Public procurement in Canada: overview

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LEGISLATIVE FRAMEWORK

1. What is the principal legislation that regulates public procurement? What regulatory authorities are responsible for public procurement enforcement?

Regulatory framework
Federal, provincial and municipal authorities in Canada purchase over Can$200 billion in goods and services each year.

The leading legislation and policies that apply to federal contracts for goods and services include:

- Government Contracting Regulations (SOR/87-402).

Public Works and Government Services Canada (PWGSC) does most purchasing for line departments. Other departments and agencies can only procure goods either when their own legislation specifically permits or when the Minister of PWGSC makes an appropriate delegation of authority.

Each province and territory has its own separate legislation, with varying degrees of complexity and formality. For example, in Ontario, the Ministry of Government Services Act 2010 (S.O. 2010, c. M.25) requires the provincial government to follow policies and directives established by Management Board of Cabinet when undertaking procurements relating to construction, renovation or repair of a public work. In Ontario, procurements by broader public sector entities including school boards and hospitals are subject to the requirements of the Ontario Broader Public Sector Directive 2010, which includes a Supply Chain Code of Ethics and 25 mandatory requirements.

Municipal contracting processes are generally governed by common law and codified in municipal statutes, purchasing byelaws, contracting policies and purchasing procedures.

Procurement by the federal government is subject to the requirements of the North American Free Trade Agreement 1994, the World Trade Organization Agreement on Government Procurement 1996 and the Agreement on Internal Trade 1995 (AIT).

The contracting practices and contract awards of federal, provincial and municipal academia, school boards and hospitals are subject to the requirements in the AIT. Its purpose is to provide equal trade opportunities to domestic suppliers regardless of their province or territory of origin. It does not apply to foreign suppliers, although foreign suppliers with offices in Canada, Canadian subsidiaries or their Canadian distributors can take advantage of this agreement.

Provincial and territorial government tendering practices and contract awards are subject to the obligations and procedural protections set out in the Canada-United States Agreement on Government Procurement 2010.

The New West Partnership Trade Agreement (NWPTA) 2006 is an accord between the provincial governments of British Columbia, Alberta and Saskatchewan. The NWPTA imposes obligations and standards on these provincial governments to ensure that there is no discrimination in the procurement practices and contract awards for suppliers from each of these provinces.

The Atlantic Procurement Agreement (A Memorandum of Agreement on the Reduction of Interprovincial Trade Barriers) 1996 is a procurement accord between the governments of the Atlantic provinces.

In October 2013 Canada signed the Canada EU Comprehensive Economic Trade Agreement (CETA), which has significantly opened up provincial, utility and municipal procurements to European suppliers. The Agreement imposes significant standards on the conduct of tendering processes and contract awards on federal, provincial and municipal procurements.

Regulatory authorities
Section 9 of the Department of Public Works and Government Services Act 1996 gives the Minister of Public Works and Government Services exclusive responsibility for the procurement of all goods as described in the Act. Other departments and agencies can only procure goods either when their own legislation specifically permits or when the Minister of Public Works and Government Services makes an appropriate delegation of authority.

For federal contracts, almost all departments, agencies and state-owned enterprise are considered contracting authorities. They are subject to the contracting rules and the Canadian International Trade Tribunal’s bid and contract award review mechanisms.

2. What are the overriding principles of the legislation listed in Question 1?

What is somewhat unique to Canadian law is that public procuring entities are subject to trade agreements and legislation that regulates their procurement practices. However, they are also subject to obligations at common law when conducting public procurements.

Trade agreements and legislation. The treaties generally require that procurements are conducted and awarded in a non-discriminatory manner and in an open, fair and transparent manner. Generally, to be considered for an award, a bid must comply with all mandatory requirements in the solicitation document. Generally, an award will be made to the qualified bidder whose bid complies with mandatory terms and is most advantageous to the government considering price and non-price related factors included in the bid document. Bidders who are debarred, suspended or declared ineligible cannot receive a
contract award. In addition, there are procedures to allow a department to establish prequalification requirements, which could have the effect of excluding non-qualified bidders.

