



# Canadian Free Trade Agreement

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SUMMARY OF NOTABLE CHANGES TO CANADA'S  
DOMESTIC PUBLIC PROCUREMENT REGIME

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## ▼ Canadian Free Trade Agreement: Summary of Notable Changes to Canada's Domestic Public Procurement Regime

The *Canadian Free Trade Agreement* ("CFTA") came into force on July 1, 2017 – replacing the *Agreement on Internal Trade* ("AIT").

Among other matters, the CFTA regulates public sector procurement activities. In doing so, the CFTA generally replicates much of the AIT's public procurement regime, but makes some important changes. These changes are intended to align Canada's domestic trade treaty arrangements with the *Canada-European Union Comprehensive Economic and Trade Agreement* and other international treaties. The CFTA also adds Nunavut as a party.

The following is a discussion of notable differences between the procurement regime in the CFTA relative to the AIT, with a particular focus on what public sector organizations will now need to do differently. This summary is relevant for public sector purchasers, as it discusses how they should change their documentation and processes. It is also relevant for suppliers who bid on public sector procurements, as the CFTA's regime provides suppliers with greater transparency and access to information. Suppliers can expect future procurement processes to reflect the considerations discussed in this summary.

It is important to note that the CFTA (and the AIT which preceded it) are not the only obligations imposed on public sector purchasers. CFTA obligations may be supplemented by regional domestic trade treaties, or by separate government procurement directives or policies that can impose additional or more restrictive obligations.

## > A. Threshold Considerations

### Competitive Procurement Value Thresholds

The CFTA's procurement regime only applies to opportunities that reach or exceed certain value thresholds. The CFTA uses the same value thresholds as the AIT, but makes them subject to future adjustment for inflation (Article 504). Annex 504.4 sets out how that adjustment will occur, and provides that the Internal Trade Secretariat will notify parties of the adjusted values before they take effect. The first adjustment is to take effect on January 1, 2018, and adjustments will occur every 2 years thereafter.

Calculating the value of a given contract must account for the maximum total value of the contract, across its term. Unlike the AIT, the CFTA specifically states that the calculation must include the value of any options to extent the scope of the contract (Article 505).

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#### *Change in Purchaser Documentation and Practice:*

- Ensure that as inflationary adjustments are made to value thresholds, those adjustments carry forward to procurement approval forms and similar documents (unless more stringent thresholds are used in your jurisdiction).
- When calculating the value of a procurement, ensure the value of all options is included.

### Non-Application (Exclusions)

The CFTA includes many standard non-application provisions (i.e., matters that are not subject to the CFTA procurement chapter). Although similar to the non-application provisions in the AIT, the CFTA's provisions have been updated to reflect the phrasing of recent international trade treaties (Article 504.11). This has resulted in many exceptions under the AIT now being treated as exclusions to the CFTA procurement chapter.

The CFTA also adds a new exclusion for small Business set aside programs. Any procurement that is part of such a program is not subject to the CFTA procurement requirements, as long as the program is fair, open, transparent, and does not discriminate on the basis of origin or location within Canada of goods, services, or suppliers (Article 504.13).

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#### *Change in Purchaser Documentation and Practice:*

- Revise procurement forms (e.g., non-competitive procurement approval form) and policies to reflect the new non-application provisions of Article 504.11. This will ensure that exclusions from the procurement chapter are properly applied and documented. **See Attachment 1 to this summary for the list of non-application provisions** (and limited tendering provisions) that can be inserted into those forms and policies.

## Limited Tendering

Aside from the exclusion noted above, the CFTA includes many standard exceptions to the competitive procurement requirements (i.e., matters that are subject to the CFTA procurement chapter generally, but that are not subject to many of the competitive procurement requirements even if they meet or exceed the applicable value threshold for competitive procurements).

Although similar to the non-competitive procurement clauses in the AIT, the CFTA's provisions have additional nuances. Also, as noted above, many exceptions under the AIT are now being treated as exclusions to the CFTA procurement chapter under its non-application provisions.

Two new exceptions are notable.

