CFTA and CETA: Ten "Tips" for Ontario Broader Public Sector Entities

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his primer highlights ten "tips" respecting public procurement for Ontario broader public sector entity ("BPS Entity") consideration due to: (i) the replacement of the Agreement on Internal Trade ("AIT") by the Canadian Free Trade Agreement ("CFTA") as of July 1, 2017; and (ii) the provisional imposition of the Comprehensive Economic Free Trade Agreement ("CETA") (including Chapter 19 (Government Procurement)) between Canada and the European Union effective as of September 21, 2017 (subject to certain Canadian and Provincial regulatory enactments).

1. Do not assume that continued compliance with the BPS Procurement Directive (Ontario) (the "Directive") equates to compliance with the CFTA or CETA. As of the date of this article, the Directive has not been updated to reflect the application of either the CFTA or CETA. In many respects, the Directive and its corresponding Implementation Guidebook are inconsistent with the CFTA and CETA. While the Directive has never applied to all Ontario BPS Entities, it has in many cases acted as a "best practice"; But no longer. An independent assessment of the CFTA and CETA as against the Directive is required before relying upon any provision of the Directive.
2. Do not assume that a BPS Entity can ignore the Directive. While not wholly consistent with either the CFTA or CETA, the Directive continues to apply to many BPS Entities where the Directive does not conflict with the CFTA or CETA; normally by the Directive placing constraints upon BPS Entities that do not exist in either the CFTA or CETA. One example would be the concept of "Consulting Services" and the procurement requirements and procurement thresholds that apply to "Consulting Services" under the Directive. While not a requirement of either the CFTA or CETA, this requirement lowers the competitive procurement monetary threshold for "Consulting Services" but is not inconsistent with, but rather more severe on BPS Entities than, either CFTA or CETA and therefore continues to be valid and binding on applicable BPS Entities.
3. The public procurement exceptions to competitive procurements under the CFTA and CETA differ from those that were available under the AIT (or those referenced in the Directive Implementation Guidebook) — caution is advised. Any use of an exception, non-application or exemption to a competitive procurement referenced in the Directive Implementation Guidebook needs to be carefully scrutinized as against the CFTA and, if applicable, CETA. The

exception references in the Implementation Guidebook do not apply unless expressly stated in the CFTA, CETA or other applicable treaty.

4. New Disclosure Requirements for Debriefings under CFTA and CETA. Under the Directive, the primary purpose of a debriefing was to speak to the strengths and weaknesses of a supplier's submission, and if information about other suppliers was sought, then it was stated that the option of a freedom of information request could be made known to, and lodged by, the supplier. Under the CFTA and CETA, the purpose and level of disclosure has changed. Specifically, under CETA, there is a requirement to, "provide promptly any information necessary to determine whether a procurement was conducted fairly, impartially and in accordance with this [procurement] Chapter, including information on the characteristics and relative advantages of the successful tender." Under the CFTA, "a procuring entity shall, on request, provide an unsuccessful supplier with an explanation of the reasons why the procuring entity did not select its tender." In each case, the requirement implicitly or explicitly requires a direct comparison to the successful supplier, though both the CFTA and CETA do provide for corresponding protections for the successful supplier's information, to the extent it might prejudice fair competition between suppliers.
5. Requirement for Administrative or Judicial Review Procedures. Under the AIT, Ontario BPS Entities were not required to have independent binding dispute resolution processes. Under the AIT and the Directive, after a debriefing process, most BPS entities would normally have provided for an internal review process should a supplier have a specific grievance. Now, each of the signatory parties to the CFTA are to institute, "a timely, effective, transparent and non-discriminatory administrative or judicial review procedure" to address breaches of the Procurement Chapter and including, "procedures that provide for rapid interim measures to preserve the supplier's opportunity to participate in the procurement." We understand that the Province of Ontario intends to make such resources available pursuant to a VOR as of September, 2018. Until then, however, it would be an appropriate practice for Ontario BPS Entities to consider how comparable processes can be instituted by them with respect to their public procurement disputes, should a supplier seek to rely on the CFTA provisions. A potential damages award must also be contemplated by the BPS Entity, which may be limited to the cost of the procurement preparation or the costs of the challenge or both. Substantially similar rules and damages provisions apply under CETA.
6. Apply caution when developing conditions for participation. In light of the right to administrative or judicial review, including procedures for rapid interim measures to preserve a supplier's opportunity to participate in a procurement, particular attention must be paid to conditions that limit participation in a procurement. Specifically, "A procuring entity shall limit any conditions for participation in a procurement to those that are essential to ensure a supplier has the legal and financial capabilities, and the commercial and technical abilities to undertake the relevant procurement." As such it would not generally be appropriate to deny participation because the supplier has not previously contracted with the BPS Entity or has relevant experience but in another jurisdiction. The CFTA and CETA have both clarified, however, the ability to exclude a supplier that has significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts.
7. Be advised that rules respecting the prequalification of Suppliers and VORs. Both the CFTA and CETA reflect a common belief that lists of prequalified suppliers can provide a convenient means of reducing participation over a long period of

time, by other suppliers. Accordingly, there is now a requirement to provide an annual opportunity for suppliers to be added to refreshed lists, if the list is to remain active for longer than three years.

8. Caution: contract negotiations, if desired, should continue to be specified in the procurement documentation. As currently permitted by the Directive, both the CFTA and CETA contemplate the ability to conduct negotiations with suppliers, and to reject a supplier that does not enter into a contract with the BPS Entity. What appears odd though is the ability under both the CFTA and CETA to conduct negotiations where, "it appears from the procuring entity's evaluation that no tender is obviously the most advantageous in terms of the specific evaluation criteria set out in the tender documentation." Traditional procurement processes would clearly specify scoring criteria and process, but the above-noted CFTA and CETA right may exist even in circumstances where the procurement document does not specifically provide for it. Any use of this right without specific provisions in the procurement document is arguably problematic; particularly in light of the new debriefing and administrative or judicial review processes, and would not generally be considered a recommended procurement approach in those circumstances.
9. Consider CETA as an impetus to electronic auctions and innovation procurement generally. Interestingly, in addition to liberalized trade, perhaps CETA will also bring forth public procurement best practices from Europe to Canada. Europe has traditionally taken the lead on such matters as innovation procurement and reverse electronic auctions. Those "best practices" are reflected in CETA (and, in turn, in the CFTA), and are worth considering, should the BPS Entity be considering these approaches to public procurement. For a general discussion on innovation under the CFTA, see my companion article, "The CFTA and Innovation Procurement — A Primer for Broader Public Sector Entities in the Healthcare Sector".
10. Canadian Value-Add. Like the AIT, the CFTA does not permit BPS Entities to prefer a particular Province or region, but it does permit a preference for Canadian value-added and limiting tendering to Canadian goods, services or suppliers. This right would be subject to Canada's international treaty obligations, including CETA. Under the AIT, BPS Entities had been limited to according a preference of no greater than 10 per cent for Canadian value-add.

In summary, Ontario BPS Entities must understand and accept that they may not have a reasonable defence against supplier claims by simply arguing that they erred by assuming that the BPS Procurement Directive and related Implementation Guidebook reflected their CFTA or CETA obligations, or that they did not institute processes and procedures respecting administrative fairness to suppliers, because they were waiting for the Province of Ontario to act. Given the new robust debriefing and administrative or judicial procedural requirements, an Ontario BPS Entity's most prudent tactic to public procurement is a complete independent understanding of their CFTA and CETA obligations, and a predictable approach to process and procedure consistent with those obligations.

By

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