



# OLR RESEARCH REPORT

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## **IMPLICATIONS OF CENTRAL AMERICAN FREE TRADE AGREEMENT**

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You asked how the Central American Free Trade Agreement (CAFTA) affects Connecticut's procurement laws and practices. You also asked for copies of letters between the US Trade Representative (USTR) and the governor.

The Office of Legislative Research cannot give legal opinions and you should not regard this memo as one.

### **SUMMARY**

Connecticut law and CAFTA require open and competitive bidding, but Connecticut may still have to conform several laws and regulations to CAFTA's requirements, which apply to procurements by certain agencies for (1) goods and non-construction services valued at \$477,000 or more and (2) construction services valued at \$6,725,000 or more. The agencies are the departments of Transportation, Public Works, and Administrative Services and the three constituents of higher education.

This memo compares CAFTA's procurement requirements with those laws and regulations governing procurements by the Department of Administrative Services (DAS) for goods and non-construction services. As Table 1 shows, some Connecticut requirements could be challenged unless the legislature amends or repeals them. For example, the law authorizing bid preferences for Connecticut-made goods could be

challenged as a way to favor Connecticut companies over those from the other CAFTA nations (Article 9.2.1).

Connecticut might also face challenges regarding other laws CAFTA appears to sanction. For example, CAFTA allows states to adopt measures needed to protect human, animal, or plant life or health as long as they do not restrict trade (Article 9.14(b)). Arguably, the bid preference for vehicles using alternative fuels could help protect public health (CGS § 4a-59(c)). But CAFTA implicitly allows bidders to challenge this law if they believe it restricts trade or discriminates against them. CAFTA establishes a commission to resolve disputes.

The legislature may have to enact laws that implement several CAFTA requirements. It may have to (1) set a maximum 40-day deadline for submitting bids, (2) require DAS to notify the public about bid awards and publish its regulatory orders and decisions, and (3) establish or designate an authority to hear CAFTA challenges.

The USTR signed CAFTA last May, and it now awaits Congressional approval. The other participating nations are Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua. The CAFTA text is available at [www.ustr.gov/new/fta/Cafta/text/](http://www.ustr.gov/new/fta/Cafta/text/). It and other recent trade agreements go beyond tariffs and quotas to “impose strict rules related to government regulation, taxation, purchasing and economic development policies that are regarded as non-tariff barriers to trade by the drafters of the agreements” (William T. Warren, “Trade Agreement Trade-offs,” *State Legislatures*, July/August 2004).

Connecticut and 11 other states chose to participate in CAFTA and comply with its rules. Attachment 1 is the USTR’s September 1, 2003 letter to the governor seeking his “permission to offer our trading partners, where appropriate, the same treatment that your state already provides to 27 other Member countries of the GPA [Agreement of Government Procurement].” He added, “We are not requesting that you take on additional commitments that would require Connecticut to change its current government procurement practices.”

Attachment 2 is the governor’s November 5, 2003 reply, authorizing the USTR to offer the specified nations access to the state’s procurement market and stating that Connecticut would “treat these new commitments in the same manner in which it has treated previous commitments to the WTO [World Trade Organization] Agreement on Government Procurement.”

Attachment 3 is a February 20, 2004 memo from the Department of Economic and Community Development's International Trade Division to the governor informing him about comments it gave to the federal Advisory Committee for Trade Policy and Negotiation regarding the proposed trade agreements with Central America and Australia. The memo discusses the extent to which Connecticut trades with these nations and how the agreements could benefit the state's economy. It does not discuss how the agreements affect the state's procurement laws.

## **CAFTA AND CONNECTICUT PROCUREMENT REQUIREMENTS**

### ***Procurement Laws Susceptible to CAFTA Challenges***

Table 1 compares CAFTA's and Connecticut's procurement requirements, both of which require open and competitive bidding. But certain CAFTA requirements could trigger legal challenges, which would have to be resolved according to CAFTA's dispute settlement procedures.