First, given the prevalence of IT procurements, public sector purchasers will welcome the addition of a new exception that permits limited tendering for additional goods or services that were not included in an initial procurement (Article 513.1(c)). This exemption applies to additional deliveries by the original supplier of goods or services if a change of supplier:

- cannot be made for economic or technical reasons – such as requirements of interchangeability or interoperability with existing equipment, software, services, or installations procured under the initial procurement; and
- would cause significant inconvenience or substantial duplication of costs for the procuring entity.

Second, there is a new exception for instances of collusion. If bids in a procurement process are collusive, a procuring entity may choose to engage in a direct award (provided that the award is not substantially modified from what was set out in the previous procurement process).

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### *Change in Purchaser Documentation and Practice:*

- Revise procurement forms (e.g., non-competitive procurement approval form) and policies to reflect the new exceptions at Article 513. This will ensure that exceptions to competitive procurement requirements are properly applied and documented. **See Attachment 1 to this summary for the list of limited tendering provisions** (and non-application provisions) that can be inserted into those forms and policies.

## › B. Prohibited Practices, Eligibility

### Conditions

As with the AIT, the CFTA includes a list of prohibited practices – namely, those that are inconsistent with an open, transparent and non-discriminatory process – such as scheduling, pricing or volume mischief, or preferring local solutions (Article 503.5). The CFTA includes two new prohibited practices not expressly stated in the AIT:

- limiting participation in a procurement only to suppliers that have previously been awarded one or more contracts by a procuring entity; or
- requiring prior experience if not essential to meet the requirements of the procurement.

Also, procurement processes often impose legal or financial thresholds, or specific commercial and technical experience conditions, that suppliers must meet in order to participate. As an extension on the prohibited practices discussed above, the CFTA prohibits unnecessarily restrictive conditions on a supplier's participation in a procurement process (Article 507) – and specifically prohibits:

- requiring suppliers to have any previous contract awards from any Canadian public sector purchaser;
- requiring prior experience in a particular province or territory;
- evaluating the financial capacity and commercial / technical abilities of a supplier based only on its business activities within the province or territory of the procuring entity; and
- evaluating a supplier based on conditions not specified in advance in its tender notices or tender documentation.

However, the CFTA permits the exclusion of a supplier based on the following grounds if there is supporting evidence:

- bankruptcy or insolvency;
- false declarations;
- significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts;
- final judgments in respect of serious crimes or other serious offences;
- professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the supplier; or
- failure to pay taxes.

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In addition to the above requirements about prior experience in a province or territory, the CFTA expressly prohibits local content or economic benefits criteria that preference the goods and services of a specific province or region (Article 503.3) – and this prohibition now expressly applies to construction contracts. This requirement is subject to a limited exception that permits a procuring entity to require Canadian value-added elements or Canadian bidders if doing so is not otherwise contrary to Canada’s international trade treaty obligations (Article 503.4).

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#### *Change in Purchaser Documentation and Practice:*

Review tender documentation templates and policies to ensure that:

- prior experience requirements must be essential to the procurement;
- no requirement to be a past supplier (whether of the procuring entity or any other Canadian public sector purchaser);
- no requirement for prior experience in the province or territory;
- evaluation of financial capacity and commercial / technical abilities of a supplier must not be based only on its business activities within the territory of the procuring entity; and
- reserved rights or disqualification provisions are aligned with the list of permitted grounds for excluding a supplier, as noted above (bankruptcy or insolvency; false declarations; etc.) if there is supporting evidence.



## > C. Specifications

The CFTA imposes requirements on how technical specifications must be set out in tender documentation (Article 509). It requires technical specifications to be based on standards, if they exist. It also requires, where appropriate, that they be based on performance and functional requirements rather than design or descriptive characteristics. This approach aligns with guidance provided by many supply chain organizations, including the Healthcare Supply Chain Network, on outcome-based specifications.

The CFTA also weighs-in on a common conflict of interest issue – when a person who has advised on technical specifications seeks to bid in a procurement that uses those specifications. The CFTA requires that a procuring entity not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification for a procurement from a person who has a commercial interest in that procurement (Article 509.4). Although this requirement is qualified by the phrasing “in a manner that would have the effect of precluding competition”, it supports the general notion that those who advise on specifications may be unable to bid on the resulting procurement. Determining whether the “precluding competition” concern is triggered will depend on the circumstances, and will require procuring entities to consider whether the advisor has an unfair advantage either through a head start in proposal preparation, from insider knowledge, or through specifications skewed to advantage that advisor.

