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BIDDING IN EUROPE FOR CANADIAN COMPANIES- AFTER CETA

Agenda

- CETA triggered opening
- Overview of Government Procurement in Europe
- Procurement procedures
- SME Measures
- Common Pitfalls
- Remedies

Access

Entity / Procurement Type	Goods	Services	Construction Services
EU-level institutions / Member State government entities	Improved Access	Improved Access	Improved Access
Regional government entities	Improved Access	Improved Access	Improved Access
Local government entities and bodies governed by public law	New Access	New Access	New Access
Utilities	New Access	New Access	New Access
Procurement funded by EU cohesion funds at local government level	New Access	New Access	New Access

Tenders comprising products originating in third countries and relations with those countries

Article 85 of Directive 2014/25/EU

“Tenders comprising products originating in third countries

- 1. This Article shall apply to tenders covering products originating in third countries with which the Union has not concluded, whether multilaterally or bilaterally, an agreement ensuring comparable and effective access for Union undertakings to the markets of those third countries. It shall be without prejudice to the obligations of the Union or its Member States in respect of third countries.*
- 2. Any tender submitted for the award of a supply contract may be rejected where the proportion of the products originating in third countries, as determined in accordance with Regulation (EU) No 952/2013 of the European Parliament and the Council¹, exceeds 50% of the total value of the products constituting the tender.”*

1. Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ L 269, 10.10.2013,p. 1)

Why regulate public procurement?

- Value for money, accountability & probity
- Open up EU public procurement markets to competition
- Framework of enforceable rights and obligations
- Promotion of sustainable development
- Liberalisation and expansion of world trade



Sources of Procurement Law

- EC Treaty – free movement of goods & services
- EU Directives: **Directive 2014/24/EU (Public Sector), 2014/25/EU (Utilities) & 2014/23/EU Concessions**
- Remedies Directives: Directive 2007/66/EU
- Enforced by European Commission, European and national courts
- Case law – EU and national courts
- Other relevant laws: Contract, state aid, Freedom of Information etc.
- Government Guidelines – Circular 10/14

EU Treaty



- Principles flowing from the Treaty:
 - Equality of Treatment/Non-discrimination (clarifications, level playing field)
 - Transparency (disclosure obligations, award criteria, audit trail)
 - Mutual recognition (qualifications from other Member States)
 - Proportionality (turnover, insurance levels, technical specifications)

Specific Procurement Law

- **“Classic” or “Public Sector” Directive** (public works, supplies and services contracts): Directive 2014/24/EU
- **Utilities Directive** (works, supplies and services contracts): Directive 2014/25/EU
- **Concessions Directive** (works and services): Directive 2014/23/EU
- **Remedies Directive**: Directive 2007/66/EC
- **Security/Defence Directive**: Directive 2009/81/EC

Procurement Guidance

- European Commission
- Guidelines, Explanatory Notes, Green Papers, Public Procurement Policies
- <http://europa.eu>
- Office of Government Procurement (www.ogp.gov.ie)
- National Guidelines, Policies, Guidance Documents, Supplier Guidance, Circulars (e.g. Circular 10/14) <http://www.e-tenders.gov.ie/>
- Capital Works Management Framework (Government Construction Contracts) <http://www.constructionprocurement.gov.ie>

Scope of Public Sector Directive

- Which bodies are covered?
- “Contracting authorities”
 - State
 - Regional / local authorities
 - Bodies governed by public law

Value Thresholds

- Social and other services: only subject to rules re specifications and preparation of award notice
- Below threshold purchases: outside scope of directive

Type	1 January 2020-31 December 2020
Public Sector	
Works Contract	€5,350,000
Supply/services contracts	€139,000
For other contracting authorities, such as local/regional authorities and bodies governed by public law	€214,000
“Light touch” regime contracts	€750,000
Utilities Sector	
Works Contract	€5,350,000
Supply/services contracts	€428,000
“Light touch” regime contracts	€1,000,000

SME Support Initiatives

- Turnover Cap and Proportionality
- Obligation to consider splitting Contract up
- Use of Consortia
- Innovation Partnerships
- Framework Agreements
- PINs and PANs!!

PROCEDURES

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Types of Tendering Procedures



- Open
- Restricted
- Negotiated (Competitive Procedure with Negotiation)
- Competitive Dialogue

