

TRADE AGREEMENTS - RIGHTS & REQUIREMENTS 101

Trade agreements apply to public organizations, such as local governments, Crown corporations, health authorities and school districts, and may impact the process by which they procure goods and services (including construction).

Trade agreements are agreements that may operate amongst certain provinces (e.g. New West Partnership Trade Agreement, or "**NWPTA**"), nationally amongst all provinces, territories, and Canada (e.g. Canadian Free Trade Agreement, or "**CFTA**"), or internationally (e.g. Canada-United States-Mexico Agreement or "**CUSMA**", the successor to the "NAFTA", the North American Free Trade Agreement).

It is important for public organizations, and vendors that may supply them with goods and services, to understand the rules, limitations and exceptions that may operate for different types of procurements.

For the purposes of this article, we have limited the discussion to procurements undertaken by municipalities, regional districts, and other forms of

local governments (each an "**LG**") in British Columbia, which includes any corporation or entity owned or controlled by such LG.

TRADE AGREEMENTS APPLICABLE TO LOCAL GOVERNMENTS

The following are the main trade agreements that apply to British Columbia LGs where the procurement value is at or greater than the monetary threshold specified therein:

1. The NWPTA where the procurement value is:
 - \$75,000 or greater for goods;
 - \$75,000 or greater for services; and
 - \$200,000 or greater for construction.¹
2. The CFTA where the procurement value is:
 - \$121,200 or greater for goods or services, excluding construction; and
 - \$302,900 or greater for construction.²

3. The Canada-European Union Comprehensive Economic and Trade Agreement (“CETA”) where the procurement value is at the following thresholds (in SDR, as defined by the International Monetary Fund³):

- Goods: SDR 200,000;
- Services: SDR 200,000; and
- Construction Services: SDR 5,000,000.⁴

As between the applicable trade agreement(s), the one that is most liberal to trade (i.e., most restrictive to the LG) must be complied with.

PROCUREMENT VALUE

When considering whether the trade agreements may be applicable to a particular procurement, the LG must consider the total value of the procurement over its entire duration as opposed to a single procurement in isolation, if that procurement is part of a larger procurement. In estimating the value of a procurement for the purposes of determining whether it is covered by a trade agreement, the LG needs to consider the rules for valuation. For example, Article 505(1) of the CFTA provides that the procurement entity:

- a) estimate what the value would be as of the date the tender notice will be published; and
- b) include the estimated maximum total value of the procurement over its entire duration, whether awarded to one or more suppliers, taking into account all forms of remuneration, including:
- c) premiums, fees, commissions, and interest; and
- d) the total value of options if the procurement provides for the possibility of options.⁵

The NWPTA and CETA also have rules for valuating the procurement.

BASIC PRINCIPLES

While each trade agreement listed above has specific language regarding how procurement processes are regulated, they are all premised on the same, fundamental principles: Fair, Open, and Transparent procurement. Specifically, they require the following:

- **Non-Discrimination:** the procurement process generally cannot treat one party more favourably than another regardless of location; events cannot be timed to prevent potential suppliers from submitting responses; while procuring entities may adopt technical specifications, such specifications should not create unnecessary obstacles.
- **Essential conditions only:** conditions for participation must be those essential to the procurement and should not, for example, restrict procurement to suppliers that have previously been awarded contracts.⁶
- **Openness & Transparency:** tenders must be treated with openness, and procedures must guarantee fairness, impartiality and confidentiality, which includes ensuring that all potential suppliers receive the same information must publish award information.

VARIOUS TYPES OF PROCUREMENT ARE COVERED

Qualification of Suppliers

Both the CFTA and CETA regulate the qualification of suppliers under Article 508 [*Prequalification of*

Suppliers] and Article 19.8 [*Qualification of suppliers*] respectively. Where a procuring entity establishes a prequalification list, both the CFTA and CETA require the procuring entity to publish “[a] request for prequalification inviting interested suppliers to apply for inclusion on a prequalification list in a tender notice annually”⁷ unless the list is only valid for three years or less.

Selective Tendering

CETA also regulates selective tendering—only allowing qualified suppliers to submit tenders. Where a procuring entity intends to use selective tendering, the entity must invite suppliers to submit a request for participation and must generally allow all qualified suppliers to participate.⁸

Negotiations

Both the CFTA and CETA regulate conduct where a procurement involves negotiations. Both agreements set out requirements when negotiations are carried out concurrently and consecutively, and both prohibit a procuring entity from giving a supplier an unfair advantage.

EXCEPTIONS

Each trade agreement generally sets out exceptions where certain rules or requirements of a trade agreement may not apply, notwithstanding that a procurement is caught by the monetary threshold. Some exceptions include the following:

- A procuring entity is generally permitted to contact one or more suppliers of its choice (rather than openly procuring) if no reasonable alternatives to a particular supplier are available due to certain reasons,

if it is strictly necessary due to an urgency brought about by unforeseeable events, or if the goods or services are of a confidential or privileged nature.⁹

- A procuring entity may adopt or maintain measures that result in more limited tendering for the purpose of achieving a legitimate objective provided that the measures are the least restrictive for achieving the legitimate objective and are not disguised as restrictions to trade. A legitimate objective includes public security and safety, and protection of the environment, and programs for disadvantaged groups.¹⁰
- A procuring entity may adopt or maintain measures with respect to “Aboriginal peoples” in which case the trade agreement will not apply.

These exceptions offer an opportunity for LGs to set aside the strict requirements of the trade agreements where a recognized and greater intent is satisfied.

