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# **Trade Agreement Obligations for Public Sector Organizations**

**August 10, 2017**

# Purpose

- ✓ To assist you in meeting your procurement-related trade obligations
- ✓ Second in a series of information sessions about trade agreements that we are planning to conduct. The first took place winter 2015-16



# Agenda

- Background – Trade Agreements
- Procurement Practices
- Reporting
- Procurement Methods
- Bid Disputes
- Action Items – Ours and Yours
- Resources

# Background

# Background: Importance of Trade Agreements

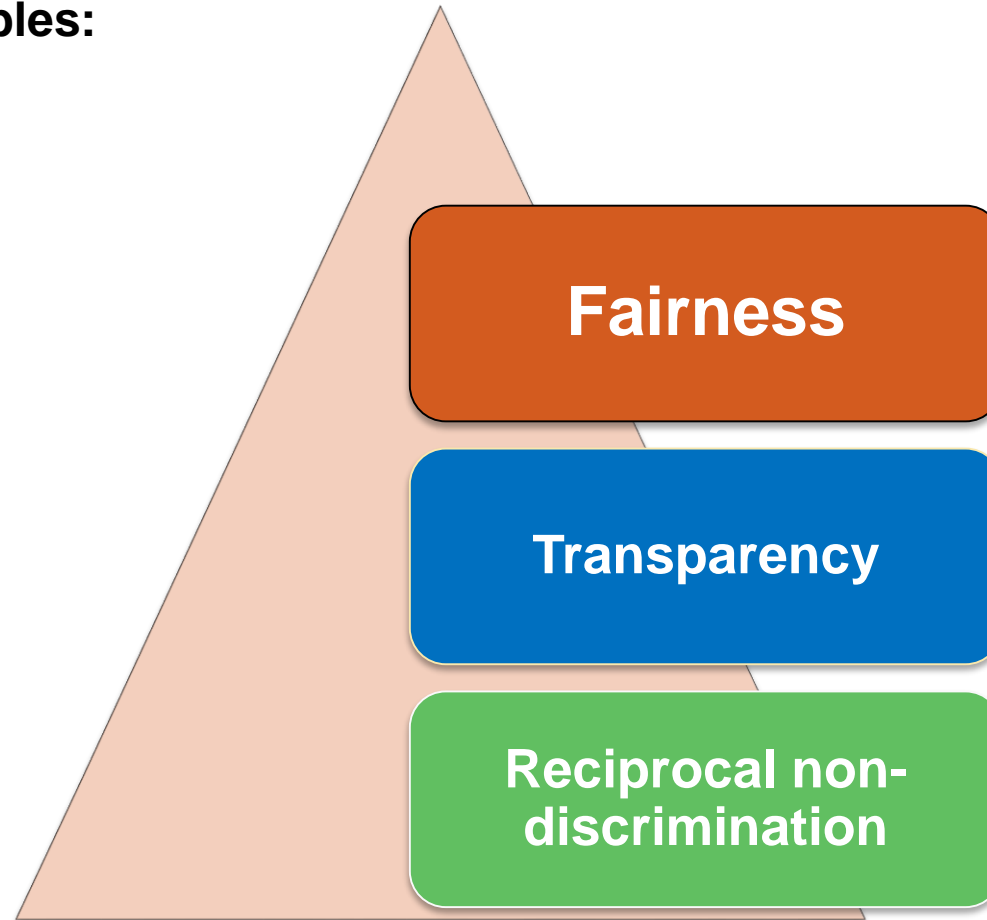
**Trade agreements support the exchange of goods and services between Ontario and other countries and provinces.**



- Trade agreements:
  - Eliminate or reduce tariffs and other barriers to trade that prevent goods and services from one jurisdiction being sold in another
  - Can increase economic growth and provide access to other markets to increase our competitiveness
  - May be negotiated with other countries and between provinces in Canada

# Background: Trade Agreements Principles

Trade agreements and procurement practices are built on the following fundamental principles:



# Ontario's Trade Commitments

Ontario is a party to two domestic trade agreements:

- **Canadian Free Trade Agreement (CFTA)**, a pan-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 (aligns with CFTA)

Ontario is also subject to international trade agreements, including:

- The **Canada-European Union (EU) Comprehensive Economic and Trade Agreement (CETA)** which is undergoing ratification in Canada and is expected to be in force in **September 21, 2017**
- The **World Trade Organization Agreement on Government Procurement (WTO-GPA)** (only for ministries and some agencies)

# CFTA and CETA – Thresholds

	<b>Procurement Type</b>	<b>Ministries and most agencies</b>	<b>Provincial Agencies commercial / industrial *</b>	<b>Municipalities, school boards, publicly funded academic, health and social services</b>
<b>CFTA</b>	Goods	\$25,000	\$500,000	\$100,000
	Services	\$100,000	\$500,000	\$100,000
	Construction	\$100,000	\$5,000,000	\$250,000
<b>CETA</b>	Goods	\$363,000	\$644,325	\$363,000
	Services	\$363,000	\$644,325	\$363,000
	Construction	\$9,062,000	\$9,062,000	\$9,062,000

