Treaty Myths and Compliance Strategies

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About the Author

Paul Emanuelli is the General Counsel and Managing Director of the Procurement Office. He was recognized by Who’s Who Legal as one of the top ten public procurement lawyers in the world. His portfolio includes advising on strategic governance in public purchasing and on negotiating high-profile major procurement projects. Paul has an extensive track record of public speaking, publishing and training. He is the author of Government Procurement, The Laws of Precision Drafting, Accelerating the Tendering Cycle and the Procurement Law Update newsletter. Paul hosts a monthly webinar series and has trained and presented to thousands of procurement professionals from hundreds of institutions across North America through the Procurement Office and in collaboration with leading industry organizations including NIGP, SCMA, the University of the West Indies and Osgoode Hall Law School.
Treaty Myths and Compliance Strategies
Charting Your Course Forward

This presentation on Treaty Myths and Compliance Strategies will debunk emerging myths and misconceptions regarding Canada’s new trade treaties and provide a rapid action plan for achieving compliance with the new procurement rules. The following materials will explain who is covered, how the new bid dispute rules impact you and how you should be prioritizing the updates to your tendering templates, procurement policies, major project governance practices and staff training strategies.
Treaty Myths and Compliance Strategies

Myth #1: The Treaties Are Not Legally Enforceable

As evidenced by nearly thirty years of Canadian International Trade Tribunal case law, Canada’s procurement trade treaties, including the domestic Agreement on Internal Trade ("AIT"), have long been legally enforceable at the federal level. However, some have maintained that the AIT was merely policy and was not legally binding on provincial and territorial institutions.
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Myth #1: The Treaties Are Not Legally Enforceable

This may have been technically accurate in the 1990s when the AIT was new and the scope of impacted institutions was expanding. However, most public institutions have long since adopted policies and procedures to comply with their trade treaty open competition duties. To now say that those duties are not legally binding is inaccurate.
Treaty Myths and Compliance Strategies

Myth #1: The Treaties Are Not Legally Enforceable

Effective July 1, 2017, the AIT has been renamed the Canadian Free Trade Agreement (“CFTA”) and new requirements have been added to the treaty rules to harmonize our domestic rules with the international standards contained in the Canada-Europe Comprehensive Economic and Trade Agreement (“CETA”).
Treaty Myths and Compliance Strategies

Myth #1: The Treaties Are Not Legally Enforceable

While the new trade treaties create new requirements that need to be added to a public institution’s updated policies and procedures, they do not alter the fact that the existing policies and procedures of most public institutions already require open competition. The failure to follow those rules remains legally challengeable under administrative law at all levels of government across Canada.
Treaty Myths and Compliance Strategies

Myth #1: The Treaties Are Not Legally Enforceable

Furthermore, separate from the trade treaties, when public institutions seek bids from the marketplace, the courts will continue to regulate how those bids are evaluated and contracts are awarded. In addition to existing court-based legal challenges, the new trade treaties have added new bid dispute mechanisms for suppliers to challenge breaches of open and fair government procurement practices.
Myth #2: There is a General Two-Year Grace Period

Rumours of a general two-year grace period for treaty compliance have been greatly exaggerated. While the piecemeal implementation of the CETA has created considerable confusion, most of CETA will come into effect pursuant to a pending official announcement after its ratification by the European Parliament and Canadian Parliament.

Treaty Myths and Compliance Strategies

Myth #2: There is a General Two-Year Grace Period

However, certain aspects, including the implementation of formal bid protest procedures, will require downstream enactment by the constituent jurisdictions. This means that there will be no single full implementation date for CETA and that it will proceed in stages as different jurisdictions ratify the rules and implement new review mechanisms in their respective spheres.
Treaty Myths and Compliance Strategies

Myth #2: There is a General Two-Year Grace Period

Regardless of this, most of the substantive requirements in the CETA are already contained in the CFTA, which applies at lower contract values and has already come into force effective July 1, 2017. The complexities of the CETA implementation process does not provide public institutions with a grace period for complying with the new open competition rules that, for the most part, are essentially the same under the CFTA. Delays in CETA ratification are therefore largely academic and have no real impact on the need to be compliant as soon as possible.
Furthermore, while some jurisdictions within Canada were able to negotiate specific exceptions for compliance, there is no general grace period for compliance with the CFTA. For example, Yukon institutions have a two-year grace period for compliance with certain aspects of their public tendering and reporting requirements. Alberta also negotiated certain temporary buy-Alberta preferences. However, those same exceptions do not apply, for example, to Ontario institutions. Public institutions should carefully review their jurisdiction-specific exceptions and not assume that a specific exception that applies in one jurisdiction applies across all of Canada.
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Myth #3: It’s Business as Usual for Bid Protests

Unlike the AIT, which only had a formal legally binding bid protest mechanism at the federal level through the Canadian International Trade Tribunal, the CFTA and CETA require an independent administrative or judicial bid review process for all levels of government across Canada. These new bid protest rules provide complainants with the right to debriefings, document disclosure, legal representation and public hearings, and provide an avenue to challenge the procurement practices of public institutions at all levels of government.
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Myth #3: It’s Business as Usual for Bid Protests

