

# Ontario Government Trade Agreement Webinar

## Question and Answers

The following questions were asked at Supply Chain Ontario's July 12, 2017 webinar on Trade Agreement Obligations for Public Sector Procurement Organizations:

### **TIMELINES FOR COMING INTO FORCE**

**Q1: Are these requirements currently in force? I read that they were supposed to come into force in June 2017.**

A1: The Canadian Free Trade Agreement ([CFTA](#)) has been in force since July 1, 2017. The Canada-European Union Comprehensive Economic and Trade Agreement's ([CETA](#)) procurement chapter is expected to be in force as of September 21, 2017.

### **CETA, CFTA AND OTHER INCLUDED ENTITIES**

**Q2: As an organization classified as an "other included entity," is everything included in this webinar applicable to us?**

A2: Yes. The content of our presentation on Trade Agreement Obligations for Public Sector Organizations applies to Other Included Entities.

### **POSTING PROCUREMENT OPPORTUNITIES**

**Q3: How are tender notices to be posted? Should it be separate from the RFX opportunity?**

A3: There is no need to publish the tender notice separately from the procurement document.

Procuring entities are required to publish procurements valued at or above the applicable trade agreement on a tendering website.

Each competitive tender notices shall include, among other details:

- the name and address of the procuring entity and other information necessary to contact the procuring entity and obtain all relevant documents relating to the procurement, and their cost and terms of payment, if any;
- a brief description of the procurement;

- the nature and the quantity, or estimated quantity, of the goods or services to be procured unless those requirements are included in tender documentation; and
- the address and final date for the submission of tenders.

“RFx” is a term used to refer to a family of requests (RFP, RFQ, etc.) for documents used to solicit bids from vendors.

**Q4: Is there specific information that needs to be posted for the 5 days to be taken off the 40 days posting time?**

A4: For details on the manner in which posting times might be reduced, see CETA, Chapter Nineteen – Government Procurement, Article 19:10 – Time-Period.

**Q5: We’re a school board. Can we decide - on the basis of Article 503 (4b) of the CFTA - to limit tenders to Canadian goods, services and vendors?**

**If yes, will my organization then be exempt from the 40-day publication deadline imposed only under the CETA?**

A5: As per Article 503 (4b) of CFTA, except as otherwise required to comply with international obligations, and provided that its purpose is not to avoid competition or to discriminate against any other Party’s goods, services, or suppliers, a procuring entity may: (a) accord a preference for Canadian value-added; or (b) limit its tendering to Canadian goods, services, or suppliers. However, entities required to comply with the BPS Procurement Directive are subject to the Directive’s mandatory requirement #14 – Non-Discrimination, which requires organizations not to discriminate or exercise preferential treatment. CFTA defines Canadian suppliers as “a supplier that has a place of business in Canada.”

Please note that under CETA, entities cannot accord a preference for Canadian value-added or limit their tendering to Canadian goods, services, or suppliers. Please also note that for procurements at or above the CETA thresholds, you would be required to comply with CETA’s timelines for posting opportunities (see above).

**Q6: What if there are circumstances that require less than the CETA posting requirements, i.e. urgent situations that could have been avoided, but happen anyway?**

A6: Failure to plan is not an excuse for not meeting the procurement obligations in CETA. Note that procurements valued at or above trade agreement thresholds, may use an invitational or non-competitive procurement process if an urgent situation arises that is clearly beyond a procuring entity’s control. (see CETA, Article 19.12 (1d) – Limited Tendering).

**Q7: Are services for licensed professionals (except for architects) still exempt from open bidding – for example, legal services?**

A7: Under CFTA and CETA, some but not all professional services are covered. In general, more professions are covered than was the case with the Agreement on Internal Trade. You'll find more details for CFTA in Article 504 – Scope and Coverage, and for CETA in Article 19.2 – Scope and Coverage, and in Annex 19-5 Services.

Please note that if CFTA and CETA indicate that particular services are not covered, you should still refer to other policies and procedures you're required to follow in the event they require you to acquire the services through open, competitive procurement.

## **THRESHOLDS**

**Q8: If we are following the BPS Directive thresholds where construction must be tendered if over \$100k, do we now follow the CFTA construction threshold to tender construction if over \$250k?**

A8: No. As per the BPS Procurement Directive, organizations required to follow that directive must conduct an open competitive procurement process for construction where the estimated value is \$100,000 or more.

