

Procurement And Trade Agreements

A practical perspective on CFTA and CETA



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Each New Year is a time to reflect. In 2017 at least two changes occurred that affect supply chain practices. On July 1 the Canadian Free Trade Agreement (CFTA) and on September 21 the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) came into force. Both trade agreements have a significant impact on procurement in the public and broader sectors.

If your organization is required to comply with these trade agreements and has not yet made the necessary procedural, practice or document changes, 2018 is the year to ensure compliance.¹ This article offers some practical considerations for organizations that are required to comply with these trade agreements.

■ **Limited tendering:** Single and sole source lists and non-competitive approval forms, both part of most organizations' procurement toolkits, now require some review and changes. These exceptions and exemptions, now collectively referred to as limited tendering, have changed substantively.

One notable change that will require unpacking and reflects challenges faced in IT procurement is to allow limited tendering if a change of supplier for additional goods or services cannot be made for economic or technical reasons (such as requirements of interchangeability or interoperability with items procured under the initial procurement) and would cause significant inconvenience or substantial duplication of costs.

Additionally, organizations should be prepared to engage in relatively more competitive processes for services by licensed professionals as the list of those professionals in the CFTA non-application provisions has decreased from the Agreement on Internal Trade.

■ **Use of prior experience:** The use of prior experience as a routine evaluative requirement in procurement documentation should be scrutinized. In establishing conditions for participation, consideration must now be given to whether the prior experience is essential to meet procurement requirements.

■ **Technical standards:** The internal technical standards that organizations have been using for prescribing technical specifications for goods or services being procured should be examined. In keeping with the principles of non-discrimination, the trade agreements

have somewhat curtailed the use of internal technical standards and instead focus on documentation approved by recognized bodies and international standards, if they exist, otherwise on national technical regulations.

■ **Notices and posting award:** One area many organizations have addressed is the revision of pre-release notices and post-award publications. Some electronic tendering systems have made this practice easier by providing templates to enable compliance. Alternatively, the applicable provisions of the trade agreements read as an easy-to-follow checklist, however, care should be given as CFTA and CETA are not entirely aligned. New is the requirement to include whether the procurement will involve negotiation or electronic auction.

■ **Prequalification:** While the practice of selecting prequalified suppliers, such as vendor of record and supplier lists, continues to be supported, some details for managing these everyday practices have changed. Organizations should review whether certain requirements to allow suppliers to be added to the list at a later date are addressed and the exceptions for the same.

■ **Low bidding:** To address a concern in a competitive marketplace, a refreshed approach in dealing with low bids should be considered. With a new price verification protocol in place, if a low bid is received, an organization may verify with the supplier that it satisfies the conditions for participation and is capable of fulfilling the terms of the contract.

■ **Supplier debrief:** An adjustment to debrief processes to support more detailed disclosure requirements is needed. In addition to providing reasons why a tender was not selected, organizations are now required to include the relative advantages of the successful supplier's tender. This comparative approach adds a different dimension to the debrief process and becomes even more complex when balancing the need for disclosure with the requirement for confidentiality of supplier information. Developing a debrief manual or adjusting existing documentation may be helpful.

While the current environment has necessitated a number of immediate changes, other areas will continue to unfold. Keep your eyes open for developments regarding a single point of contact for electronic notices and a formal review body for the escalation and resolution of supplier disputes.

These new obligations can provide an opportunity for updating procurement procedures, practices and documentation. Many approaches are available that recognize the fiscal pressures under which public sector entities operate, optimize value for money and mitigate risk associated with non-compliance. We suggest that 2018 be the year for trade agreement compliance. **B2B**

• *The content of this article is not intended to provide legal or comprehensive advice on the subject matter of this article. Specialist advice should be sought.*

1) *We note that on certain matters these Trade Agreements are not aligned with each other.*