The CFTA acknowledges that a procuring entity may require “in Canada” data storage, hosting or processing requirements if the procurement involves sensitive government information (Article 509.6).

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### *Change in Purchaser Documentation and Practice:*

Review procurement policies to ensure that they:

- require technical specifications to be based on standards (if relevant standards exist);
- require specifications to be based on performance and functional requirements (if appropriate) rather than design or descriptive characteristics; and
- prohibit advice from a person who has a commercial interest in a procurement from being used in preparing or adopting the technical specifications for that procurement – unless relying or incorporating that advice would not have the effect of precluding competition.

## › D. Evaluation and Negotiation

### Evaluation Criteria and Requirements

The CFTA codifies the general duty to disclose all material information to prospective bidders (Article 509.7).

It specifically requires that tender documentation include all pertinent details about evaluation criteria, including the methods of weighting and evaluation (unless price is the sole criterion).

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#### *Change in Purchaser Documentation and Practice:*

- Review procurement templates to ensure that they provide sufficient transparency as to the evaluation process, the evaluation criteria, and the weighting of criteria.

### Evaluation and Treatment of Bids

The CFTA imposes new rules regarding the evaluation and treatment of bids (Article 515).

The CFTA prohibits the procuring entity from penalizing a supplier whose bid is late if the delay is due solely to mishandling on the part of the procuring entity. Also, if a procuring entity provides a supplier with an opportunity to correct unintentional form errors after the deadline for bids, the same opportunity must be provided to all participating suppliers.

The CFTA confirms that a contract award must be based solely on the evaluation criteria specified in the tender notices and tender documentation – subject only to a public interest override (i.e., if the procuring entity determines that it is not in the public interest to award the contract).

The CFTA also provides procuring entities with the right to verify abnormally low prices bid by a supplier – which would involve the procuring entity verifying that the supplier can meet the conditions for participation and fulfil the terms of the contract.

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#### *Change in Purchaser Documentation and Practice:*

Ensure procurement templates and practices:

- excuse a late response from a supplier if the delay is due solely to mishandling on the part of the procuring entity; and
- apply a consistent bid correction regime for all bidders (e.g., if one is permitted, it must apply to all bidders) – generally, this would require the regime to be set out in the tender documentation.



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Consider whether to revise procurement templates and practices to permit an abnormally low price verification regime (i.e., “If [Purchasing Organization] receives a [bid/proposal] from a [bidder/proponent] with a price that is abnormally lower than the prices in other submitted [bid/proposal], it may verify with the [bidder/proponent] that it satisfies the conditions for participation and is capable of fulfilling the terms of the [Agreement].”).

### Negotiation Framework

Although the CFTA defers to each government party to set its own rules regarding whether negotiation is permitted during a procurement process, the CFTA generally permits procuring entities to negotiate with suppliers if:

- negotiation is stated in the tender notice; or
- the procuring entity determines that no tender is obviously the most advantageous in light of the evaluation criteria set out in the tender documentation (e.g., as a tie-break mechanism).

The CFTA requires that negotiations occur according to established deadlines. If negotiations occur concurrently with multiple suppliers, all suppliers must be subject to a common deadline to submit any new or revised tenders. If negotiations are conducted consecutively with one supplier at a time, clear deadlines must be set for the supplier to submit any new or revised tender before the procuring entity may move on to negotiate with the next ranked supplier.

The CFTA requires that decisions to eliminate suppliers participating in negotiations must be made in accordance with the evaluation criteria set out in the tender documentation.

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#### *Change in Purchaser Documentation and Practice:*

Review procurement templates and policies to ensure that if negotiation is to be permitted, a framework for negotiation is clearly described in the tender documentation. This includes:

- stating whether negotiation will occur in the tender notice;
- setting deadlines for new or revised tenders as a result of a round of negotiation; and
- ensuring that decisions to cease negotiation with a supplier, or otherwise eliminate a supplier from negotiation, are made in light of the evaluation criteria (and not other factors).