FRAMEWORK AGREEMENTS

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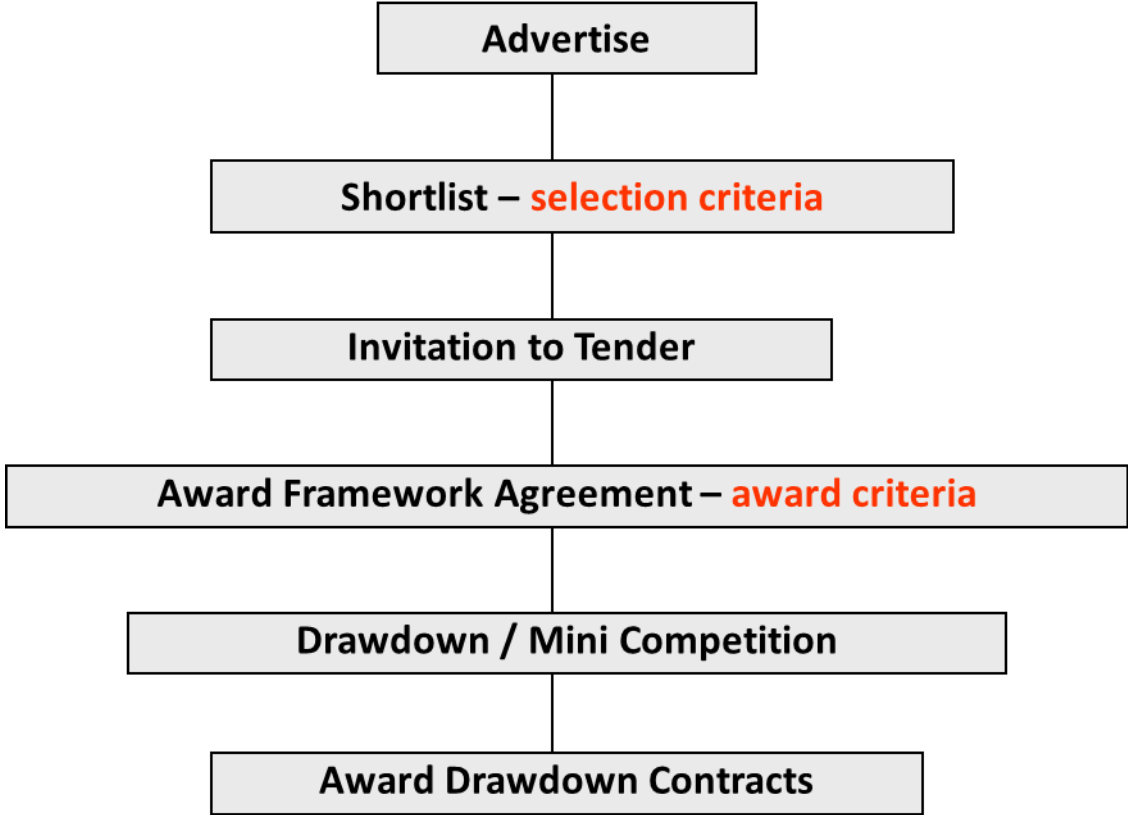
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Framework Agreements- What are they?

“...an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged”
(Article 33)

- Maximum 4 years (unless exceptional cases duly justified)
- Framework agreements cannot be used improperly to prevent, restrict or distort competition

Framework Agreement Restricted Procedure - Illustration



COMMON PITFALLS

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Common Pitfalls for Tenderers

- Tender submitted late (BAM PPP v NTMA, High Court October 2016)
- Specifications and criteria misread
- Failure to question specifications/criteria
- Failure to seek further information
- Failure to take steps to challenge the process within the relevant time period
- Failure to question actions of CA after contract is awarded
- GDPR issues

REMEDIES

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Remedies Directive

- Overview

- **Remedies Directive:** 2007/66/EC (the Remedies Directive)
Implemented by Regulations SI 130 (public sector) and 131 (utilities) of 2010
- Applies to all contracts falling within scope of Directive 2014/24/EC and Directive 2014/25/EC
- Applies to any person having interest in obtaining particular contract who risks being harmed by an alleged breach
- CETA issues may arise

What Remedies are available?



- Injunctions
- Damages
- Ineffectiveness (prospective obligations cancelled)
- “alternative remedies” (in certain instances) - including a fine of up to 10% the value of the contract or an order for the shortening of the contract

Entitlement to reasons for decision



- According to Remedies Directive, reasons may be provided to the unsuccessful tenderer by setting out:
- Summary of-
 - Characteristics and relative advantages of successful tenderers
- Additional information within 15 days of request

Remedies Directive: Procedural Rules

- Writ must be made issued the relevant period, i.e.
 - 30 calendar days after applicant notified of the decision, or knew or ought to have known of alleged infringement
- Once High Court proceedings initiated, immediate suspension of award, until court decides on the application for interim measures/review
- Standstill Provisions

APPENDIX

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Conditions relating to GPA and other international agreements

Article 25 of Directive 2014/24/EU

*“In so far as **they** are covered by Annexes 1, 2, 4 and 5 and the General Notes to the European Union’s Appendix I to the GPA and by the other international agreements by which the Union is bound, contracting authorities shall accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union.”*

Duty owed to economic operators from EEA States

Article 89 of The Public Contracts Regulations 2015

1. *“This regulation applies to the obligation on a contracting authority to comply with-*
 - a) *the provisions of Part 2; and*
 - b) *Any enforceable EU obligation in the field of public procurement in respect of a contract or design contest falling within the scope of Part 2*
2. *That obligation is a duty owed to an economic operator from the United Kingdom or from another EEA state.”*

Duty owed to economic operators from EEA States

Article 90 of The Public Contracts Regulations 2015

1. *“This duty owed in accordance with regulation 89 is a duty owed also to-*
 - a) *an economic operator from a GPA state, but only where the GPA applies to the procurement concerned; and*
 - b) *an economic operator which is not from an EEA state or a GPA state, but only if a relevant bilateral agreement applies.*
2. For the purposes of paragraph (1)(a), the GPA applies to a procurement if—
 - a) the procurement may result in the award of a contract of any description; and
 - b) at the relevant time—
 - i. a GPA State has agreed with the EU that the GPA shall apply to a contract of that description, and
 - ii. the economic operator is from that GPA state.

Duty owed to economic operators from EEA States

Article 90 of The Public Contracts Regulations 2015

3. *For the purposes of paragraph (1)(b), a relevant bilateral agreement applies if—*
- a) *there is an international agreement, other than the **GPA**, by which the EU is bound; and at the relevant time—*
 - b) *in accordance with that agreement, the economic operator is, in respect of the procurement concerned, to be accorded remedies no less favourable than those accorded to economic operators from the EU in respect of matters falling within the scope of the duty owed in accordance with regulation 89.*

4. *In this regulation—*

“GPA state” means any country, other than an EEA state, which at the relevant time is a signatory to the GPA; and

“relevant time” means the date on which the contracting authority sent a call for competition in respect of the contract to the EU Publications Office or would have done so if it had been required by Part 2 to do so.

Thank you!



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30

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