



Trade treaty tsunami

New compliance challenges for government procurement



CANADA'S STEADY CURRENT OF TRADE TREATY activity, both internationally and domestically, has been a driving force behind the standardization and expansion of open, public procurement at all levels of government. This steady tide of treaty developments has recently become a tsunami-sized source of new governance requirements. The increasingly complex matrix of trade treaties operating within the Canadian public sector increases the challenges faced by purchasing professionals, both in their day to day transactions and in developing compliant policies and procedures. While many trade treaties share common themes, such as open procurement and reciprocal non-discrimination, each trade treaty contains its own unique idiosyncrasies. Navigating the unique waters of the various treaties requires careful analysis of seemingly murky requirements embodied

in often opaque treaty language. In order to ensure compliance and avoid challenges, public sector entities must ensure their policies and procedures comply with each separate trade treaty that applies to the particular institution.

By way of background, Canada joined global efforts to promote open, competitive and geographically neutral procurement in 1996 when it agreed, together with other member states of the World Trade Organization (WTO), to adhere to the procurement requirements set out in the Agreement on Government Procurement (AGP). Motivated by recognition that the collective buying power of government entities represented a significant portion of global economic activity, the AGP requires that the signatories guarantee fair and non-discriminatory procurement practices that allow suppliers from all member states to compete fairly

for government contracts. It also requires that a dispute resolution mechanism be established so that suppliers can challenge allegedly unfair or discriminatory procurement practices. The WTO continues to advance open and competitive procurement practices globally, providing an international operating system which impacts trade and federal procurement within Canada.

On a smaller geographic scale, but no less important to Canadian trade, the North American Free Trade Agreement (NAFTA) increased trade liberalization across the continent in 1994. Executed by Canada, the US and Mexico, NAFTA only applies to the federal level; however, its impact on Canadian procurement has been significant. In addition to strengthening the already significant trade relationship across North America, the implementing legislation also created the Canadian International Trade Tribunal (CITT) to provide an administrative dispute mechanism for suppliers. While only federal procurements can be challenged at the CITT, its jurisprudence has had a lasting impact on shaping procurement practices across Canada more generally.

In the wake of these global and continental developments, Canada continues to successfully negotiate international trade treaties and is currently negotiating bilateral and multilateral agreements with countries in Asia, South America and Africa. Canada has also been actively pushing its agenda with respect to the negotiation of a Comprehensive Economic and Trade Agreement (CETA) with the European Union. The fifth round of the Canada-EU negotiations was held last fall, with the next rounds of negotiations scheduled to happen in Ottawa in April 2011.

According to the Canada-European Union Joint Report: Towards a Comprehensive Economic Agreement, a report jointly issued by Canada and the EU in March 2009, "... any agreement should substantially improve access to public procurement markets aiming to achieve full coverage of central and sub-central government procurement in all sectors, to ensure *inter alia* treatment no less favourable than that accorded to locally-established suppliers. Language on transparency should be added in order to provide insight into laws, regulations, procedures and practices, in a manner to provide business communities with easily accessible information on public procurement." If this goal of securing commitments from Canada's provinces and territories with respect to broader public sector participation is integrated into the final version of the agreement, the impact will be felt by public sector entities across the country at all levels of government.


While international trade treaties are an important part of the public procurement landscape and will continue to increase the complexity of future compliance requirements, most public procurement professionals are already facing the tide of existing domestic treaty obligations. The most comprehensive domestic trade treaty is the Agreement on Internal Trade (AIT), which covers the federal sector, all ten provinces, as well as the Northwest Territories and the Yukon, and includes the MASH (municipalities, academia, schools and hospitals) sectors. The AIT (www.ic.gc.ca/eic/site/ait-aci.nsf/eng/home) requires specific procurement pro-

cedures, in addition to mandating non-discriminatory, geographically-neutral procurement for all captured entities and requiring open competitive procurement processes above the monetary thresholds. The AIT also includes a complex set of single and sole source exemptions, pursuant to which entities may legitimately run a procurement process that deviates from the prevailing standards. These exemptions form the basis of many purchasing policies within the Canadian public sector.

The AIT continues to evolve and improve as a framework document for governing procurement across Canada. The Eighth Protocol of Amendment expanded the government-to-government complaint process to also give suppliers the right to bring a complaint under the AIT. This expansion provides another stream for suppliers to challenge public sector procurement processes.

Domestically, the AIT is supplemented by various regional trade treaties that exist between two or more provinces. For example, the Agreement on the Opening of Public Procurement between Ontario and Quebec imposes its own separate procedural requirements, such as a 15-day minimum between issuing a procurement document and the closing date. There has also been an increase in regional trade treaty agreements within Canada. The Atlantic Procurement Agreement (APA), which is between the four Atlantic provinces and was originally entered into in 1996, was expanded in 2008 to increase access to provincial government purchasing by removing all forms of trade discrimination between the four provinces. The 2008 amendments also lowered the applicable tendering thresholds to increase opportunities for smaller businesses. Going further than other domestic trade treaties, the APA also requires some public sector entities to use a set of standard terms and conditions for their procurement projects.

The other important regional treaty is the New West Partnership Trade Agreement (NWPTA). The NWPTA, which was signed by British Columbia, Alberta and Saskatchewan and came into effect on July 1, 2010, built on the prior Trade, Investment and Labour Mobility Agreement (TILMA) that was originally only between BC and Alberta. The NWPTA provides for open competitive procurement practices and mandates non-discrimination between the three provincial parties to the agreement. It also provides an avenue to challenge specific procurement processes: the three provinces are finalizing an interprovincial bid dispute mechanism, which starts with a public procurement entity's local bid dispute procedures and escalates to a yet-to-be-established tri-party process for addressing bid disputes.

The relentless tide of domestic and international trade treaty developments will continue to draw Canadian procurement professionals into the increasingly complex waters of open public procurement. Rather than sailing these uncharted waters without assistance, as is often the case with public procurement, proper advice can help ensure a safe voyage. 

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