## › E. Notices

### Tender Notices

Tender notices are publicly-posted summaries containing key details of a tender. The CFTA expands on the AIT's tender notice obligations in several respects (Article 506). Under the CFTA, all tender notices must be available to suppliers free of charge. Also, in addition to the elements required under the AIT, each tender notice must state:

- the time-frame for the delivery of goods or services, or the duration of the contract;
- a description of any options, unless those requirements are included in the tender documentation;
- the procurement method that will be used;
- whether the procurement method will involve negotiation or an electronic auction;
- if a pre-qualification process is used (pursuant to Article 508), the criteria that will be used to pre-qualify suppliers and, if applicable, any limitation on the number of suppliers that will be permitted to bid (unless the criteria for limiting the number of suppliers is included in tender documentation); and
- the language or languages in which tenders or responses to requests for prequalification may be submitted, if they may be submitted in a language other than that of the tender notice.

The CFTA recognizes that the Government of Canada will develop an electronic Canada-wide single-point-of-access (“**SPA**”) to tender notices to meet its international obligations. Once developed, and subject to federal, provincial and territorial government consultation, the SPA will be the required portal for publishing all tender notices required by the CFTA. Until that time, each government that is a party to the CFTA must designate one or more tendering website or systems through which tender notices are to be published.

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#### *Change in Purchaser Documentation and Practice:*

- Review tender notice template to ensure that all of the above information is included (in addition to what was previously required by the AIT).

### Award Notice

The CFTA requires procuring entities to make available information about contract award decisions (Article 516).

- Suppliers who participated in a procurement process must be informed of contract award decisions under that process, and (if requested) an unsuccessful supplier must be given an explanation of the reasons why it was not selected.
- A general award notice must be published within 72 days of a contract award on one of the tendering websites or systems designated by the procuring entity's government. That award notice must contain the following information:

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- a description of the goods or services procured;
- the name and address of the procuring entity;
- the name and address of the successful supplier;
- the value of the successful tender;
- the date of award; and
- if limited tendering was used (i.e., if an exception to the competitive procurement requirement was invoked), the conditions and circumstances described in Article 513 that justified its use.

The above general award notice must be available for a reasonable period of time.

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#### *Change in Purchaser Documentation and Practice:*

Procurement policies must be amended to require:

- the notice to bidders described above;
- the general award notice described above; and
- the requirement to explain why a bidder was unsuccessful (if requested by that bidder).

### **Prequalification Notices and Standing Arrangements**

Vendor of record arrangements, standing offers, and similar prequalified supplier lists help to expedite routine or repeat purchases. The CFTA specifies new requirements for prequalification processes and standing arrangements (Article 508).

If a procuring entity intends a list of prequalified suppliers to be valid for more than 3 years, then, in each year, a request for prequalification must be published in a tender notice on one of the tendering websites or systems designated by its government. That notice must include:

- the criteria that will be used to prequalify suppliers, unless those requirements are included in the prequalification documentation;
- a statement that only the suppliers on the prequalified list will receive further notices of procurements covered by that list; and
- the period of validity of the list, or if the period of validity is not provided, how notice will be given of the termination of that list.

If a prequalification list will be valid for 3 years or less, a procuring entity may instead publish the request for prequalification only once (i.e., at the outset) containing the above information – but the period of validity must be stated, along with a statement that no further requests will be published regarding that list.

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A prequalification process presupposes that a second stage process will be used to select which prequalified supplier will be called upon for a particular purchase. The CFTA requires that all prequalified suppliers be eligible to participate in any second stage process unless the original request for prequalification specified limits or criteria that restricted eligibility for the second stage.

For standing arrangements, the CFTA requires that the tender document used to initiate a competitive process to establish a standing arrangement (request for standing offer, etc.) must describe how call-ups or orders under that standing arrangement will be made.

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#### *Change in Purchaser Documentation and Practice:*

- Revise procurement policies to ensure that they require an annual re-posting of requests for prequalification if the prequalification list will be valid for more than 3 years.
- Review prequalification templates to ensure that they state:
  - the criteria that will be used to prequalify suppliers, unless those requirements are included in the prequalification documentation;
  - that only the suppliers on the prequalified list will receive further notices of procurement covered by that list; and
  - the period in which the prequalification list will be valid, or how notice of the termination of that list will be given; and if the procuring entity will not be re-posting the request for prequalification (e.g., annually) pursuant to the exception noted above for validity periods of 3 years or less.
- Review standing offer templates to ensure that they clearly describe how call-ups or orders under that standing arrangement will be made.