While the Canadian International Trade Tribunal’s existing procedures may, for the most part, satisfy the new bid protest requirements for federal government entities, the existing bid protest procedures established by provincial and territorial governments to comply with the AIT and other regional trade treaties do not satisfy the more onerous CFTA or CETA bid protest standards. It is the responsibility of senior-level governments (federal, provincial and territorial), who are the official “parties” to these treaties, to establish the bid review processes contemplated under the CFTA and CETA.
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Myth #3: It’s Business as Usual for Bid Protests

While other public institutions are subject to the treaties, they are not responsible for establishing their own CFTA and CETA bid review processes. Rather, they will be subject to the bid review regimes created by senior governments. However, public institutions should not remain idle while they wait for senior governments to formalize the bid review regimes. In the interim, those institutions remain subject to the treaties and to administrative law challenges. They should therefore update their local bid protest protocols to align them with the new mandatory debriefing duties and to ensure that their first-step protocols are designed to contain bid disputes before they escalate to the more formal bid review regimes.
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Myth #4: It’s Business as Usual for Debriefings

Apart from federal procurements that are subject to the North American Free Trade Agreement’s mandatory debriefing duties, debriefings have always been voluntary under the trade treaties. While most institutions have decided to implement their own debriefing procedures, those voluntary procedures attract a far lower level of disclosure than the requirements imposed by the Canadian International Trade Tribunal in its enforcement of the mandatory trade treaty debriefing standards.
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Myth #4: It’s Business as Usual for Debriefings

Now that both the CFTA and CETA have expanded mandatory debriefing duties to institutions at all levels of government, the failure to provide sufficient disclosures will be challengeable under the new trade treaty rules. This will require institutions to update their debriefing procedures since suppliers will no longer need to file public access requests to be entitled to higher levels of disclosure and will have the right to legally challenge insufficient debriefing disclosures as trade treaty breaches.
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Myth #5: It’s Business as Usual for Debarments

The new trade treaty rules create very specific standards and requirements that must be followed when organizations want to seek the debarment of problematic suppliers. To better protect any future debarment decisions from bid protest challenges or court-based administrative law challenges, debarment protocols should be updated to comply with the specific due process standards contained in the new trade treaties.
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Myth #6: It’s Business as Usual for Rosters and VORs

The days of engaging in non-transparent contract award practices under supplier lists, prequalification rosters and vendor-of-record arrangements are coming to an end. These arrangements have been widely recognized as a source of non-competitive contracting and the new trade treaties create far more onerous rules around standing arrangements. These new rules significantly restrict the length of time that an institution can maintain a “closed shop” to limit their suppliers lists. Moving forward, public entities should implement open frameworks that permit permanent prequalification lists but require regular refreshes to allow new suppliers onto existing rosters.
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Myth #7: Paywalls Are Now Prohibited

The new trade treaty rules prohibit the practice of making suppliers pay to access the information required in bid opportunity notices; however, this does not mean that the posting platforms that require suppliers to pay to download solicitation documents are now prohibited. While the practice of only providing the required posting information within a solicitation document hidden behind a paywall is now prohibited, public institutions can still require suppliers to pay to download documents as long as they also post the required bid opportunity information in a notice that can be reviewed by all suppliers for free.
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Myth #8: The New Treaties Prohibit Contract A

The new trade treaties expressly recognize the use of newer and more advanced tendering formats, including consecutive and concurrent negotiated RFPs and electronic auctions, but fail to mention the more outdated “Contract A” invitation to tender format. However, this does not mean that Contract A formats are no longer permitted under the new treaties.
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Myth #8: The New Treaties Prohibit Contract A

While a growing percentage of public institutions across Canada are phasing out Contract A formats in favour of the more advanced international standards that are now formally adopted under the new trade treaties, the new rules do not specifically prohibit the use of Contract A formats. While, as a general rule, institutions should continue phasing out their Contract A formats, if they choose to still use those higher risk and less flexible procedures, they should update those templates, along with their other templates, to ensure that they are compliant with the new treaty rules.
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Myth #9: Senior Governments Will Ensure Compliance

All public institutions will remain responsible for their own procurement practices and for compliance with all applicable procurement rules. While the senior level governments across Canada have agreed to implement the new trade treaties, it will remain the responsibility of each independent institution to develop, implement and fund its own trade treaty compliance initiatives as part of its general responsibility to properly manage the administration of public funds. In the event of a legal challenge, the failure to obtain senior level government assistance will not serve as a defence for non-compliance.
Treaty Compliance Rapid Action Plan