Additionally, CFTA requires construction-related procurements valued at or above \$250,000, conducted by regional, local, district, and other forms of municipal government, municipal organizations, school boards, and publicly-funded academic, health, and social service entities, as well as any corporation or entity owned or controlled by one or more of the preceding entities, to be done in a competitive manner as prescribed by CFTA unless an exception is warranted, in which case an appropriate approval must be sought with a robust business case.

**Q9: We understand that this webinar is based on trade treaties however it is our understanding the interprovincial trade treaties have to be as robust if not more so than the former Agreement on Internal Trade. Considering that the dollar thresholds are being adjusted every 2 years, what thresholds are we to follow in Ontario, BPS or CFTA?**

A9: The threshold related to goods, services and construction posted in CFTA must be considered when conducting covered procurements. If the thresholds posted in the BPS Directive are more liberal (i.e. lower) than those posted in CFTA, then the BPS threshold must be followed. Making procurement at lower thresholds competitive will ensure your compliance with the applicable trade agreement.

**Q10: Could you clarify the currency for the thresholds (e.g. CAD or USD)? What are the thresholds in Canadian Dollar terms?**

A10: The thresholds reflected in our webinar presentation are in Canadian dollars.

### **POSTING AWARDS**

**Q11: Can you elaborate on posting awards specifically to limited tenders?**

A11: As stated in both CFTA and CETA, not later than 72 days after the award of each contract covered by this Chapter, a procuring entity shall publish a notice announcing the award. The requirements are spelled out in greater detail for CFTA in Article 516 – Transparency of Procurement Information and for CETA in Article 19.5 – Transparency of Procurement Information. This notice would include, but not be limited to, a description of the circumstances of the use of limited tendering.

### **DEBRIEFINGS**

**Q12: Is there a time-period or cut-off date from award date for vendor to request debrief?**

A12: All unsuccessful vendors who participate in a covered procurement must be offered a debriefing opportunity. In line with both the OPS and BPS Procurement Directives, procuring entities must confirm the right to a debriefing, in writing, and allow vendors 60 calendar days following the date of the written communication to respond. CFTA and CETA do not specify any cut-off time period.

### **REVISED BID DISPUTE PROCESS**

**Q13: Will there be a roster of qualified agents to undertake bid disputes?**

A13: Under the new Vendor of Record arrangement for bid disputes that Ontario is developing, public sector organizations will have access to independent, third-party review. Further details are being established, and will be shared prior to its expected implementation date of July 2018.

**Q14: Does this new bid dispute process replace the bid dispute process in the BPS Directives?**

A14: All covered entities are required to have in place a bid dispute mechanism or system that is independent and impartial to allow vendors to challenge a procurement if they believe it was not conducted in accordance with trade agreement rules. A rapid interim measure is also an important feature of the new bid system to allow vendors to fully participate in the procurement process. Therefore, entities covered in the trade agreements may be required to revise

their current bid protest process to include specific minimum mandatory requirements (as necessary).

**Q15: Can an award be paused under these provisions, while a dispute is underway?**

A15: Yes, CETA and CFTA allow the use of rapid interim measures, such as pausing the award of a contract, in order to preserve the vendor's opportunity to participate in the procurement process, while their complaint is under review. The use of rapid interim measures is at the discretion of the reviewer of the bid dispute where circumstances warrant.

**Q16: Can we use our organization's Ombudsman to oversee the bid dispute process?**

A16: Only if such Ombudsman is operating independently of your organization. If not, you may not be complying with the requirements of the trade agreement related to impartial and independent bid dispute systems. The best advice is to use a system or a body that is completely independent of your organization.

**Q17: For covered entities which do not currently have a formal bid dispute process, will they need to create an interim process until Ontario streamlines its process? What are other government entities required to do with any bid disputes received in the interim prior to the summer 2018?**

A17: Covered entities are expected to be in compliance with the bid dispute requirements in CFTA and CETA, and may if they wish, make use of the revised bid dispute process Ontario is putting in place, once it is available. Alternatively, they could make use of their own processes, so long as they are consistent with the trade agreements. Until the revised bid dispute process is in place, Ontario's Bid Dispute Resolution Guide, which will soon be available on our [Information for Buyers](#) page, may be of assistance.