## Buying Group Notices

The CFTA adds additional requirements for buying groups, including requirements related to expanded procurement processes (i.e., processes that allow purchasers who are not expressly named in the tender documents to enter into a contract with the successful bidder) (Article 504.6 to Article 504.9).

- Buying groups must publish a notice that lists the participating purchasers, and that outlines if other purchasers may participate in the procurement at a later stage. This must be done for each procurement.
- A purchaser that is a member of a buying group must publish a notice of that fact at least annually on one of the tendering websites or systems designated by its government. That notice must direct potential suppliers to the buying group tender notices website (if it is different from its government's tendering websites or systems).

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However, if a purchaser is procuring through a buying group and has little or no control over the procurement process, the CFTA exempts that purchaser from the requirements of the procurement chapter of the CFTA.

The CFTA also clarifies that a supplier is not itself treated as a “buying group” (e.g., for subcontracting purposes) other than under exceptional circumstances. Only if the supplier is acting as an authorized agent of the purchaser and is able to enter into contracts that bind, and are enforceable by, the purchaser would the supplier fall within the buying group requirements.

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#### *Change in Purchaser Documentation and Practice:*

- Buying groups will need to publish the required notice for each procurement they conduct on behalf of any of their members.
- Procuring entities will need to publish the required notice indicating their membership in a buying group.
- Although most buying groups (including shared services organizations) already include “expanded procurement” clauses in their tender documents, it is advisable to revisit those clauses to ensure they reflect the CFTA requirements.



## › F. Other Arrangements

### **Public-Private Partnerships**

The CFTA includes exemptions for public-private partnerships (Article 504.10). These rules exempt a procuring entity from complying with various CFTA obligations if it is procuring under the terms of a public-private partnership.

### **Electronic Auctions**

The CFTA contains new provisions regarding electronic auctions (Article 514).

If a procuring entity intends to use an electronic auction to conduct a procurement required by the CFTA, it must provide each participant, before commencing the electronic auction, with:

- the automatic evaluation method, including the mathematical formula, that is based on the evaluation criteria set out in the tender documentation that will be used in the automatic ranking or re-ranking during the auction;
- the results of any initial evaluation of the elements of its tender, if the contract is to be awarded on the basis of the most advantageous tender; and
- any other relevant information relating to the conduct of the auction.

## > G. Disputes

The CFTA sets out new procedures to resolve disputes (Article 518). This dispute resolution regime is significant and will serve as an important check on compliance.

First, the CFTA requires that the procuring entity and the supplier seek to resolve a supplier's complaint through consultations. The procuring entity must be impartial and timely in responding to the complaint, so as not to prejudice the supplier's participation in any ongoing or future procurement, or its right to seek corrective measures under the administrative or judicial review procedure (discussed below).

Second, the CFTA requires that each government that signed the treaty:

- establish written procedures through which a Canadian supplier may challenge a breach of the CFTA procurement chapter;
- designate an impartial administrative or judicial authority that is independent of any procuring entity who will receive and review these supplier challenges (or who will act as an appeal body if another person initially receives and reviews them);
- ensure that a review body that is not a court is subject to judicial review (unless the review body is subject to certain formal procedures); and
- develop rapid interim measures to preserve the supplier's opportunity to participate in the procurement pending the resolution of the dispute – which may result in the postponement or suspension of the procurement process, depending on the circumstances.

Aside from the rapid interim measures, final remedies for breaches of the CFTA procurement chapter may include corrective action or compensation for the loss or damages suffered. The CFTA provides that this compensation may be limited to either the costs for the preparation of the tender, the costs relating to the challenge, or both.

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### *Change in Purchaser Documentation and Practice:*

Procurement policies must be amended to align with the dispute consultation requirements – namely that the procuring entity must:

- respond to supplier complaints;
- initially attempt to resolve any supplier complaint through consultation; and
- ensure that complaints are considered in an impartial and timely manner, so as not to prejudice the supplier's participation in any ongoing or future procurement or its right to seek corrective measures under the administrative or judicial review procedure.

