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**Beyond NAFTA: Navigating the
Impact of USMCA – A Virtual
Roundtable Series**

**Session 2:
USMCA's New Government
Procurement Commitments**

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Welcome

- **Moderator:** Samir Varma, Partner, Thompson Hine
- **Panelists:**
 - Marcia Mills, Counsel, Fasken Martineau DuMoulin LLP
 - Thomas Mason, Partner, Thompson Hine

Speakers



Samir Varma, Partner, Thompson Hine | Samir.Varma@ThompsonHine.com

Samir is a partner in the International Trade and White-Collar Criminal Practice, Internal Investigations & Government Enforcement practice groups. He advises multinational corporations on export controls, economic sanctions and customs, and counsels individuals and corporations on the Foreign Corrupt Practices Act (FCPA) and other anti-corruption laws. (*Moderator*)



Marcia Mills, Counsel, Fasken Martineau DuMoulin LLP | MMills@Fasken.com

Marcia has more than 20 years of private and public sector experience in procurement, government contracts and security, most recently as counsel to Public Services and Procurement Canada (PSPC), the central purchasing agent for federal departments and agencies. (*Panelist*)



Thomas Mason, Partner, Thompson Hine | Thomas.Mason@ThompsonHine.com

Tom is the leader of the firm's Government Contracts practice group. He focuses his practice on all aspects of government contracts law and litigation. (*Panelist*)

Coverage & Threshold Variations Between NAFTA and WTO

WHO? - Covered Entities

- In both trade agreements, the entities that are covered must be expressly identified in the trade agreement
- Additional covered entities under WTO- AGP:
 - Department of Transport, for the following goods:
 - Automatic Data Processing Equipment, software supplies and support equipment (except: Automatic Data Processing Equipment (ADPE) configuration) (FSC 70).
 - Office machines, text processing systems and visible record equipment (FSC 74).
 - Special industry machinery (FSC 36).
- Sub-central entities in US and Canada are covered entities under WTO but not under NAFTA:
- For Canada: Procurement for goods, services, and construction service by sub-central entities:
 - Each province specifies the coverage. In general, ministries, departments and agencies of provinces are covered.
 - Exceptions: highway projects, distressed areas, and economic development of certain provinces.

Coverage & Threshold Variations Between NAFTA and WTO

WHAT? Goods and Services (including construction services)

- NAFTA is a “by exception” trade agreement – all goods and services are covered, unless excepted.
- WTO-AGP is a “by inclusion” trade agreement - only expressly identified goods and services are covered.

WHEN? Thresholds

- WTO-AGP thresholds are higher for goods and services; but lower for constructions services
- **Construction Services:**
 - The WTO contains lower thresholds for construction services than the corresponding thresholds under the NAFTA. Lower thresholds mean more liberal access to procurements. Canada currently provides the following coverage under the WTO:
 - Central Government: CAD \$14,100,000 under the NAFTA and CAD \$9,100,000 under the WTO.
 - Other Entities: CAD 17,300,000 under the NAFTA and CAD \$9,100,000 under the WTO.

Coverage & Threshold Variations Between NAFTA and WTO

Goods and Services:

- Procurements of goods and services that are covered by WTO is more restricted than under the NAFTA. The WTO contains higher thresholds for goods and services than the corresponding thresholds under the NAFTA:
 - Central government: CAD \$32,600 (for goods) and CAD \$108,400 (for services) under the NAFTA; CAD \$238,000 for both goods and services under the WTO.
 - Other entities: CAD \$542,400 under the NAFTA; CAD \$650,000 under the WTO.
- Note: Canadian suppliers retain the advantage of the substantially lower thresholds under the Canadian Free Trade Agreement (CFTA) that is only available to Canadian suppliers when bidding for federal and sub-central opportunities.