**Common law.** Public procuring entities in Canada are also subject to obligations at common law. The tendering process is governed by the Contract A/Contract B analysis established by the Supreme Court of Canada in R. (Ont.) v. Ron Engineering and Construction (Eastern) Ltd., [1981] 1 S.C.R. 111. In general, competitive procurement processes create two contracts:

- The bidding contract A, which sets out the "rules" that apply up until the completion of the competitive procurement process.
- The substantive contract entered into between the procuring authority and the successful bidders.

Procuring entities must adhere to the terms and conditions of Contract A and cannot accept any non-compliant bids, no matter how attractive they may be. They must:

- Act towards all compliant bidders fairly and in good faith, particularly during the evaluation of bids.
- Make their decisions to award or reject submissions based on criteria that are disclosed in the procurement documents.
- Bidders, for their part, cannot revoke or supplement their submissions.

Procuring entities can include privilege clauses, which are recognised as fully enforceable. These clauses allow entities to reserve to themselves the right to award contracts to bids that may not be for the lowest price, or not to award contracts at all. Entities are also free to impose any number of criteria on bidders such as:

- Prior similar work experience.
- The absence of claims or prior litigation.
- Scheduling criteria.
- Composition of construction teams provided such criteria are not discriminatory or biased.

**Regulation of specific industries**

### 3. Are any industries subject to specific regulation?

For Canadian defence procurement, the Defence Production Act (R.S.C., 1985, c. D-1) gives the Minister of PWGSC the responsibility to administer the Act and the exclusive authority to buy or otherwise acquire defence supplies and construct defence projects required by the Department of National Defence. There are also security requirements for individuals, facilities, controlled goods and technology.

The Industrial Security Program provides security screening services for government contractors before they are entrusted with protected and classified information and Government assets.

The Controlled Goods Program is Canada's national domestic industrial security and prevents the proliferation of tactical and strategic technology and assets, including missile technology, military equipment and related intellectual property (see http://ssi-iss.tpsgc-pwgsc.gc.ca/dmc-cgd/index-eng.html).

The Joint Certification Program protects uncalled military critical technical data from common adversaries but allows the data to be transmitted to private US and Canadian entities that have a legitimate need for them.

The federal government also maintains a domestic offset programme for high value defence procurement called the Industrial and Regional Benefits (IRB) Policy. The policy requires companies that win defence and security contracts with the Government of Canada place business activities in Canada at the same value of the contract (see http://www.ic.gc.ca/eic/site/042.nsf/eng/home).

Under the recently announced Defence Procurement Strategy, Industrial and Regional Benefits (IRBs) will be transformed into Industrial and Technological Benefits (ITBs). This is a significant change that will give the Government more flexibility to improve economic outcomes from defence procurement projects.

A core element of the new approach is rated and weighted Value Propositions (VPs) for defence and major Canadian Coast Guard procurement projects. Bidders will be motivated to put forward their best industrial plan for Canada, as these plans will be scored on the quality of their VPs. When applied, the default weighting of the VP in the overall evaluation will be 10%. The actual percentage will be determined on a procurement-byProcurement basis. In addition, where the Government chooses to specify a targeted, desired industrial outcome, mandatory requirements will be used, as appropriate.

Key Industrial Capabilities (KICs), as originally identified by Tom Jenkins in his report (Canadian Armed Forces' need, innovation and export potential), will be a significant factor in the rating and weighting of VPs. The KIC criteria proposed in this report will serve as a framework for analysing Canadian defence industrial capabilities and their potential for growth. VP ratings will favour actions that lead to improved economic outcomes through:

- Investments that strengthen Canadian KICs.
- Investments that support enhanced productivity in Canadian firms.
- Broader industrial and technological high-value activities, such as a "technology transfer".

