



MEMBER BULLETIN

August 21, 2017

Changes Coming to Construction Procurement Across Ontario

By September 21, 2017, procurement policies across the province will be changing. The rules governing procurement for provincial departments and agencies, municipalities and municipal-owned entities, school boards, academic institutions, and health and social service entities must all be modified to account for a host of requirements coming out of the newly minted Canada – European Union Comprehensive Economic Trades Agreement (CETA). While some public entities may already meet the requirements, the great majority will be reforming how construction projects are tendered to meet the four core principles set out in CETA: non-discrimination; equal treatment; transparency; and, accountability.

What Does This Mean?

The CETA requires that all public procurement bodies open the bidding process on construction contracts priced over \$8.5 million to all interested parties from the EU (this threshold will be updated every two years, with the next update set to occur on January 1, 2018). Anything priced below this threshold is not required to meet the CETA's procurement obligations. This means that any preference for local companies/goods/services that may presently be in procurement policies will have to be removed. Additionally, all projects over this threshold must be advertised in a more transparent and easily accessible manner (i.e. a federal project repository).

Highlights of Some of the New Requirements:

Prequalification:

- Conditions for prequalification must be limited to essential items only. The CETA defines this as measuring only a contractor's legal and financial capacity to complete the project(s), and their commercial and technical capabilities to undertake the project(s).
 - Any "Prior Experience" requirements within a prequalification **cannot** be limited to the territory/region/municipality of the procuring entity. For example, the Toronto Transit Commission (TTC) cannot require that a contractor have previous experience installing TTC track to prequalify for an installation



contract. Instead, they requirement would have to be broadened to ask for previous experience installing light rail transit track.

Project Tenders:

- All relevant grading criteria for a tender must be disclosed in the tender documents, including the relative importance of each item being graded.
- All public procurement bodies must provide a debrief, upon request, to a contractor to explain why a bid was not selected and the relative advantages of the successful contractor's bid.
- All public procurement bodies are required to publish notices of intended procurement (over the \$8.5 million threshold for construction) on a single federal government website that is free for all to access. The notice must be posted at a minimum of *40-days prior to the closing of the bid period*.
 - This timeline may be reduced by up to fifteen days if the following conditions are met (each item allows for a 5-day reduction in the posting timeline): 1) The notice of intended procurement is published by electronic means; 2) All tender documentation is made available by electronic means from the date of publication of the notice of intended procurement; and, 3) The public procurement body accepts tenders by electronic means.

Negotiation:

- Price negotiations are permitted in the circumstance when the public procurement body is unable to recommend an award within the existing funding approval. In this circumstance when the project would otherwise be cancelled, negotiation is permitted with the low-bidder to identify changes in the scope or quality of work to reduce the price up to 15% of the total contract value.

Pre-Award and Post-Award Disputes

- A “timely, effective, transparent, and non-discriminatory administrative or judicial review procedure” is required to be in place such that a bidder may challenge any of the procurement requirements outlined in the CETA.

Local Content

- The CETA prohibits the use of “Canadian Content” rules (i.e. requires EU suppliers to be treated no less favourably than Canadian suppliers), with the single exception being for the purchase of transit vehicles.

If you have any questions about the new procurement requirements or CETA, please contact Patrick McManus (905-629-7766 ext. 222 or patrick.mcmanus@oswca.org).