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Canada Signs FTA with Panama – Paves the Way to Bids on Panama Canal Authority Infrastructure Projects

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On May 14, 2010, Canada and Panama signed the Canada-Panama Free Trade Agreement (CPFTA), which is intended to significantly increase access for Canadian businesses to bids on Panamanian government procurement relating to infrastructure. In particular, the CPFTA is intended to provide increased market access to a number of contracts awarded by Panama's central government, such as access to contracts of goods, services and construction services, including contracts awarded by the Panama Canal Authority (ACP) relating to the US\$5.4-billion Panama Canal expansion project that is currently underway.

The ACP indicates that the expansion project, which is slated for completion in 2014, involves the construction of two new sets of locks, one on each side of the Canal as well as the widening and deepening of the existing navigational channels. Due to the high cost of the project, it is likely to involve a substantial number of procurement opportunities. According to the Canadian government, Canadian suppliers were awarded procurements by the ACP valued at just under US\$30-million between 2000 and 2007. The Canadian government believes that the CPFTA will provide even further opportunities for Canadian businesses to access contracts under this project.

Beyond the Canal expansion, the Panamanian government has indicated that it is planning other improvement projects, particularly in the areas of infrastructure, transportation and services. The Canadian government considers that the CPFTA will allow Canadian businesses access to this growing government procurement market and has the potential to create long-term growth opportunities between Canadian businesses and Panama.

The Canadian government argues that the CPFTA provides increased opportunities to bid on Panamanian projects in several ways. First, the CPFTA requires Panama to treat Canadian suppliers in the same way as domestic suppliers for specified listed procurements covered by the CPFTA. This non-discriminatory treatment ("national treatment") means that Canadian suppliers will be entitled to bid on Panamanian procurement of goods and services in Panama covered by the CPFTA on the same legal basis as Panamanian suppliers. Second, the government of Panama will be prohibited from discriminating against locally established Panamanian suppliers on the basis that the degree of Canadian ownership of a Canadian-Panamanian joint venture is such as to make it Canadian owned or controlled. Third, the CPFTA provides that a notice inviting tenders, like those for the Panama Canal expansion project, must be published, widely disseminated and readily accessible to the public for the entire tendering period. Fourth, Panama (and Canada) will be required to publish additional notices throughout the procurement process, such as the requirement for specific evaluation criteria and notice of the actual contract award.

There are other provisions in the CPFTA that the Canadian government argues may increase the profitability of Canadian infrastructure suppliers and allow for greater transparency in the procurement process. In particular, the Canadian government notes that the CPFTA prohibits the use of offsets by Panama (or Canada) such as, for example, local Panamanian content requirements or other conditions to improve local development related to the supply of materials and services to main contractors and sub-contractors at any stage of the procurement process. The CPFTA also imposes obligations on procuring entities to avoid conflicts of interest and prevent corrupt practices. Finally, the CPFTA requires that all laws, judicial or administrative decisions, and procedures related to procurement must be promptly published and made accessible to the public.

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Canada and Panama must now bring the CPFTA into law through implementing legislation in a process that is known as treaty ratification. While both the governments of Panama and Canada have not disclosed their respective legislative timelines to implement the CPFTA, some parliamentary observers have projected as early as Fall 2010 for the mutual ratification of the treaty. Consequently, companies with an interest in Panamanian infrastructure projects and their advisors will want to track the progress of the implementing legislation and develop strategies to make full use of the CPFTA.

In our view, the CPFTA offers Canadian companies the opportunity to capitalize on the infrastructure procurement contracts arising from improvements to the Panama Canal, large-scale Panamanian infrastructure and other procurement projects.

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