### RECENT TRENDS

#### 4. What are the recent trends in the public procurement sector?

The following are recent trends and developments in the public procurement field:

- A significant increase in procurement litigation as government contracts can be worth many millions, if not billions, of dollars and if a bidder believes it has wrongly lost a contract there is a desire to exercise all the legal remedies available. Successful challengers may secure the contract in question. Or they could be awarded damages, such as lost profits.
- Traditionally, disappointed bidders challenged contract awards and procurement processes in Canadian courts relying on the Contract A paradigm, arguing the tender process was not carried out as originally stipulated. However, there is a new trend emerging where failed bidders rely on administrative law, seek judicial review and ask the courts to review the procurement conduct of the government in question.
- The Canada EU Comprehensive Economic Trade Agreement 2013 (CETA) will provide European companies with unfettered access to provincial and municipal contract competitions. Canada lacks a mechanism for quickly resolving provincial and municipal procurement disputes. Currently, failed bidders at the provincial and municipal levels have no choice but to launch a lawsuit. Procurement disputes involving federal government contracts are resolved through the Canadian International Trade Tribunal, which was established as Canada's bid review mechanism under the trade treaties.
- The federal government and some of the provinces have introduced debarment regimes where bidders are debarred from participating in government contracts if they have been found guilty of committing offences such as bid rigging, corruption and fraud. For federal procurement, this regime is found in the Federal Government's new Integrity Provisions.
- Increasing use of co-operative purchasing and piggybacking on other agencies' contracts is a major force and saves money by increasing leverage of small entities.

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**SCOPE OF RULES**

**Entities covered**

5. Which entities must comply with the procurement rules? Are there any exemptions?

Entities covered

All government and quasi government entities at the federal, provincial and municipal level including crown corporations school boards, hospitals, universities and utilities are subject to procurement rules that may be imposed by legislation, trade treaty, common law or administrative law. Municipals are also subject to these rules.

Exemptions

There are no exemptions available.

**Contracts covered**

6. What contracts do procurement rules cover? Are there any exemptions?

Contracts covered

In general, the procurement rules cover all contracts for goods, services, construction and defence.

Exemptions

Certain procurements may be exempt from the procurement rules. For example, certain defence contracts with national security objectives may be exempt from the rules. Sole sourcing may be permitted according to the value of the procurement and whether it falls under a prescribed exemption under the trade treaty or statute.

7. Are there specific thresholds to determine if a contract is subject to the public procurement regime? Are there any aggregation/anti-avoidance rules?

Thresholds

The thresholds for determining whether a contract is subject to the public procurement are set out in the various trade agreements (see table, Impact of the Canada-EU Comprehensive Economic and Trade Agreement on Government Contracting in Canada).

Aggregation/anti-avoidance rules

Several statutes and regulations provide that a contracting authority will not subdivide a works project, or a proposed purchase of a specified quantity of supplies or specified services so as to prevent the project or purchase from coming within the scope of the legislation. In some cases, there is an express prohibition on subdivision of contracts.

**Concessions**

8. Does the procurement regime apply to concession contracts? If not, how is the award of concession contracts regulated?

Yes, the procurement regime applies to concession contracts.

**Privatisations and PPPs**

9. Are privatisations and PPPs subject to the procurement regime? If not, what are the relevant legal rules?

Privatisations

Yes, privatisations are subject to the procurement regime provided that there is a financial commitment made by the procuring entity.

PPPs

Yes, PPPs are subject to the procurement regime provided that there is a financial commitment made by the procuring entity.

**Shared services and “in-house” arrangements**

10. Do shared services projects and “in-house” arrangements trigger the application of the public procurement requirements? Are there any exemptions?

No, shared services projects and “in-house” arrangement do not trigger the application of the public procurement requirements provided that the in-house or shared services arrangement does not access the public market.

**PROCUREMENT PROCEDURES**

11. What procedures do regulated entities use when carrying out procurements? Can regulated entities freely choose between the procedures? When is it appropriate to use each procedure?

Available procedures

In general, procuring entities can use open, restricted and negotiated procedures.

Available procedures include:

- Invitation to tender.
- No-Negotiation Request for Proposal (RFP).
- Consecutive Negotiation/Rank and Run RFP.
- Concurrent Negotiation/Best and Final Offer RFP.
- Invitational Request for Quotation.
- Open Request for Quotation.
- Request for Information.
- Request for Supplier Qualification – Prequalification.

Freedom of choice

In general, procuring entities have significant discretion on their choice of procurement procedures, with the exception of a broad restriction on sole sourcing unless certain limited exceptions exist.

