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Government Procurement Obligations of Canada's Trade Agreements

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Purpose of Trade Agreements

Trade agreements (TAs) help to foster global competition and innovation by enabling Canadian suppliers to compete on a more level playing field with firms in other countries.

Trade agreements greatly expand the potential marketplace for Canadian goods and services. This often includes **access to foreign government procurement for Canadian suppliers, goods, and services**.



In return, however, trade agreements may also provide suppliers, goods, and services of Canada's trade partners with **access to the Canadian marketplace, including certain Canadian procurements**.

Canada's Trade Agreements

Canada is Party to 11 trade agreements that contain substantive obligations for government procurement activities:



Structure of Government Procurement Chapters

The government procurement obligations of all of Canada's trade agreements are similarly structured and have two main components:

Procedural Rules

- Procedural rules are found in the Government Procurement Chapter.
- They describe how procurements subject to the agreement must be conducted, such as rules on technical specifications, notices, bid periods, and bid challenge.

Market Access Obligations

- Market access obligations are found in the Annexes to the Government Procurement Chapter (i.e. Canada's Market Access Schedule).
- They indicate which procurements are subject to the procedural rules of the trade agreement, by setting out the covered entities and commodities, etc.

Determining Coverage – Overview

- Not all procurements are subject to (also called ‘covered by’) Canada’s trade agreements.
- **The steps to determine whether a procurement is covered by a trade agreement are the same for all of Canada’s trade agreements.**
- A procurement is subject to the obligations of a trade agreement **only if:**
 - 1 • Its total estimated value is equal to or greater than the relevant monetary threshold;
 - 2 • The end user entity is covered;
 - 3 • The commodity is covered; **and**
 - 4 • There are no exclusions applicable.
- **All four criteria must be met** in order for the procurement to be covered by the applicable trade agreement.

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Trade Agreement Thresholds

A procurement may be subject to a trade agreement if the total estimated value in Canadian dollars (including options and applicable taxes) is **equal to or greater than** the applicable threshold.

Trade agreement	Thresholds – Federal Departments / Agencies (CAN\$, July 2020 - Dec 2021)		
	Goods	Services	Construction
CFTA	26,400	105,700	105,700
Canada-Korea Free Trade Agreement	100,000	100,000	9,100,000
Canada-Chile, Canada-Colombia, Canada-Honduras, and Canada-Panama Free Trade Agreements	108,400	108,400	9,100,000
Canada-Peru Free Trade Agreement	173,900	173,900	9,100,000
WTO-GPA, CETA, CPTPP, and Canada-Ukraine Free Trade Agreement	238,000	238,000	9,100,000

Coverage in a Nutshell

Entities	Construction
<ul style="list-style-type: none">In all TAs, the vast majority of federal departments and agencies are covered.Coverage of federal Crowns, PT entities, and MASH varies between TAs.	<ul style="list-style-type: none">The CFTA covers all construction services.In general, ITAs cover all construction services except for dredging services and construction services procured by or on behalf of the Department of Transport.
Goods	Exclusions
<ul style="list-style-type: none">In general, all goods are covered by all TAs.	<ul style="list-style-type: none">TAs do not apply to any procurement where an express exclusion exists.Exclusions usually take the form of “This Agreement does not cover procurement of...”, or “This Chapter does not apply to procurement...”, etc.
Services	

Introduction to Procedural Rules

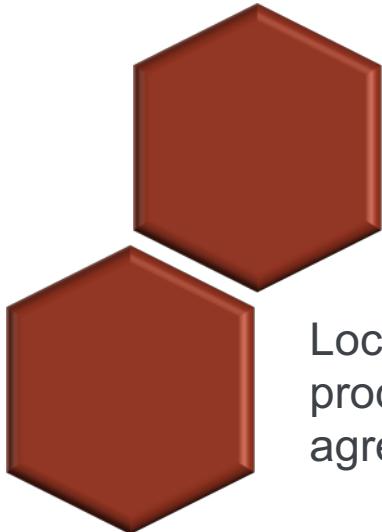
- If a procurement is covered by a trade agreement, then the procedural rules of that trade agreement must be respected by the procuring entity when running the procurement.
- Procedural rules in trade agreements are comprehensive and include obligations for essentially all aspects of the procurement process (other than contract administration).
- If a procurement is subject to more than one trade agreement, all applicable trade agreements must be complied with at the same time. This can be achieved by following the procedural rules of the most rigorous applicable TA, usually the WTO-GPA.