## ➤ Attachment 1

### Non-Application and Limited Tendering Provisions

#### Non-Application

(Exclusions from CFTA Procurement Chapter)

- (a) public employment contracts;
- (b) non-legally binding agreements;
- (c) any form of assistance, such as grants, loans, equity infusions, guarantees, and fiscal incentives;
- (d) a contract awarded under a cooperation agreement between a Party and an international cooperation organization if the procurement is financed, in whole or in part, by the organization, only to the extent that the agreement includes rules for awarding contracts that differ from the obligations of this Chapter;
- (e) acquisition or rental of land, existing buildings, or other immovable property, or the rights thereon;
- (f) measures necessary to protect intellectual property, provided that the measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or are a disguised restriction on trade;
- (g) procurement or acquisition of:
  - (i) fiscal agency or depository services;
  - (ii) liquidation and management services for regulated financial institutions; or
  - (iii) services related to the sale, redemption, and distribution of public debt, including loans and government bonds, notes, and other securities;
- (h) procurement of:
  - (i) financial services respecting the management of government financial assets and liabilities (i.e., treasury operations), including ancillary advisory and information services, whether or not delivered by a financial institution;
  - (ii) health services or social services;
  - (iii) services that may, under applicable law, only be provided by licensed lawyers or notaries; or

#### Limited Tendering<sup>1</sup>

(Exceptions to Competitive Procurement Requirements)

- (a) if:
  - (i) no tenders were submitted or no suppliers requested participation;
  - (ii) no tenders that conform to the essential requirements of the tender documentation were submitted;
  - (iii) no suppliers satisfied the conditions for participation; or
  - (iv) the submitted tenders were collusive, provided that the requirements of the tender documentation are not substantially modified;
- (b) if the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute goods or services exist for any of the following reasons:
  - (i) the requirement is for a work of art;

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<sup>1</sup> Limited tendering means that compliance with the following provisions of the CFTA is not required: Articles 504.5 through 504.10, Article 506, Article 507, Article 508.5, Article 508.6, Article 509.7, Article 509.8, Articles 510 through 512, Article 514 and Article 515. Limited tendering is only permitted if it is not used for the purpose of avoiding competition among suppliers, or in a manner that discriminates against suppliers in another province/territory, or protects suppliers in [insert procuring entity's province/territory].



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- (ii) the protection of patents, copyrights, or other exclusive rights;
  - (iii) due to an absence of competition for technical reasons;
  - (iv) the supply of goods or services is controlled by a supplier that is a statutory monopoly;
  - (v) to ensure compatibility with existing goods, or to maintain specialized goods that must be maintained by the manufacturer of those goods or its representative;
  - (vi) work is to be performed on property by a contractor according to provisions of a warranty or guarantee held in respect of the property or the original work;
  - (vii) work is to be performed on a leased building or related property, or portions thereof, that may be performed only by the lessor; or
  - (viii) the procurement is for subscriptions to newspapers, magazines, or other periodicals;
  - (iv) services of expert witnesses or factual witnesses used in court or legal proceedings; or
- (i) procurement of goods or services:
- (i) financed primarily from donations that require the procurement to be conducted in a manner inconsistent with this Chapter;
  - (ii) by a procuring entity on behalf of an entity not covered by this Chapter
  - (iii) between enterprises that are controlled by or affiliated with the same enterprise, or between one government body or enterprise and another government body or enterprise;
  - (iv) by non-governmental bodies that exercise governmental authority delegated to them;
- (v) from philanthropic institutions, non-profit organizations, prison labour, or natural persons with disabilities;
  - (vi) under a commercial agreement between a procuring entity which operates sporting or convention facilities and an entity not covered by this Chapter that contains provisions inconsistent with this Chapter;
  - (vii) conducted for the specific purpose of providing international assistance, including development aid, provided that the procuring entity does not discriminate on the basis of origin or location within Canada of goods, services, or suppliers; or
  - (viii) conducted:
    - (A) under the particular procedure or condition of an international agreement relating to the stationing of troops or relating to the joint implementation by the signatory countries of a project; or
    - (B) under the particular procedure or condition of an international organization, or funded by international grants, loans, or other assistance, if the procedure or condition would be inconsistent with this Chapter.
  - (c) for additional deliveries by the original supplier of goods or services that were not included in the initial procurement, if a change of supplier for such additional goods or services:
    - (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, software, services, or installations procured under the initial procurement; and
    - (ii) would cause significant inconvenience or substantial duplication of costs for the procuring entity;
  - (d) if strictly necessary, and for reasons of urgency brought about by events unforeseeable by the procuring entity, the