Procurement in Canada

Trade agreement covered procurements:

- All trade agreements require an administrative or judicial review procedure for bidders
- Only the federal government has an independent 3rd party - the Canadian International Trade Tribunal
- At the sub-central level, limited dispute process offered by each specific government. Five provinces offer a formal dispute process outside of the courts:
 - B.C., Alberta, Manitoba and Saskatchewan have set up a Bid Protest Mechanism
 - Ontario offers a non-binding dispute process for bidders
- Costs awards at all levels are limited; with limited exceptions, reviewer authority for 'recommendations'
- All dispute mechanisms apply the most limited dispute time period: 10 days
- non-exclusive - bidders could decide to litigation or seek Judicial Review of a procurement decision

Procurement in Canada

Procurements not covered by trade agreements:

- The courts - judicial review of the administrative decision or a general claim for damages
- No Canadian equivalent to the US processes, such as Government Accountability Office (GAO) or the Court of Federal Claims (COFC) etc.
- Canadian courts have not dealt with trade agreement issues or federal procurement-related matters to any large extent

USMCA: Public Procurement

- The United States-Mexico Canada Agreement's ("USMCA") Chapter 13 covers public procurement between the U.S. and Mexico.
- In practice, this means that there will be very different procurement rules within North America.
- Access between the U.S. and Canada will be governed by the WTO-Government Procurement Agreement ("GPA").
 - It is important to note that the exclusion of Canada from the USMCA has a more limited impact in practice because of the level of market access that Canada provides under the WTO-GPA.
- Procurement between Canada and Mexico is covered by the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership ("CPTPP").

USMCA: Chapter 13

This chapter covers the following topics:

- Article 13.1 Definitions
- Article 13.2 Scope
- Article 13.3 Exceptions
- Article 13.4 General Principles
- Article 13.5 Publication of Procurement Provisions
- Article 13.6 Notices of Intended Procurement
- Article 13.7 Conditions of Participation
- Article 13.8 Qualifications of Suppliers
- Article 13.9 Limited Tendering
- Article 13.10 Negotiations
- Article 13.21 Committee on Government Procurement
- Article 13.11 Technical Specifications
- Article 13.12 Tender Documentation
- Article 13.13 Time Periods
- Article 13.14 Treatment of Tenders and Awarding Contracts
- Article 13.15 Transparency and Post-Award Information
- Article 13.16 Disclosure of Information
- Article 13.17 Ensuring Integrity in Procurement Parties
- Article 13.18 Domestic Review
- Article 13.19 Modifications and Rectifications of Annex
- Article 13.20 Facilitation of Participation by SMEs

USMCA: Conditions for Participation and Qualification of Suppliers

- Each notice of intended procurement will include a list and a brief description of any conditions for participation of suppliers. This notice may also include any related requirements for specific documents or certifications that suppliers must provide. (Art. 13.6.3(g))
- In assessing whether a supplier satisfies the conditions for participation, a procuring entity in the U.S. and Mexico will: (Art. 13.7.3(a)-(b))
 - evaluate a supplier’s financial capacity, as well as its commercial and technical abilities based on that supplier’s business activities both inside and outside the U.S. and Mexico; and
 - base its evaluation solely on the conditions that the procuring entity has specified in advance in notices or tender documentation.

USMCA: Negotiations & Procurement Integrity

- Criminal, civil, and administrative measures will be in place to address corruption, fraud, and other wrongful public procurement acts. (Art. 13.17.1)
- These measures may include things such as debarment, suspension, or declaring suppliers ineligible from participating in a Party's procurements for a period of time, in the event a Party determines a supplier has engaged in corruption, fraud, or other wrongful acts. (Art. 13.17.2)
- Both the U.S. and Mexico will have policies and procedures in place to address potential conflicts of interest for individuals who are engaged in, or have influence over, public procurement. (Art. 13.17.3)
- Suppliers may be required to maintain and enforce effective internal controls, business ethics, and compliance programs to aid in preventing and detecting corruption, fraud, and other wrongful acts. (Art. 13.17.4)

QUESTIONS?





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