Non-Discrimination and Offsets (1)

- The core principle of the government procurement procedural rules is **non-discrimination**.
- To ensure non-discrimination, trade agreements include key provisions that require that Canada treat the suppliers and commodities of our trade partners “no less favourably” than we treat Canadian suppliers and commodities. This means that, where trade agreements apply, procuring entities are **prohibited** from discriminating against:
 - The goods, services, and suppliers of Canada’s trade partners; and
 - Our domestic suppliers based on the degree of foreign affiliation to or ownership by Canada’s trade partners.
- Trade agreements also **prohibit offsets**. Offsets are any condition or undertaking that encourages local/domestic development, such as the use of domestic content.

Non-Discrimination and Offsets (2)

- In practice, barring the invocation or application of certain limited exceptions or set-asides, the non-discrimination and offset provisions mean that:



Canadian content requirements, domestic content preferences, and requirements for Canadian benefits are prohibited in procurements that are subject to any international trade agreements; and

Local preferences and benefits are prohibited in procurements that are subject to any trade agreements.

- When a procurement is covered by the ***Canadian Free Trade Agreement (CFTA) only***, Canadian content requirements may be applied, so long as those requirements comply with Canadian content provisions of the CFTA, are applied in a manner otherwise consistent with CFTA obligations, and do not discriminate between Provinces, Territories, or regions.

Overview of Procedural Rules

- In order to ensure non-discrimination, all of the trade agreements contain procedural rules based on the principles of an **open, fair, transparent** and **competitive** tendering process. An open tendering process is the default tendering approach under trade agreements.
- Key procedural rules of trade agreements include:

Using generic specifications or reference to international standards, rather than specifying a name brand;

Publishing bid solicitations on the government's designated tendering website;

Providing bidders with a reasonable time to respond to bid solicitations (most agreements fix a minimum period);

Providing all information necessary for responsive tenders in the tender documentation; and

Evaluating all bids fairly according to the rules set out in the tender documentation.

- At the federal level, many of the procedural rules found in the trade agreements also exist under regulations (e.g. the *Government Contracts Regulations*), at common law, or in Government of Canada policies, and as such must be respected by the federal government even where trade agreements do not apply.

Bid Challenge

- If a procurement process does not comply with the obligations of applicable trade agreements, suppliers may file a complaint.
- The **Canadian International Trade Tribunal (CITT)** is the mechanism by which the federal government enforces the implementation of the procurement obligations of the trade agreements.
- At the federal level, where trade agreements apply, a potential supplier may file a complaint with the CITT, on the grounds that any aspect(s) of the procurement process contravened the trade agreement(s).
- If the CITT determines that a complaint is valid, it may recommend remedies such as re-evaluating the bids, terminating the contract, or compensating the complainant for lost profits.
- Under the CFTA, P/Ts are also required to provide an administrative or judicial review procedure through which a Canadian supplier may challenge a breach of CFTA obligations.



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Trade Agreement Flexibilities (1)

- Trade agreements contain flexibilities that, in certain circumstances, can allow for deviations from the normal procedural rules or permit contracting officers to remove a procurement entirely from the obligations of applicable trade agreements.
- Notable trade agreement flexibilities include:

Urgency Provision	Limited Tendering	National Security Exception (NSE)	Indigenous Carve-Out
Minimum bid periods may be reduced to a minimum of 10 days if there is a state of urgency.	Limited tendering is a tendering approach where, in specific circumstances, a contracting officer can deviate from certain procedural rules of the applicable TA(s).	The NSE allows Canada to remove a procurement from all of the obligations of the applicable TA(s) where Canada considers it necessary to do so in order to protect its national security interests.	All trade agreements include a provision that permits for measures to be taken to benefit Indigenous peoples / businesses.

- Relying on or invoking trade agreement flexibilities does not remove a procurement or permit deviations from other applicable regulations, policies, procedures, etc.

Trade Agreement Flexibilities (2)

- Key procurement initiatives and priorities are permissible within the trade agreement context. For example:
 - **Green procurement:** All trade agreements permit contracting officers to prepare, adopt or apply technical specifications that promote the conservation of natural resources or protect the environment.
 - **Social procurement:** Social procurement (i.e. procurement that leverages the government's buying power in order to increase supplier diversity, generate positive societal impacts, or otherwise realize broader socio-economic policy objectives when acquiring goods or services) is not prohibited by the trade agreements, but, where trade agreements apply, must be done in accordance with their obligations.
 - **Accessibility:** Trade agreements do not prevent the inclusion of accessibility requirements, provided they are consistent with trade obligations (e.g. non-discriminatory, should be based on international standards, etc.).
 - **Vendor Performance:** Where there is supporting evidence, trade agreements allow procuring entities to exclude suppliers from competition due to significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts.

Questions?

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Contact Information



For further questions about this presentation, please contact the Trade Agreements Unit of Public Service and Procurement Canada's Strategic Policy Sector at tpsgc.paaccordscommerciaux-aptradeagreements.pwgsc@tpsgc-pwgsc.gc.ca.