

Trade Agreement News

Procurement Chapter

Newsletter #2, April 2018

CFTA and CETA – Some Background

Since the Canadian Free Trade Agreement ([CFTA](#)) and most provisions of the Canada-European Union Comprehensive Economic and Trade Agreement ([CETA](#)) have entered into force, we've received many important questions from public sector organizations trying to further understand their trade agreement obligations. Some of the most commonly asked questions have been on topics such as thresholds, exceptions and posting periods. In this newsletter, we will address these topics with the goal of providing greater clarity.

But first, we'll provide some context.

As outlined in the May 2017 newsletter, the Ontario government has made procurement commitments under different trade agreements. Commitments under CFTA and CETA apply to Broader Public Sector organizations (including school boards and publicly funded academic, health and social services organizations), municipalities, and Ontario government ministries and agencies (with some exceptions).

CFTA provides Ontario vendors with increased access to the wider Canadian marketplace and vendors from other provinces with greater access to opportunity in Ontario. And CETA provides vendors from Ontario and across Canada with access to the European Union, the largest single market in the world, with over 500 million consumers. Similarly, it offers European vendors significantly improved market access to Canada.

Between them, CFTA and CETA provide you, as public sector buyers, access to a more competitive range of vendors and high quality goods and services. In order to create a level playing field and ensure accountability from all parties, both these trade agreements include government procurement rules with which covered public sector organizations are expected to comply.

Covered Procurement

Ontario's trade agreement procurement obligations apply to "covered procurement." We recommend you review the agreements themselves and seek independent legal advice when determining whether a procurement you're considering is covered under the relevant trade agreement.

Some helpful factors to consider when determining whether a procurement is covered under a trade agreement include whether:

- The procuring entity itself is covered under the agreement;
- The good or service being procured is covered under the agreement;
- The procurement meets or exceeds the agreement's thresholds; and
- None of the agreement's exceptions apply.

Threshold Updates

Trade agreement thresholds refer to the value at which trade agreement procurement rules apply. The thresholds at which CFTA and CETA rules apply are adjusted every two years, with the most recent revisions having gone into effect on January 1, 2018.

You can find the updated thresholds by going to the [Information for Buyers](#) section of the Doing Business with the Government of Ontario website.

Exceptions

CFTA and CETA identify exceptions whereby certain types of procurements are not subject to (that is, not required to follow) trade agreement rules. We recommend you seek independent legal advice when determining whether an exception may apply to your procurement. Please keep the following in mind:

- While many exceptions are found in both CFTA and CETA, some are only found in one agreement but not the other;
- Exceptions in CFTA and CETA are not necessarily the same as those found in other trade agreements that you may also be required to follow (for example, the Trade and Cooperation Agreement between Ontario and Quebec) or have been required to follow in the past (for example, the Agreement on Internal Trade, which was replaced by CFTA on July 1, 2017);
- Exceptions may be found throughout the trade agreements – in the procurement chapters themselves, in the annexes to the procurement chapters, and in other chapters within the agreements. For example, both CFTA and CETA have exceptions related to aboriginal peoples which are not prescribed within the procurement chapters themselves; rather, these exceptions can be found in other chapters and annexes of each agreement; and

- Although CFTA and CETA identify exceptions where the trade agreements themselves may not apply to certain kinds of procurements, other policies and processes governing your organization might still set rules for these procurements.

Posting Periods

Under CETA's requirements, you are obligated to post most procurements opportunities for a minimum of 40 calendar days, with the option of reducing the posting period by five days for each of the following:

- Posting the notice of intended procurement electronically;
- Making all tender documentation available electronically from the date of the publication of the notice of intended procurement; and
- Accepting tenders electronically.

In some cases, the minimum posting times may be further reduced. For details, see CETA, Article 19:10 – Time-periods.

CFTA requires that public sector buyers post their procurement opportunities so that vendors have “a reasonable period of time” to respond. When determining a sufficient time period, you must take into account certain factors, including the nature and complexity of the procurement, and the degree to which subcontracting might come into play. For further details, see CFTA, Article 511.

When it comes to the posting periods for procurement opportunities, in addition to trade agreement obligations, you will need to consider any other relevant policies with which you are required to comply (for many of you, this would include the Broader Public Sector Procurement Directive).

Implementation Support

On the [Information for Buyers](#) section of the Doing Business with the Government of Ontario website, which is updated as information becomes available, you will find newsletters, presentations on trade agreements, and other materials. To determine the extent to which these materials pertain to a procurement you're conducting, you may need to confer with your own legal counsel.

Finally, should you have additional general questions about how to implement the procurement chapters of CFTA, CETA or other trade agreements, you're welcome to contact Supply Chain Ontario at BPSSupplyChain@ontario.ca.