”
 - ▭ Must be limited to suppliers’ legal/financial capacity and commercial/technical abilities
 - ▭ Must be evaluated on the basis of suppliers’ business activities in Canada and internationally
- ▭ Suppliers’ prior experience
 - ▭ May require relevant prior experience **if** essential
 - ▭ May not require prior experience with the procuring entity or in Canada
- ▭ Very limited performance exclusions – no “litigation debar”

Tendering Procedural Rules

CETA/CFTA 101

▸ Technical Specifications

▸ Must:

- Be “unbiased” and avoid creating “unnecessary obstacles to trade”
- Describe **performance** and **functional** requirements
- Use **international**, rather than national, **standards**

▸ Should not:

- Describe design or descriptive characteristics
- Refer to trademarks, patents, copyrights, designs, types, specific origins, producers or suppliers

▸ Allow for “**equivalent**” goods and services

Tendering Procedural Rules

CETA/CFTA 101

- ↪ **Bid Evaluation Criteria**
 - ↪ May include price and other cost factors, quality, technical merit, environmental characteristics and terms of delivery
 - ↪ Must be disclosed in the notice of intended procurement (unless price is the only criteria)
 - ↪ **Common litigious issue:** “hidden” criteria and undisclosed weighting
- ↪ **De-Briefing of Unsuccessful Suppliers**
 - ↪ Upon request (no specified cut-off time period)
 - ↪ Must explain (i) why the supplier was not selected, and (ii) relative advantages of the bid winner’s tender

Tendering Procedural Rules

CETA/CFTA 101

- ↪ **Negotiation Protocol**
- ↪ Specifically contemplated by CFTA and CETA
- ↪ May conduct either Rank & Run or BAFO
- ↪ Must outline the procedures to be used in the tender notice.
- ↪ For BAFO – must provide a common deadline.
- ↪ For Rank & Run – must provide a deadline for submitting a final offer before terminating.

Tendering Procedural Rules

CETA/CFTA 101

↪ **Disputes**

- ↪ Supplier challenges:
 - ↪ Suppliers have at least **10 days** to submit (from the time when the basis of the challenge became known)
 - ↪ Rapid **interim measures** available, including the suspension of procurement process
 - ↪ Possible **remedies**: monetary awards (bid preparation costs, costs of challenge, lost profit) and re-opening of the outcome of bidding processes
- ↪ Canadian forum for “timely, effective, transparent and non-discriminatory administrative or judicial review”:
 - ↪ Federal procurement → CITT (90 day expedited process)
 - ↪ Other procurement → Bid Protest Mechanism

Bid Protest Mechanism

- ↪ Available only in BC, Alberta, Saskatchewan, Manitoba – but can be used by any qualifying supplier.
- ↪ Creates roster of arbitrators to engage in ad hoc arbitration for bid protests.
- ↪ Very tight timelines
- ↪ Lack of precedential value
- ↪ 3 rulings so far – questionable (non)-use of CITT caselaw.

DPM – ParklandGEO v AI

- April 2019 challenge by ParklandGEO
- ParklandGEO responded to RFP by AI – disqualified by AI, protested under the CFTA.
- AI brought a procedural objection claiming that the claimant was an Alberta entity, claiming against an Alberta procurement, and therefore the CFTA should not apply.
- Arbitrator bought it – The Agreements contain no constriction on jurisdiction and should be open to **all** suppliers

Implications of CETA/CFTA

What now?

- **Bottom line** → procurement is now more:
 - Competitive
 - Scrutinized
 - Susceptible to challenge
- Procurement **≠** tool for local economic or social development

Implications of CETA/CFTA

What now?

- ↪ Procuring entities may expect:
 - ↪ **Administrative costs** associated with:
 - ↪ Disclosure related to their procurement practices
 - ↪ Issuing notices and tender documents in accordance with CETA rules
 - ↪ Accounting to unsuccessful suppliers for their procurement decisions
 - ↪ Responding to supplier challenges
 - ↪ **Slowing down** of procurement process associated with:
 - ↪ Limited availability of sole-sourced tendering processes
 - ↪ Supplier challenges
 - ↪ Uncertainty as CETA requirements are being interpreted and as new bid-review mechanisms are being developed

Implications of CETA/CFTA

What now?

↪ **Devil is in the details:**

1. **Do not assume** that compliance with Canadian procurement directives or other trade agreements equates to compliance with CETA/CFTA
2. **Understand** when CETA/CFTA applies
 - ↪ Value thresholds
 - ↪ Designated contracts, goods and services
 - ↪ Exemptions

Implications of CETA/CFTA

What now?

▸ **Devil is in the details:**

3. **Be aware** of your enhanced obligations when procurement is subject to CETA/CFTA
 - Develop guidelines, procedures and training
 - Proactively protect and promote your interests by taking action with respect to CETA compliance

4. **Identify and evaluate** your risk exposure under CETA/CFTA
 - Monitor your procurement needs and processes

National Security Exemption

- Exemptions within the Trade Agreements to allow for violations in cases of Nat. Sec.
- Old Interpretation: Self-Judging
- Modern Interpretation: Objective/Subjective
- Post-Modern Interpretation: Statutory Change
- Can only be invoked by “Party”/Gov Can

“Commercial Purpose” vs “Governmental Purpose”

- ↪ Trade agreements do not protect commercial purchases.
- ↪ Raises question – what is purpose for procurement.
- ↪ Consider Crown Corps – is a purchase in a commercial or regulatory context?

Questions? Comments?

The text 'mccarthy tetrauit' is displayed in a large, bold, lowercase font. The letters are filled with a semi-transparent image of a green plant with small yellow flowers, likely a species of grass or wildflower. The text is arranged in two lines: 'mccarthy' on the top line and 'tetrauit' on the bottom line. The overall color palette is green and yellow, matching the plant imagery.

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