# The CFTA And Innovation Procurement — A Primer For Broader Public Sector Entities In The Healthcare Sector

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Effective as of July 1, 2017, the Agreement on Internal Trade (the "AIT") will be replaced by the Canadian Free Trade Agreement (the "CFTA"). It will be binding upon all Provinces and Territories of Canada as signatories.

In the case of Ontario, pending changes to the Broader Public Sector Procurement Directive (the "Directive") are expected shortly to permit the Directive to be consistent with the CFTA as of July 1, 2017. The Directive is binding upon Ontario public hospitals, and as well as other health and community healthcare publicly funded organizations that have received $10 Million or more in public funds from the Government of Ontario in the previous fiscal year.

This article is a high level summary of certain aspects of the CFTA that ought to be considered in developing innovation procurement strategies for broader public sector entities operating in healthcare sector.

Chapter 5 of the CFTA, "Government Procurement" — has a specific purpose, "The purpose of this Chapter is to establish a transparent and efficient framework to ensure fair and open access to government procurement opportunities for all Canadian suppliers." Interestingly, the AIT had a continuation of such sentence which is now deleted, "[…] in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency."

As will be discussed below, the CFTA does not specifically address innovation procurement, and many of the amendments are focused on establishing a more rigid regulatory regime consistent with traditional procurements, together with the requirement of putting in place administrative or judicial review procedures for the benefit of suppliers which wish to challenge public procurements under the CFTA.

Further commentary will have to await the provision of an amended Directive that will address the CFTA for July 1, 2017 implementation for applicable Ontario broader public sector entities.

Changes introduced by the CFTA (as against the AIT) relevant to the conduct of innovation procurements include the following:

1. **Exception for Legitimate Objectives**. Article 501 of the CFTA refers to the permitted use of the "Legitimate Objectives" under Article 202 for covered procurements by a Party to the CFTA (*i.e.*, Province of Ontario) —*i.e.*, establish a level of protection it considers appropriate to achieve a legitimate objective. "Legitimate Objectives" permits the use of appropriate measures as necessary to achieve the legitimate objective provided it: (i) is not applied arbitrarily or to effect unjustified discrimination; (ii) is not a disguised restriction on trade; and (iii) there are no reasonably available alternatives. It will be interesting to determine how Ontario, as a Party to the CFTA, will apply, if at all, Articles 501 and 202 to in order to actively foster the development of innovation procurements within Ontario.
2. **Local Content or Economic Benefits**. Per Article 503.3, criteria to favour goods or services, including for construction contracts, from a particular Province or region is not permitted.
3. **Canadian Preference**. Per Article 503.4, subject to international obligations and provided its purpose is not to avoid competition or discriminate against another Party to the CFTA, a preference to Canadian value-added or a limitation to Canadian goods, services or suppliers is permitted. Ostensibly, these may be applied when a transaction value falls below those international treaty obligations or apply to a good or service to which such treaty obligations do not apply. A previous limitation on a preference for Canadian value-add at no greater than 10% has been removed under Article 503.5 and a number of other specific restrictive practices consistent with the common law on procurement discrimination have been added.
4. **Procurement Thresholds**. The procurement value is to be estimated at the time of publication of the procurement notice, and Article 504.4 sets out those thresholds subject to inflationary increases based on a specific index. In the case of publicly funded health or social service organizations, the following thresholds apply: (i) $100,000 for goods or services; and (ii) $250,000 for construction (as they have been, subject to the new inflation index). Further description of the valuation of the procurement is set out in Article 505, and includes the total value of options, if options are available under the procurement.
5. **Buying Groups**. While Buying Groups were addressed under the AIT, further regulatory requirements are set out in the CFTA. Interestingly, currently under the Directive Implementation Guidebook, applicable broader public sector entities are to exercise control over the procurement compliance of its buying group while Article 504.8 suggests there may be exceptions to that where it has little or no control over the procurement process.
6. **Public-Private Partnership**. Under Article 504.10, differing procurement rules apply to a public-private partnership.
7. **General Exemptions from the Public Procurement Chapter**. A number of significant changes have been made to the general exemptions available to the public procurement chapter under Article 504.11, including narrowing the limitation of the exemption for provincial licensed professionals to lawyers or notaries (as opposed to including doctors, etc.). Helpful exemptions which remain include, (i) procurement of goods or services primarily financed from donations that require the procurement to be done in a manner inconsistent with the Procurement Chapter; and (ii) procurement from philanthropic institutions, non-profit organizations, prison labour, or natural persons with disabilities.