\*Such as OLGC, LCBO, WSIB

Notes: CETA threshold expressed in international currency in agreement and converted every 2 years. CFTA thresholds will be adjusted every 2 years for inflation

Figures in this table are for illustrative purposes



# Background: CFTA and CETA



- Applies to municipalities, many Broader Public Sector organizations (including school boards and publicly funded academic, health and social services organizations), Ontario government ministries and agencies

# Comparing CFTA and AIT

## Sample of changes:

- Thresholds will be adjusted every two years, taking inflation into account
- Will cover nearly every sector of the economy (AIT limited coverage to 11 specific sectors or industries), including new goods and services as industries continue to evolve (for example, newly emerging green technology)
- Obligations are now included in Procurement Chapter (in AIT, some information was in annexes)
- Aligns procurement rules with international trade agreements
- Uses “negative list” approach – all sectors and public sector organizations covered unless specifically excluded

# **Key Obligations: What You Need to Know**

# Procurement Commitments

Covered entities are responsible for ensuring they are compliant with procurement-related commitments in the trade agreements.

- Key areas of Ontario's trade procurement commitments include:



**1. Information and Reporting** – Adopting new rules, standards and procedures to ensure transparency of procurements, enabled through a Canada-wide single point of access (SPA).



**2. Procurement Practices** – Revised and/or expanded rules and procedures around evaluation criteria, debriefings and duration of bid postings.



**3. Bid Dispute** – Establishing a timely, impartial administrative procedure for vendors to challenge a procurement process conducted by a covered entity.

# Information and Reporting

# Information and Reporting (1)

- Your Obligation: **Annual collection and reporting on number and aggregate value of contracts for goods, services and construction for both competitive and non-competitive procurements which are covered by CFTA and CETA**
- Our Recommendation: Please review your systems, tools and processes, and ensure you're capturing the needed information from January 1, 2017 onwards

2016 Survey:

45% to 65% of organizations surveyed track value of procurements, number of contracts, types of procurement, number of non-competitive procurements

# Procurement Practices

# Procurement Methods

- The trade agreements require open, competitive procurement process when acquiring goods and services above monetary thresholds
- Invitational and Non-Competitive procurements (described as “Limited Tendering”) possible under particular circumstances
  - Criteria varies between agreements – for example, CFTA allows for invitational and non-competitive procurements for expert witnesses, social enterprise or aboriginal procurement, but CETA does not
  - Procurements of this nature must be consistent with organization’s internal policies, and based on a strong business case (or may risk facing bid dispute)



# Bid Posting

## Under CFTA

- No minimum posting time required, however **postings must be for a reasonable period of time** for vendors to prepare and submit responsive tenders
- Compliance with internal policies for posting periods

## Under CETA

- **Open procurement opportunities must be posted for a minimum of 40 calendar days** (note different than BPS Procurement Directive)
- Can be reduced under particular conditions, bid posting times can be reduced:
- By 5 days if bids are posted electronically
- By 5 days if bids are received electronically,
- By 5 days if tender document is posted at same time as the procurement notice
- To 10 days if previously published notice of planned procurement (has specific requirements to apply this correctly)
- Posting times for **other types of procurement opportunities**, refer to CETA article 19-10

# Award Notification

Your obligation: award notices to be published **within 72 calendar days** of award

Our recommendation: As is likely already your practice, notify successful vendor, then unsuccessful vendors, then post the award information

2016 Survey:

more than 50% of organizations like yours post award information electronically, with 10% more preparing to do so

# Debriefings

Your Obligation: **Debriefings to be offered upon request of vendor.** Information to be shared includes: name of successful vendor, value of the successful bid, reasons the proposal was not selected

Our Recommendation: review your process, consult the Bidder Debriefing Preparation Guide on our Information for Buyers Page

2016 Survey:

almost 60% of respondents have a formal debriefing process for unsuccessful vendors

# Single Point of Access

**Single Point of Access (SPA)** will be a single electronic point of access to allow vendors to quickly retrieve information about all applicable Canadian opportunities

- To be created by Federal Government within 5 years of CETA's implementation
- Organizations covered by CETA will be required to make procurements available on the SPA
- SPA may link to your procurement opportunities on your current e-tendering system
- Will be adapted for use by parties covered by CFTA

# Bid Disputes

# Bid Dispute Process (1)

- Your Obligation: An **independent and impartial process to allow a vendor to challenge a procurement** if the vendor believes it was not conducted in accordance with trade agreement rules. Resolution to be achieved within 90 days (or 135 days under extenuating circumstances)
- Require rapid interim measures
- Remedies may be applied as corrective action or compensation for loss of damage suffered limited to either/both bid development costs and dispute costs.
- Bid Disputes are between vendors and procuring organization, and can resolve potential procurement-related trade agreement breaches