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goods or services could not be obtained in time using open tendering;

- (e) for goods purchased on a commodity market;
- (f) 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;<sup>2</sup>
- (g) for purchases made under exceptionally advantageous conditions that only arise in the very short term in the case of unusual disposals such as those arising from liquidation, receivership, or bankruptcy, but not for routine purchases from regular suppliers;
- (h) if a contract is awarded to a winner of a design contest provided that:
  - (i) the contest has been organized in a manner that is consistent with the principles of the CFTA procurement chapter, in particular relating to the publication of a tender notice; and
  - (ii) the participants are judged by an independent jury with a view to a design contract being awarded to a winner; or
- (i) if goods or consulting services regarding matters of a confidential or privileged nature are to be purchased and the disclosure of those matters through an open tendering process could reasonably be expected to compromise government confidentiality, result in the waiver of privilege, cause economic disruption, or otherwise be contrary to the public interest.<sup>3</sup>

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<sup>2</sup> 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.

<sup>3</sup> In using limited tendering under this paragraph (i), compliance with Article 516 of the CFTA is not required.

## Author



**Daniel Fabiano**  
Partner  
+1 416 868 3364  
dfabiano@fasken.com

Daniel has a business law practice that emphasizes procurement, technology, and privacy/information protection.


Daniel supports a wide range of clients navigating the challenges of procurement law – including private, public and broader public sector purchasers, as well as companies bidding on procurement opportunities. Daniel frequently advises on initiating and documenting the bidding process, drafting and negotiating contracts, as well as managing and mitigating procurement risks and bid disputes. With a recent focus on innovative procurement methodologies, Daniel is co-author and legal counsel to Healthcare Supply Chain Network’s Innovation Procurement Toolkit.

Daniel has both a “Certificate in Public Procurement Law and Practice” and a “Certificate in Advance Procurement Law and Practice: Major Projects and Tendering” from Osgoode.

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# Ten offices Four continents One Fasken

> [fasken.com](http://fasken.com)



## ▼ Canada

### Vancouver, BC

550 Burrard Street, Suite 2900  
T +1 604 631 3131  
[vancouver@fasken.com](mailto:vancouver@fasken.com)

### Calgary, AB

350 7th Avenue SW, Suite 3400  
T +1 403 261 5350  
[calgary@fasken.com](mailto:calgary@fasken.com)

### Ottawa, ON

55 Metcalfe Street, Suite 1300  
T +1 613 236 3882  
[ottawa@fasken.com](mailto:ottawa@fasken.com)

### Québec, QC

140 Grande Allée E., Suite 800  
T +1 418 640 2000  
[quebec@fasken.com](mailto:quebec@fasken.com)

### Surrey, BC

13401 - 108th Avenue, Suite 1800  
T +1 604 631 3131  
[surrey@fasken.com](mailto:surrey@fasken.com)

### Toronto, ON

333 Bay Street, Suite 2400  
T +1 416 366 8381  
[toronto@fasken.com](mailto:toronto@fasken.com)

### Montréal, QC

800 Victoria Square, Suite 3700  
T +1 514 397 7400  
[montreal@fasken.com](mailto:montreal@fasken.com)

## ▼ Global

### London, United Kingdom

15th Floor, 125 Old Broad Street  
T +44 20 7917 8500  
[london@fasken.com](mailto:london@fasken.com)

### Johannesburg, South Africa

Inanda Greens, Building 2  
54 Wierda Road, West  
T +27 11 586 6000  
[johannesburg@fasken.com](mailto:johannesburg@fasken.com)

### Beijing, China

Level 24, China World Office 2  
No. 1 Jianguomenwai Avenue  
T +8610 5929 7620  
[beijing@fasken.com](mailto:beijing@fasken.com)

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