This appears to be the case with respect to the law authorizing bid preferences for goods and services made or originated in Connecticut (CGS § 4a-59(c)). The administrative services commissioner may grant the preference only if the Connecticut good or service is equal in every respect to that offered by the lowest qualified bidder. CAFTA requires procuring agencies to "accord to the goods and services of another party, and the suppliers of another party of such goods and services, treatment *no less favorable* than the most favorable treatment the party or procuring entity accords to its own goods, services, and suppliers" (Article 9.2.1, emphasis added). A Honduran bidder, for example, might challenge a bid awarded to a Connecticut bidder under this law if it did not receive the same preference.

CAFTA allows states to impose restrictions intended to promote environmental quality as long as they "are not disguised barriers to international trade" (Annex 9.1.2(b)(i) § B, Note 3). But this authorization might still trigger challenges to Connecticut laws intended to eliminate the use of disposable and single-use products (CGS § 4a-67b) or require the purchase of equipment and appliances meeting federal energy conservation standards (CGS § 4a-67c), to name two examples. In contrast, CAFTA allows states to set aside contracts for exclusive bidding by small and minority-owned businesses without the same qualification, a difference that seems to protect Connecticut's practice in this regard from challenges (Annex 9.1.2(b)(i)§ B, note 2).

CAFTA bans people with a commercial interest in a bid invitation from helping procurement agencies to prepare the bid specifications if doing so would hurt competition (Article 9.7.4). The regulations allow DAS to change bid specifications after meeting with bidders, which they may do in order to discuss their qualifications and explain the specifications (Conn. Agencies Regs § 4a-52-17). Bids awarded under these conditions could be challenged under CAFTA for favoring certain bidders and thus hindering competition.

### ***Procurement Regulations that May Need to be Changed***

DAS regulations regarding trademarks and records retention may need to be changed in order to comply with CAFTA. DAS may use trademarks as a way to describe a product, but doing so does not bar bidders from submitting comparable products as long as the bid specifications do not specify “no substitute” (Conn. Agencies Regs § 4a-52-5(i)). CAFTA allows procurement agencies to use trademarks only if (1) there is no other way to describe the procurement and (2) the specifications explicitly allow comparable items (Article 9.7.3).

The law requires the public records administrator to specify how long agencies must keep different types of documents (CGS § 11-8). Like CAFTA (Article 9.11.3), her rules require agencies to retain most procurement documents for three years or until audited, whichever is later (*Records Management Manual*, March 1999). But they must retain direct purchase orders until the contract expires or the next audit, which could be less than three years.

### ***Laws that May Need to be Adopted***

In order to comply with CAFTA, the legislature may have to enact several new procurement requirements. It may have to adopt a procedure for notifying CAFTA participants about proposed procurement law and regulatory changes. (CAFTA gives states up to 30 days to object to a change. Objections could require other changes intended to compensate the objecting states for any changes that affect their ability to bid on contracts (Article 9.16.2)).

The legislature may have to set deadlines for submitting bids that corresponds to CAFTA's. Under CAFTA, states must allow at least 40 days from when a bid notice is published to prepare and submit bids. It

allows them to shorten the deadline to at least 10 days if there are no qualified bidders and other specified conditions are met. Under Connecticut law, the administrative services commissioner sets the deadline, which he must specify in the bid invitations (Conn. Agencies Regs § 4a-52-5).

The legislature may have to require agencies to notify the public about bid awards and publish their regulatory orders and decisions (Article 9.11.2). It may also have to create or designate an authority to hear and act on CAFTA related appeals (Article 9.15).

