

Fasken Martineau Releases Primer on Procurement Rules in the New Canadian Free Trade Agreement

Procurement Bulletin

Toronto (Canada) – Fasken Martineau today released its primer on important changes in Canada's domestic public procurement regime that came into force on July 1, 2017 with the introduction of the new *Canadian Free Trade Agreement* (CFTA). The CFTA effectively replaces the *Agreement on Internal Trade* (AIT). These changes are intended to align Canada's domestic trade treaty arrangements with the *Canada-European Union Comprehensive Economic and Trade Agreement* and other international treaties. The CFTA also adds Nunavut as a party.

"This information is relevant for public sector purchasers, as it discusses how they should change their documentation and processes. It is also critical for suppliers who bid on public sector procurements, as the CFTA's regime provides suppliers with greater transparency and access to information," said Daniel Fabiano, Partner at Fasken Martineau and a leading procurement lawyer in Canada.

Highlights of the key changes in Canada's domestic public procurement regime include:

Competitive Procurement Value Thresholds

- Only opportunities that reach or exceed certain value thresholds are subject to the requirements of the CFTA. These thresholds are now subject to future adjustment for inflation.

Exclusions and Exceptions

- The CFTA updates the non-application provisions and exceptions to competitive procurement requirements in the AIT to reflect the phrasing of recent international trade treaties.
- The CFTA also adds new exclusions and exceptions, including for small business set aside programs, public-private partnerships, and (notable for IT arrangements) additional goods or services not contemplated under an existing agreement where a change of supplier would present certain challenges.

Prohibited Practices, Eligibility Conditions

- New prohibited practices include: requiring suppliers to have any previous contract awards from any Canadian public sector purchaser, requiring prior experience in a particular province or territory, or requiring prior experience if not essential to meet the requirements of the procurement.

Specifications

- Technical specifications must be based on standards, if they exist.
- Technical specifications must be based on performance and functional requirements rather than design or descriptive characteristics (where appropriate).
- When developing technical specifications for a procurement process, the CFTA prohibits a procuring entity from relying on advice from a person who has a commercial interest in that procurement – unless doing so would not have the effect of precluding competition.

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Practice Areas

Procurement

Evaluation and Negotiation

- Tender documentation must include all pertinent details about evaluation criteria, including the methods of weighting and evaluation (unless price is the sole criterion).
- A contract award must be based solely on the evaluation criteria specified in the tender notices and tender documentation.
- Procuring entities may negotiate with suppliers, but the intention or option to negotiate must be stated in the tender notice. The CFTA also allows negotiation if no tender is obviously the most advantageous (e.g., as a tie-break mechanism).
- Negotiations must occur according to established deadlines. If negotiations occur *concurrently* with multiple suppliers, all suppliers must be subject to a common deadline to submit any new or revised tenders.

Notices

- The 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 – and that provinces and territories will use that portal to publish their notices once it is developed.
- All tender notices must be available to suppliers free of charge, and must include prescribed content.
- A general contract award notice must be published within 72 days of a contract award on one of the tendering websites or systems designated by the procuring entity's government.
- If a procuring entity intends a list of prequalified suppliers to be valid for more than 3 years, then, 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.

To learn more, download a copy of Fasken Martineau's complete CFTA summary report.