# Bid Dispute Process (2)

- Our Recommendations:
  - Familiarize yourselves with article 19.17 of CETA and article 518 of CFTA
  - Seek independent legal advice to ensure you're in compliance

2016 Survey:

86% of respondents  
have a process for  
addressing procurement  
complaints

# Ontario's Revised Bid Dispute Process

- Ontario will be launching an alternative service delivery method for bid dispute resolution
  - Operational expected summer 2018
  - Will use impartial, third-party resolution services
  - Available for use by provincial agencies, BPS organizations and municipalities
  - Consistent approach for vendors and buyers to resolve complaints
  - Cost to be borne by unsuccessful party to the dispute
- Further communications and webinar will be available in future



# **Future Bid Dispute Resolution Services Poll**

# Ten Tips to Avoid a Bid Dispute

1. Devote **sufficient time** in the planning stage of the procurement, to ensure all considerations have been addressed

2. Seek **legal advice**

3. Write clear, unbiased functional specifications or performance requirements

4. Draft evaluation rated criteria that promotes a consistent and fair review of the bids received and ensures a clear alignment between scope / performance requirements, evaluation criteria and the pricing form

5. Use **procurement document templates** that align with current case law and trade agreements

6. Provide vendors sufficient time to review the procurement document and ask questions during **Question and Answer Period**

7. Limit **mandatory requirements** to only essential requirements

8. Select evaluators with **relevant / technical subject matter expertise** to effectively evaluate a bid

9. Conduct the evaluation in the manner described in the procurement document

10. Provide bidders with **specific, clear reasons** why their bid was not successful during a debriefing meeting

# Action Items – Ours and Yours

# Our Action Items

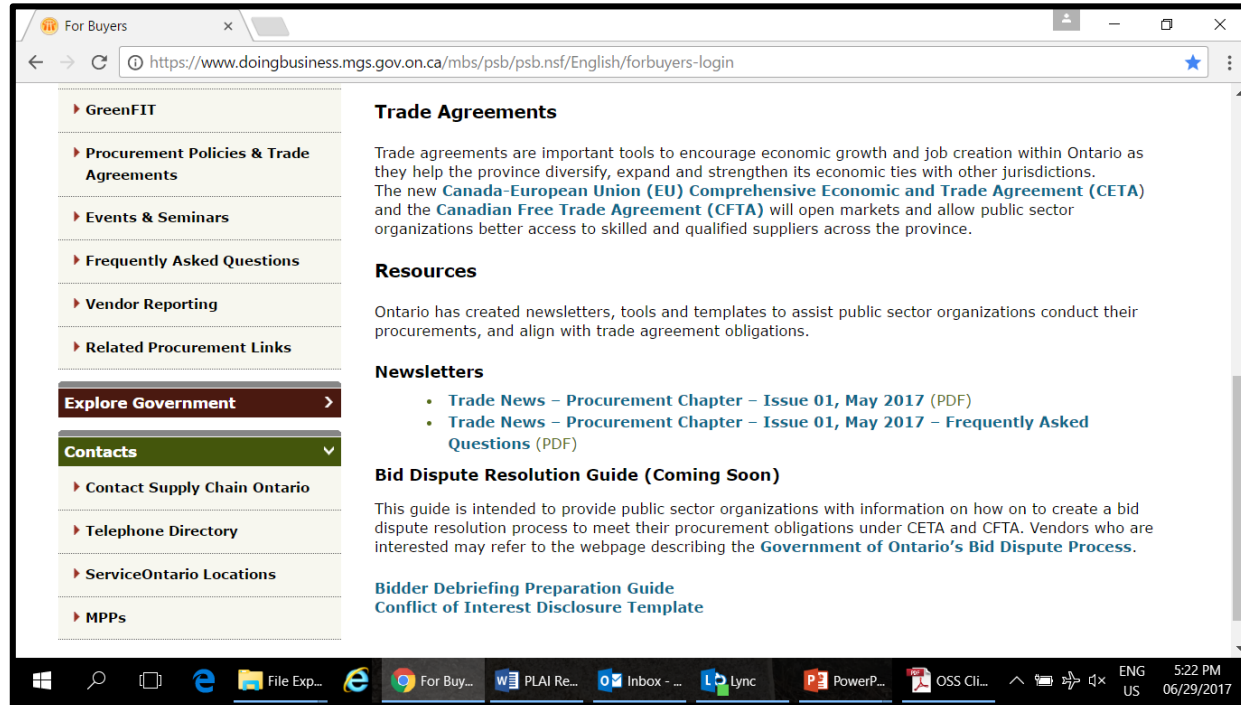
- Implementing revised bid dispute resolution vendor of record arrangement
- Development of reporting strategy
- Developing additional implementation support materials to help you meet your procurement obligations (such as newsletters)

# Your Action Items

- Learn about trade agreements, by reviewing their procurement-related sections
- Review your policies and practices
- Gather your reporting data
- Review resources available

# Resources

## Information for Buyers Webpage



CFTA  
CETA

# Questions?

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