Table 1: Comparison of CAFTA and Connecticut Procurement Requirements

Procurement Requirement	CAFTA		Connecticut		Comment
	Article	Summary	CGS §	Summary	
Scope	9.1 and Annex 9.1.2(b)(i)B	Contracts for goods and non construction services over \$477,000 and construction services over \$6,725,000  Economic development assistance, purchases made with funds from other entities, certain fiscal services, hiring, and opportunity purchases exempted from CAFTA.	4a-50	Contracts for personal property and contractual services procured through competitive bidding or competitive negotiation.	
Publishing Procurement Requirements	9.3	States must: <ul style="list-style-type: none"> <li>publish new and amended procurement laws and regulations;</li> <li>publish procurement-related procedures, administrative rulings, and judicial decisions; and</li> <li>provide these materials upon request.</li> </ul>	4a-57(c)  4-168 (b) and 4-173  4-180a	Procurement requirements and procedures must be specified in regulations.  Notify the public about proposed regulations in the <i>Connecticut Law Journal</i> , provide them upon request, and published them upon adoption in the <i>Journal</i> .  Agency written orders and decisions must be indexed and available to the public for copying.	CAFTA requires orders and decisions to be published, but Connecticut law requires only that they be indexed and available to the public for copying.
Anti Corruption Measures	9.13	States must (1) adopt procedures for disqualifying bidders from future procurements for violating procurement procedures and (2) identify them if requested and, where appropriate, explain why they were disqualified.	4a-63  4a-65	Bidders face up to two years suspension or disqualification from bidding for specified causes.  State officials are personally liable for failing to comply with the procurement laws and regulations.	

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<i>Procurement Requirement</i>	<i>CAFTA</i>		<i>Connecticut</i>		<i>Comment</i>
	<i>Article</i>	<i>Summary</i>	<i>CGS §</i>	<i>Summary</i>	
CAFTA authorized exceptions	9.14	States can adopt measures to protect public health and safety and intellectual property provided they do not restrict trade or discriminate against CAFTA parties.	4a-57(d)	<p>The following procurement practices address social and environmental goals:</p> <ul style="list-style-type: none"> <li>• waiving competitive bidding or negotiation for alternative fuel vehicles,</li> <li>• encouraging Connecticut businesses doing business in Africa to bid on state contracts,</li> <li>• increasing purchases of goods containing recyclable materials or goods that can be recycled or remanufactured,</li> <li>• eliminating use of disposable and single-use products,</li> <li>• purchasing equipment and appliances meeting federal energy conservation standards,</li> <li>• purchasing cars and light-duty trucks purchased meeting federal highway mileage ratings,</li> <li>• purchasing recycled graphic and copy paper that meet federal minimum recycled content standards,</li> <li>• reducing the use of paper derived from harvested trees,</li> <li>• increasing the use of recycled products and environmentally preferable products and services, and</li> <li>• requiring state agencies to set aside contracts for bidding exclusively by small and minority-owned businesses.</li> </ul>	<p>The state's environmental related procurement requirements appear to fall under CAFTA's exceptions, but bidders can appeal them to CAFTA's commission by showing that they are trade barriers, and are not needed to (1) protect human, animal, or plant life and health or (2) promote environmental quality.</p> <p>CAFTA challenges could also arise if the DAS commissioner rejects bids, which she may do when she thinks it's in the state's best interest (CGS §4-59a(d)).</p>
		They can also adopt measures relating to goods or services handicapped people, philanthropic institutions, or prisoners provide.	4a-57b		
		4-67a			
	Annex 9.1.2(b)(i) § B	States can apply restrictions that promote general environmental quality as long as they "are not disguised barriers to international trade."	4-67b		
	4-67c				
	Annex 9.1.2(b)(i) § G	Small and minority-business set-aside requirements are exempted from CAFTA.	4-67d		
	4-67e				
	4-67f				
	4-67h				
	4a-60g				

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<i>Procurement Requirement</i>	<i>CAFTA</i>		<i>Connecticut</i>		<i>Comment</i>
	<i>Article</i>	<i>Summary</i>	<i>CGS §</i>	<i>Summary</i>	
Changes	9.16	<p>States can make technical rectifications to their "coverage" under CAFTA's procurement chapter and minor changes to the lists of subnational governments and agencies subject to the chapter. But they must first notify the other states, which have up to 30 days to object. The rectifications and changes are effective after the 30 days.</p> <p>States can make more substantive changes but may also have to make "compensatory adjustments" that are acceptable to the other states.</p>	4-168(g)	The law sets conditions under which agencies can make technical changes to any type of regulation without prior notice or hearing.	It appears that Connecticut has to notify the participating nations about proposed changes to its procurement laws and regulations and negotiate with them if they object. Any disagreements may have to be resolved according to CAFTA's dispute settlement procedures (Chapter 20).
Participation Conditions and Requirements	9.8	<p>States may limit bidding to certified businesses as long as the certification criteria are publicly available.</p> <p>They may maintain bidder lists and limit bidding to the listed businesses. But they must keep the lists open and allow a business to qualify for placement and bid on a pending a contract if it meets the requirements before the bid deadline.</p> <p>States cannot limit bidding to in-state businesses or prior bid winners.</p> <p>They must notify businesses about their eligibility to bid and, upon request, tell them why they were denied or removed.</p> <p>States can disqualify businesses from bidding because of bankruptcy, false declaration, or similar reasons.</p>	4-60g(l) & (o)	Small and minority-owned businesses must meet specified criteria before they can bid on contracts set aside for their exclusive bidding.	