A Roadmap Forward

With the new Canadian Free Trade Agreement and Canada-Europe Comprehensive Economic and Trade Agreement taking effect on July 1, 2017, the Procurement Office has developed a Treaty Compliance Rapid Action Plan to help public institutions transition to the new trade treaty regime. This plan focuses on: (i) updating tendering templates and procurement procedures; (ii) offering direct support for high-risk major projects; and (iii) delivering treaty compliance training.
Treaty Compliance Rapid Action Plan

Template Updates – Upgrade to 3.0 Series

For those institutions that recently updated their templates based on our 2.0 series (2015 to the present), we are offering a spot-repair service to quickly incorporate the revisions contained in our new treaty-compliant 3.0 series. Those institutions that are either still using our 1.0 series templates (2009-14) or have not yet had their templates updated by our office, should migrate directly to our new 3.0 series.
Treaty Compliance Rapid Action Plan

Template Updates – Implement with Orbidder

For all template users, we also recommend a rapid deployment using our Orbidder drafting system since this is the most efficient route to training your organization on the use of treaty-compliant templates.
Treaty Compliance Rapid Action Plan

Procurement Procedures – Governance Overhaul

The new trade treaties will require significant updates to your operating rules and procedures, including new bid solicitation and contract award posting rules, mandatory debriefings with more detailed disclosure, and a far more extensive bid protest regime for all levels of government.
Treaty Compliance Rapid Action Plan

Procurement Procedures – Governance Overhaul

Those organizations that have worked with us in recent years to update their internal procedures are in a good position to achieve compliance with an internal governance spot repair for specific updates to certain procedures and protocols.

Those organizations that have not updated their procurement policies and practices in recent years will likely require a more extensive overhaul of their procurement procedures.
Treaty Compliance Rapid Action Plan

Procurement Procedures – Take the Test

To get a better picture of how you measure up, please take our quick Treaty Compliance Test for a free assessment of where your organization currently stands in complying with the new trade treaty requirements.
Treaty Compliance Rapid Action Plan

Major Projects – Risk Mitigation

While major projects are always subject to a higher risk of legal challenge, the new trade treaty regime, with its stricter standards and more onerous debriefing and bid protest mechanisms, significantly increases the risk of major project challenges for all levels of government.
Treaty Compliance Rapid Action Plan

Major Projects – Project Hot Launch Services

While you are updating your overall procurement practices, your organization should also be implementing specific due diligence procedures to ensure that its high-risk major projects receive special screening for treaty compliance.

Whether you need help drafting your solicitation documents, using negotiated RFP formats under the new trade treaties rules, or implementing Enhanced Consensus Scoring to bolster your debriefing defensibility, please feel free to contact us if you need project support for your major projects during this transition period.
To better ensure compliance with the new procurement treaties, your organization should be implementing a treaty awareness program to train staff on the new treaty rules. Our Live Online Learning program includes the new Canadian Law Series, with a specific Treaty Compliance stream featuring four 90-minute modules that will help bring your team up to speed on the new trade treaty rules. Please contact us today for more information or to book your online training sessions.
Next Webinar:
Leveraging Technology for Treaty Compliance

The Leveraging Technology for Treaty Compliance webinar will explain how Orbidder and Bonfire, two made-in-Canada procurement platforms, provide a cost-effective path to high-speed compliance. Sign up today to see how you can launch your full suite of treaty-compliant tendering templates in Orbidder’s RFX drafting control room, while simultaneously leveraging Bonfire’s electronic posting, bid receipt and bid evaluation platform. From strategic project design to final contract award, this proven combination of smart procurement technologies gives your team an end-to-end path to high-speed compliance.

Thursday July 27, 2017, 1:00 - 2:00 pm EDT

REGISTER FOR JULY 27
August Repeat Webinar: Treaty Myths and Compliance Strategies

*Treaty Myths and Compliance Strategies* will debunk emerging myths and misconceptions regarding Canada’s new trade treaties while offering our rapid action plan recommendations to help your organization achieve compliance with the new procurement rules. Register today to find out who is covered, how the new bid dispute rules impact you and how you should be prioritizing the required updates to your tendering templates, procurement policies, major project governance practices and staff training strategies.

*Wednesday, August 2, 2017, 1:00 - 2:00 pm EDT*

[REGISTER FOR AUGUST 2]
Introducing the Live Online Learning Series

We are pleased to announce the launch of our new Live Online Learning series. These webinars offer the best of both worlds, combining the interactivity of in-person training with the accessibility of online learning. Whether you book a single ninety-minute session, select a full training stream, or build a custom program, Live Online Learning offers exclusive access to the leading-edge training your team needs to excel in its tendering cycle. Please see our training catalogue and contact us for more details.

Contact us for pricing and to book your Live Online Learning dates!
Upcoming Free Webinars

How Do You Measure Up? Fourth Annual Survey Results
June 21, 2017 @ 1:00 pm - 2:00 pm EDT

Treaty Myths and Compliance Strategies
July 12, 2017 @ 1:00 pm - 2:00 pm EDT

Treaty Myths and Compliance Strategies
August 2, 2017 @ 1:00 pm - 2:30 pm EDT
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