8. **Tender Notices**. Per Article 506, a detailed tender notice is now to be provided free of charge, and is to include details on the selection process if only a limited number of suppliers will be invited to bid, and is to state if negotiation or electronic auction is to be used.
9. **Exclusion of Bidders**. Per Article 507, suppliers can be excluded for a number of reasons including "significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts," and "professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the supplier". "In assessing whether a supplier satisfies the conditions for participation, a procuring entity shall evaluate the financial capacity and the commercial and technical abilities of a supplier on the basis of the supplier's business activities both inside and outside the territory of the Party of the procuring entity."
10. **Supplier Prequalification Regime**. A pre-qualified list of suppliers is permitted but new suppliers will be invited annually, if the list is to be used for 3 or more years. The process for selecting from the list is to be set out as part of pre-qualification, or else all pre-qualified suppliers may bid on each procurement.
11. **Technical Specifications**. Article 509 addresses technical specifications. The focus of Article 509 seems to be "performance and functional requirements", rather than design or descriptive characteristics, and to "base the technical specifications on standards if they exist". As such, an opportunity seems to be lost to set out specifications from the perspective of a "solutions based" approach. Article 509(5) permits reference to the promotion of conservation of natural resources or to protect the environment. Article 509(6) references provisions to protect sensitive information, including storage, hosting or processing not outside of Canada. Interestingly, Article 509(8) suggests that a procurer should be realistic in setting out delivery dates in the procurement documentation.
12. **Time to Respond**. Article 511 does not provide a minimum time period to respond to a procurement but states that a number of factors should be considered including procurement complexity, the number of subcontractors, and bidders' timely access to documentation.
13. **Negotiation**. Article 512 acknowledges the ability to conduct contract negotiations if addressed in the procurement documents, and provides for both concurrent and sequential negotiations, as appropriate and disclosed. The Directive contemplated negotiations with the highest ranked bidder only. There is a suggestion of negotiations even if not referenced in the procurement documentation if "no tender is obviously the most advantageous". This sounds subjective and would not be a preferred course in most circumstances unless specifically detailed as such in the procurement documentation as a "tie breaker". Clarification on this point would be welcome.
14. **Sole Source Procurement**. Article 513 considers exceptions for sole source procurement. One exception that has been elaborated upon, and is relevant to innovation procurement is Article 513(f):
    1. if a procuring entity procures a prototype or a first good or service that is developed in the course of, and for, a particular contract for research, experiment, study, or original development. Original development of a first good or service may include limited production or supply in order to incorporate the results of field testing and to demonstrate that the good or service is suitable for production or supply in quantity to acceptable quality standards, but does not include quantity production or supply to establish commercial viability or to recover research and development costs;

15. **Award of Contracts**. Under Article 515, abnormally low bids can be verified and the capability of fulfilling the terms of the contract confirmed.
16. **Transparency of Award and Debrief**. Article 516 requires disclosure of winning procurement particulars within 72 days of award. Article 517 provides that no disclosure shall provide any particular supplier information that might prejudice fair competition between suppliers.
17. **Administrative or Judicial Review Procedures**. Each Party to the CFTA is to establish an administrative or judicial review procedure through which a Canadian supplier can challenge a breach of Chapter 5 or a failure to comply with the Chapter. Specific timeframes of 90 to 135 days for a finding is required, and procedural rules for all challenges and the remedies available to the supplier shall be made in writing and made generally available. Each Party shall adopt or maintain procedures that provide for:
    1. rapid interim measures to preserve the supplier's opportunity to participate in the procurement. The interim measures under those procedures may result in the postponement or suspension of the procurement process. The procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account when deciding whether interim measures should be applied. The reasons for not applying those measures shall be provided in writing; and
    2. if a review body has determined that there has been a breach or failure as referred to in paragraph a, corrective action or compensation for the loss or damages suffered, which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, or both.

While it is "early days", and elaborating documents from the Parties are required, such as the Directive from the Province of Ontario, the sage use of the "Legitimate Objectives" provision and each Party's approach to "administrative and judicial review procedures" for supplier disputes, arguably an opportunity was missed to be clear and specific in promoting the timely implementation of innovation procurements through the CFTA.

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By

Mark Fecenko

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## BLG Offices


**Calgary**

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

**Ottawa**

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

**Vancouver**

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

**Montréal**

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

**Toronto**

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749



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