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<i>Procurement Requirement</i>	<i>CAFTA</i>		<i>Connecticut</i>		<i>Comment</i>	
	<i>Article</i>	<i>Summary</i>	<i>CGS §</i>	<i>Summary</i>		
Technical Specifications	9.7	Bid specifications cannot unnecessarily block trade between the participating states.	4a-59(c)	All other factors being equal, bid preference must be given to goods and services made or originating in the state.	This law could be challenged on the grounds that it inhibits free trade and is not based on performance.	
		They must be based on the task or service to be performed, not on the design or description of a specific product or service.		Agencies must use performance standards when awarding bids.		
		Trademarks and similar descriptors are allowed only if there's no other way to describe the procurement and the bid invitation includes the phrase, "or equivalent."	4a-52	Bid invitations may specify brand names, but businesses may offer comparable products or services unless the bid specifies "no substitute" (Conn. Agencies Regs. § 4a-52-5)		This regulation could be challenged since CAFTA criteria for using trademarks is stricter (i.e., only if the product cannot be described in other ways and the phrase, "or equivalent" is used.
		People with a commercial interest in a potential bid award cannot participate in preparing bid specifications if doing so would preclude competition.		Procurement officials may meet with bidders to discuss their qualifications and explain the specifications and change them after these discussions (Conn. Agencies Regs § 4a-52-17).		CAFTA's conflict of interest ban might extend to these discussions. If the state changes the bid specifications after discussing them with the bidders, an unsuccessful bidder might claim that the changes favored the winning bidder.
		States can adopt specifications designed to conserve natural resources	4a-59 (c)	DAS may give a 10% bid preference for: <ul style="list-style-type: none"> <li>• goods made with recyclable materials or remanufactured products,</li> <li>• motor vehicles using clean alternative fuels, and</li> <li>• those using both these and conventional fuels.</li> </ul>	CAFTA does not authorize bid preferences for any purpose but allows bid specifications designed to conserve natural resources.	

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	<i>Article</i>	<i>Summary</i>	<i>CGS §</i>	<i>Summary</i>	
Intent to Procure	9.4	<p>Procurement must be through a publicly advertised bidding process that includes public notices referencing CAFTA and providing the administrative and technical information needed to submit bids.</p> <p>States must also encourage agencies to publish their future procurement plans as early as possible in their fiscal years.</p>	4a-57	<p>Bidding process must maximize public participation and competition. Specific requirements and procedures apply to contracts over \$50,000.</p> <p>Waivers from competitive bidding are allowed for minor nonrecurring, emergency, and for alternative fuel consuming vehicles purchases.</p> <p>Public utility service contracts are exempted from competitive bidding.</p>	
Tendering Procedures	9.9	<p>Publicly advertised bidding may be waived when:</p> <ul style="list-style-type: none"> <li>• no bids are received,</li> <li>• intellectual property rights must be protected,</li> <li>• goods must be bought on the commodity market,</li> <li>• a prototype is being developed at an agency's behest,</li> <li>• a construction service contract has to be extended to complete a project, or</li> <li>• unforeseen circumstances required immediate action.</li> </ul> <p>These reasons must be documented.</p>	<p>4a-57(a) &amp; (b) and 4a-58</p> <p>4a-59a</p>	<p>DAS must advertise bid invitations in newspapers (Conn. Agencies Reg. § 4a-52-4), but can waive this rule for minor, nonrecurring, and emergency purchases of \$10,000 or less and during specified emergencies (Conn. Agencies Reg. §4a-52-20).</p> <p>Contracts can be extended without competitive bidding under specified narrow conditions.</p>	CAFTA's public bidding exemptions seem broader than Connecticut's, but are not binding.
Tender Documentation	9.6	<p>Tender documents must provide all necessary administrative and technical information.</p> <p>States may publish them electronically but must also provide them upon request if all parties cannot access them.</p> <p>Published documents may be subsequently modified, but interested parties must be notified and allowed to modify and resubmit bids.</p>	4a-52	Agency invitations to bid must specify the procurement's terms and conditions (Conn. Agencies Reg. 4-52a-1).	