## **REPORTING**

**Q18: Are the new reporting requirements available yet? To whom will we submit our reporting? Is there a template available that shows how you'd like to see this info?**

A18: At this point, details are being determined with respect to the specifics of the reporting requirements. In the meantime, you should be collecting the required data from January 1, 2017 onwards so that it may be integrated into the reports.

For reporting purposes CFTA has a lower threshold than CETA, so by collecting data based on CFTA's thresholds, you will have also collected the data required for CETA.

You will be expected to collect data on the number and total value of contracts for goods, services and construction for open competitive procurements and those procurements for which an allowable exception under an applicable trade agreement was used.

It is expected that Ontario will be looking to collect and report on the first set of data in early 2018.

We will reach out to share more information regarding reporting as details become available.

**Q19: Do we need to report on limited tendering?**

A19: Trade agreements require that annual reports be submitted on all covered procurements conducted. As noted above, we will reach out to share more information regarding reporting as details become available.

**SINGLE POINT OF ACCESS**

**Q20: Who is required to use the single point of access and what is required to be posted on it?**

A20: The Government of Canada is required to develop and launch a Single Point of Access (SPA) within five years of the commencement of CETA. All entities covered by CETA will be required to make their CETA-related tender notices (not the procurement documents themselves) available on the SPA.

Once the SPA is developed for CETA, the Government of Canada shall consult with the other CFTA Parties in order to determine how to adapt the SPA for the purposes of CFTA. Once all CFTA Parties agree that the SPA is suitable, all entities covered by CFTA will be required to make their CFTA-related tender notices directly accessible through the SPA. Please note that entities may continue using the electronic tendering sites that best suit their business needs, as long as they comply with applicable trade agreements.

More details will be provided about the SPA's functionality as they are determined.

**AFFECTED ORGANIZATIONS**

**Q21: Will Ontario be releasing a list of which organizations fall within each category of CETA and CFTA as other provinces have? If not, in particular, will you be providing guidance for organizations to determine which category they fall into?**

A21: CETA and CFTA set out which organizations are required to follow the respective agreements. Please note that CFTA uses a negative list approach, meaning that all government entities are required to comply with the procurement chapter unless specifically excluded or a relevant exception applies.

**Q22: How do you know if you're a government enterprise or an agency of an industrial nature such as WSIB?**

A22: Agencies of a commercial or industrial nature, such as the Liquor Control Board of Ontario, Ontario Lottery and Gaming, and the Workers Safety Insurance Board, are those which have a commercial or industrial mandate. This criteria applies to a small number of agencies.

**Q23: Will these trade agreements be implemented through legislation or regulations, particularly regarding municipal obligations?**

A23: In Ontario, CETA and CFTA will not be implemented through legislation. However, all public sector entities covered by CETA and CFTA are still required to comply with their procurement-related obligations. Ontario will continue to provide support in assisting you to meet these obligations.

## **INDIGENOUS PEOPLES**

**Q24: Wondering if “with respect to Aboriginal peoples” has the same meaning as Aboriginal/Indigenous organizations (i.e. are Indigenous organizations exempt)?**

A24: Yes. Procurements with respect to and in support of Indigenous peoples are exempt from the requirements of CFTA and CETA.

## **BPS PROCUREMENT DIRECTIVE**

**Q25: Will the BPS Procurement Directive be rewritten to align with CETA and CFTA? And does the CFTA now take precedence over the BPS Procurement Directive?**

A25: The BPS Directive is not being updated at this time. Your own review of CFTA and CETA, in addition to the webinars and online resources we're providing on our [Information for Buyers](#) page, should assist you in meeting your trade agreement obligations. Organizations are required to follow the obligations of the directives and trade agreements which apply to them.

## **OPS PROCUREMENT DIRECTIVE**

**Q26: Has the OPS Procurement Directive been updated to reflect thresholds under CFTA and CETA, along with other obligations?**

A26: The OPS Procurement Directive is still under review. In its current form, its requirements, including the thresholds, essentially align with CFTA and CETA. Your own review of CFTA and CETA, in addition to the webinars and online resources we're providing on our [Information for Buyers](#) page, should assist you in meeting your trade agreement obligations. Organizations are required to follow the obligations of the directives and trade agreements which apply to them