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Government Procurement Obligations of Canada's Trade Agreements

Presentation to the Canadian Institute for Procurement and
Materiel Management

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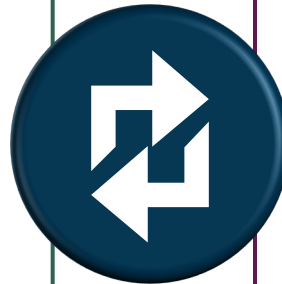
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Purpose of Trade Agreements

Trade agreements 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 securing access to foreign government procurements access 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 12 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



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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Coverage in a Nutshell

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 (see Annex A).

Entities

- In all TAs, the vast majority of federal departments and agencies are covered.
- Coverage of Federal Crowns, P/T entities, and MASH varies between TAs.

Goods

- In general, all goods are covered by all TAs.

Services

- The CFTA covers all services.
- Coverage of services varies between the ITAs, as well as between Federal and P/T / MASH entities.

Construction

- 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.

Exclusions

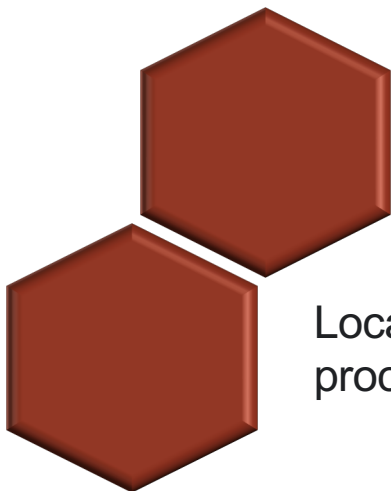
- TAs do not apply to any procurement where an express exclusion exists.
- Exclusions usually take the form of “This Agreement does not cover procurement of...”, or “This Chapter does not apply to procurement...”, etc. (See Annex B)

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Summary of Procedural Rules (1)

- 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 conducting the procurement.
- The procedural rules of trade agreements are built upon the principles of **non-discrimination**, and an **open**, **fair**, and **transparent** tendering process.
- Trade agreements include key non-discrimination provisions that ensure Canada treats the goods, services, and suppliers of our trade partners “no less favourably” than we treat Canadian goods, services, and suppliers. In practice, barring the invocation or application of certain limited exceptions or set-asides, these 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.

Summary of Procedural Rules (2)

- Procedural rules in trade agreements are comprehensive and include obligations for essentially all aspects of the procurement process (other than contract administration).
- Key procedural rules of trade agreements include:

Publishing Notices of Intended Procurement (NIPs) on the Government Electronic Tendering System (GETS) (i.e. CanadaBuys)

Providing bidders with a reasonable time to respond to bid solicitations that is no shorter than any required minimum bid period

Only applying conditions for participation that are **essential** to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake a procurement

Summary of Procedural Rules (3)

- Key procedural rules of trade agreements (continued):

Using generic specifications or reference to international standards, rather than specifying a name brand (if brand names must be referenced, then equivalent products must also be considered)

Providing all information necessary for responsive tenders in the tender documentation

Communicating amendments in writing to all suppliers at the same time and in the same manner the original notice and tender documentation were made available

Evaluating all bids fairly and solely according to the criteria set out in the tender documentation (no changes or additions to criteria or their weighting can be made after bid closing)

- **Note:** Many of the procedural rules found in the trade agreements also exist under the *Government Contracts Regulations*, at common law, or in Government of Canada policies, and as such must be respected 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.
- At the federal level, the **Canadian International Trade Tribunal (CITT)** is the mechanism provided to suppliers to bring complaints if they believe Canada has not adhered to its procurement obligations under the trade agreements.
- Where the trade agreements apply, a potential supplier with standing may file a complaint concerning a procurement action to the CITT, on the grounds that any aspect of the procurement process relating to a requirement covered by these agreements contravened the trade agreement (e.g. breaching rules related to technical specifications, contract award decisions, etc.).
- 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.



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

Minimum bid periods may be reduced to a minimum of 10 days if there is a state of urgency that renders the normal bid period impracticable.

Limited Tendering

Limited tendering is a tendering approach where, in specific circumstances that are outlined in the TAs, a contracting officer can deviate from certain procedural rules of the applicable TA(s). Limited tendering procurement processes may be non-competitive, where appropriate, but the default is a competitive process.

Non-Disclosure

Non-disclosure provisions permit for confidential information, that would otherwise be required to be included in notices and tender documentation, to be omitted from these documents in certain specified instances (e.g. where disclosure would impede law enforcement, is contrary to public interest, etc.).

Trade Agreement Flexibilities (2)

- Notable trade agreement flexibilities (continued):

Legitimate Objectives / General Exceptions

The legitimate objectives provisions of the CFTA and the general exceptions provisions of the ITAs allow Canada to apply measures that deviate from TA obligations in specific circumstances where those measures are **necessary** in order to achieve certain “legitimate objectives” (e.g. protection of human life or health, public order)

National Security Exception (NSE)

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 specified in the text of the NSE provision.

Indigenous Carve-Out

All trade agreements include a provision that permits for measures, including but not limited to set-asides, to be taken to benefit Indigenous peoples / businesses.

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

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Trade Agreement Flexibilities (3)

- Key procurement initiatives and priorities can be considered within the trade agreement context. For example:
 - **Green procurement:** There are mechanisms in all trade agreements that permit contracting officers to prepare, adopt or apply technical specifications and evaluation criteria 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?

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.

Annex A : Trade Agreement Thresholds

(Federal Departments/Agencies only)

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\$, Jan 2022 - Dec 2023)		
	Goods	Services	Construction
CFTA	30,300	121,200	121,200
Canada-Korea Free Trade Agreement	100,000	100,000	9,100,000
Canada-Chile, Canada-Colombia, Canada-Honduras, and Canada-Panama Free Trade Agreements	120,400	120,400	9,100,000
Canada-Peru Free Trade Agreement	174,200	174,200	9,100,000
WTO-GPA, CETA, Canada-UK TCA, CPTPP, and Canada-Ukraine Free Trade Agreement	238,400	238,400	9,100,000

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Annex B: Exceptions vs. Exclusions

Trade agreements contain exceptions (which are discussed in slides 11 and 12) and exclusions (which were discussed in slides 5 and 6). There are important differences between the two:

Exclusions	Exceptions
Trade agreements do not apply to any procurement where an express exclusion exists (i.e. procurements subject to an exclusion are not covered).	Exceptions may apply to procurements that are covered by trade agreements, and allow contracting officers to deviate, where necessary, from the procedural rules of the applicable trade agreement(s).
Trade agreement procedural rules do not apply because the procurement is not covered by the trade agreement.	If an exception applies, some or all aspects of a procurement may not be subject to certain trade agreement procedural rules.
Exclusions usually take the form of “This Agreement does not cover procurement of...”; or “This Chapter does not apply to procurement...”, etc.	Exceptions usually take the form of “This Chapter does not apply to measures...” or “This Agreement does not prevent a Party from imposing or enforcing measures...”, etc.
Example: Shipbuilding and repair	Example: Legitimate Objectives Exception

- Unless an exception is used to remove a procurement from the all of the obligations of the trade agreements (only possible in certain cases with certain exceptions), trade agreements should still be indicated as applying to the procurement on any Notices.

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