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	<i>Article</i>	<i>Summary</i>	<i>CGS §</i>	<i>Summary</i>	
Tendering Time Limits	9.5	States must allow at least 40 days from the bid notice's publication to prepare and submit bids. They can shorten this period to at least 10 days if there are no qualified bidders and <ul style="list-style-type: none"> <li>a separate bid notice was published between 40 days and 12 months before the submission deadline,</li> <li>the procurement involves goods and services private entities customarily sell and use, or</li> <li>urgent, foreseen problems require the procurement to be completed in less than 40 days.</li> </ul>	4a-52	Regulations require bid invitations to indicate the deadline for opening bids (Conn. Agencies Regs §4a-52-5).	Since DAS bid deadlines are set on a case-by-case basis, bid invitations providing fewer than 40 days to prepare and submit bids could be challenged under CAFTA unless its conditions for shorter deadlines have been met.
Information on Contract Awards	9.11	After awarding a contract, procuring agencies must: <ul style="list-style-type: none"> <li>promptly notify each losing bidder and, if requested, explain why its bid was rejected;</li> <li>promptly publish a notice identifying the winning bidder, the procured goods or services, the contract's value, and, if applicable, why competitive bidding was not used; and</li> <li>keep related records and reports for at least three years.</li> </ul>	4-59a(c)  4a-59(e)  11-8	Agencies must evaluate each bid in writing, identifying each bidder and its costs and explaining why a bid was rejected.  They must keep a record of each procurement and allow the public to see it.  Most procurement records must be kept for three years or until audited, whichever comes sooner. Others, such as direct purchase orders for contracts, must be kept until the contract expires or the next audit.	The law requires agencies to keep records, but it may have to be changed to incorporate CAFTA's provisions requiring agencies to notify bidders and the public about awards.  Unlike CAFTA, the states' record management policy sets different retention requirements for different documents. For this reason, agencies may have to retain all procurement documents for at least three years in order to comply with CAFTA.

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	<i>Article</i>	<i>Summary</i>	<i>CGS §</i>	<i>Summary</i>	
Non Disclosure of Bid Information	9.12	Agencies cannot disclose confidential, proprietary about bidders without their formal approval.	1-210(b)(5)	Trade secrets and commercial or financial information contained in bid documents are exempt from disclosure under the Freedom of Information Act.	
Domestic Review of Supplier Challenges	9.15	<p>Agencies adopt and publicize written procedures for reviewing challenges and respond in writing to bid challenges.</p> <p>Agencies must establish or designate impartial, independent authorities to review and act on challenges. Actions include suspending a bid award before resolving a challenge if necessary to correct a potential CAFTA violation.</p> <p>The reviewing authority must:</p> <ul style="list-style-type: none"> <li>• give bidders at least 10 days to prepare and submit written challenges,</li> <li>• allow them to review all documents,</li> <li>• hear their complaints in a timely manner,</li> <li>• allow them to reply to agency's response,</li> <li>• state its findings and recommendations, and</li> <li>• explain the reasons for its decision.</li> </ul> <p>Agencies must ensure that a challenge does not prejudice a bidder from participating in a current or future procurement.</p>		The law authorizes no procedure for challenging bids.	To comply with CAFTA, the legislature may have to require procuring agencies to establish or designate an entity to receive and act on bid challenges.

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