COMPLAINTS FROM SUPPLIERS

For municipalities in British Columbia, complaints by suppliers are generally handled under the NWPTA’s bid protest mechanism (the “**BPM**”)¹¹, which is set out in a separate agreement between the parties to the NWPTA (the “**BPM Agreement**”).¹²

The BPM applies to the avoidance and resolution of disputes between the supplier and the procuring entity, and it applies to procurements covered by NWPTA, CFTA and CETA. The BPM is a two-step

process—consultation and then arbitration—with a possibility of having the arbiter’s decision judicially reviewed.

The BPM Agreement categorizes cost awards under three labels: tariff cost awards, operational cost awards, and bid preparation awards.¹³ Tariff cost awards are a maximum of \$5,000 per disputant, operational cost awards (which refer to remuneration and expenses to be paid to the administrator and arbiters)¹⁴ are assessed under Schedule 3 [*Operational Cost Awards*] of the BPM Agreement, and bid preparation cost awards are assessed under Schedule 4 [*Bid Preparation Cost Awards*] of the BPM Agreement but must not exceed \$50,000 per procurement. While an arbiter’s decision is final and binding¹⁵, a party may request judicial review of the arbiter’s decision within 15 days of it being issued.

A recent arbitration decision pursuant to the BPM under the NWPTA and CFTA was decided against a procuring provincial entity: *West-Can Seal Coating Inc v Ministry of Highways and Infrastructure for the Province of Saskatchewan*.¹⁶ West-Can had challenged the Ministry’s scoring processes, claiming unequal treatment by the Ministry as compared to a local company that was ultimately awarded the work. In brief: (i) the Ministry used West-Can’s previous score from a work zone traffic audit though the audit process had changed, and West-Can had not been informed that such information would be used for bid evaluation, nor was West-Can given an opportunity to dispute the score; (ii) the audit score for the successful competitor was adjusted post-bid closing after West-Can was the recommended proponent; (iii)

the Ministry refused in its scoring of the successful competitor’s performance to include scoring for a past contract (that would have lowered their score) on the basis that the contract was in active litigation; and lastly, (iv) scoring for community benefits awarded maximum points to proponents having 100% local labour and 0 points for those have 60% or less. The arbiter found the Ministry in breach of the CFTA on several grounds, including a breach of Article 500 [*fair and open access*] and Article 503 [*prohibition on local content/economic benefits designed to favour one party*], and awarded to West-Can costs in the action and bid-preparation costs.

An application for judicial review made by the Ministry of the arbiter’s decision was dismissed by Saskatchewan’s superior court.¹⁷

CONCLUSION

This article has discussed the application of the NWPTA, CETA and CFTA briefly to local governments in British Columbia, as they may be subject to overlapping obligations when conducting procurement valued at or above amounts covered by trade agreements. Both local governments and vendors should be aware that such agreements may require the procurement to be open, fair and transparent. Furthermore, local governments cannot contract out of the requirements of a trade agreement. Therefore, these requirements operate in addition to other requirements that may impact local government procurement, such as Canadian tender law, statutory obligations, internal policies and administrative law principles of fairness.

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Sonia Sahota & Kai Hsieh

13. See BPM Agreement at art 7.

14. See *ibid* at Schedule 3.

15. See *ibid* at art 5(9).

Footnotes:

1. See NWPTA at art 14, s 1(c).

2. See CFTA at art 504(4).

3. "Special Drawing Rights" (2022) online: *International Monetary Fund* <www.imf.org>.

4. See CETA, Annex 19-2.

5. See e.g. CETA at art 19.2(6).

6. *Ibid* at art 19.7.

7. CFTA at art 508(2)(c).

8. See CETA at art 19.8.

9. See e.g., CFTA at art 513; see e.g., CETA at art 19.12.

10. See e.g., NWPTA at art 6.

11. See "Bid Protest Mechanism" (2019), online: *New West Partnership* <www.newwestpartnership.ca>.

12. See "Agreement Among the Parties to the New West Partnership Establishing the Bid Protest Mechanism" online (pdf): *New West Partnership* <<http://newwestpartnership.ca/Bid-Protest-Mechanism.pdf>>.



SONIA SAHOTA

604.358.7167

SONIA@CIVICLEGAL.CA

Sonia is a founding partner of Civic Legal LLP, and practises in the are-as of procurement, construction and land development, with a particular focus on tendering law, procurement fairness, construction contracting and use of standard form construction contracts. Sonia routinely provides advise on structuring and administering public tenders and competitive RFPs, managing contractor performance and lien issues and securing land tenure. She practised as a professional engineer for 10 years and worked on civil and geotechnical design and construction projects in British Columbia and abroad. She provides legal advice with practical insight by drawing upon her unique professional understanding of construction and engineering projects. Sonia keeps a watchful eye on technological disruptions to the construction industry, and how these may impact the traditional relationships between parties, such as with the use of BIM technology and smart contracts.



KAI HSIEH

604.358.7014

KAI@CIVICLEGAL.CA

Kai is an associate lawyer of the firm and maintains a general municipal law practice with a focus on real estate development.

Kai obtained his Juris Doctor from the Peter A. Allard School of Law at The University of British Columbia and was called to the Bar of British Columbia in May 2022. His law school experience included competing in the 2021 Adam F. Fanaki Competition Law Moot, where he and his moot partner were awarded Best Factum - Appellant, as well as volunteering with Pro Bono Students Canada, for which Kai was co-recipient of the 2021 Honourable Donna J. Martinson Access to Justice Award. Prior to law school, Kai obtained his Bachelor of Applied Science in Mechanical Engineering with Distinction from The University of British Columbia.

Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

710 - 900 West Hastings Street, Vancouver, BC V6C 1E5
604.639.3639 | www.civiclegal.ca |  @CivicLegal