Suitability

The suitability depends on the circumstances and purpose of the procurement as follows:

- Invitation to Tender (ITT). This is common in the construction industry. This format creates a binding tender call and is subject to the common law obligations under Contract A. It is typically used when price is the only selection factor among compliant bidders.
- No-Negotiation Request for Proposal (RFP). This is similar to an ITT but the highest ranked supplier is based on the highest score combining both price and non-price factors.
• **Consecutive Negotiation/Rank and Run RFP.** The procuring entity enters into negotiations with the proponent, who based on the predetermined criteria established in the RFP obtained the highest ranking. The other suppliers who meet the basic threshold requirements are put on a ranked waiting list and notified that they may be eligible for negotiations. If negotiations with the higher ranked suppliers fail to result in a contract award.

• **Concurrent Negotiation/Best and Final Offer RFP.** The procuring entity enters into simultaneous negotiations with multiple suppliers. Once the negotiations are completed, all eligible bidders are required to submit their best and final offers. The proposal that best meets the institution’s needs based on the criteria and weighting established in the RFP is selected for contract award.

• **Request for Quotation.** The contract requirement must be well defined such that:
  - bids can be evaluated and compared on the basis of price and delivery; and
  - contract award can be determined on the basis of lowest-priced bid that meets the requirements.

• **Request for Information.** A request for information is used when detailed information and feedback are required from suppliers.

• **Request for Supplier Qualification – Prequalification.** A procuring entity can limit tenders to prequalified goods, services or suppliers.

• **Standing Offer.** A standing offer is not a contract. A standing offer is an offer from a potential supplier to provide goods and/or services at pre-arranged prices, under set terms and conditions, when and if required. It is not a contract until the government issues a “call-up” against the standing offer. The government is under no actual obligation to purchase until that time. Standing offers are used to meet recurring needs when institutions are repeatedly ordering the same goods or services. Standing offers are most suited to goods or services that can be clearly defined to allow suppliers to offer firm pricing.

• **Supply Arrangement.** This is a method of supply used to procure goods and services. Like standing offers, it is not a contract and neither party is legally bound as a result of signing a supply arrangement alone. Supply arrangements include a set of predetermined conditions that will apply to bid solicitations and resulting contracts. They allow the institution to solicit bids from a pool of pre-qualified suppliers for specific requirements.

**Key features**

12. **What are the key features of each procedure? What are the applicable time limits?**

See Question 11.

**Technical specifications**

13. **Are there any requirements concerning technical specifications of tenders?***

Generally, the trade agreements prohibit technical requirements that refer to a particular design or type, rather than referring to generic functionalities.

**Alternative bids**

14. **Are there specific rules in relation to alternative bids?***

There is no law in Canada that prescribes how and when alternative bids can be requested or handled by a public procuring entity.

**Contract award criteria**

15. **What are the requirements relating to contract award criteria?***

Procuring entities must award contracts on the basis of either the best value or the lowest price. Where a contract is awarded on the basis of the best value, the procuring entity must adopt criteria linked to the subject matter of the contract, which might include, in addition to price, criteria such as:

- Running costs.
- Servicing costs.
- Level of after-sales service.
- Technical assistance.
- Technical merit.
- Environmental characteristics.

The award criteria must be disclosed to bidders in advance in the solicitation documents, including the relative weighting for each criterion. Where it is not possible to indicate criteria weightings in advance, the criteria must be listed in descending order of importance.

**Changes to an existing contract**

16. **Does an extension or amendment of an existing contract require a new procurement procedure?***

Extension of contract

In general, the extension or amendment of an existing contract does not require a new procurement procedure if the extension or amendment is expressly articulated in the solicitation document.

Amendment of contract

See above, Extension of contract.

**ENFORCEMENT**

17. **Who can bring a claim for non-compliance with procurement legislation? What are the available review procedures? Are there any associated statutes of limitation?***

Right to bring a claim

Generally, any aggrieved supplier can bring a claim for non-compliance with the applicable procurement legislation or rules in the courts alleging either:

- A breach of the common law obligations by the procuring entity.
- A breach of the administrative law obligations on the procuring entity.

These breaches include the requirement to be reasonable and non-biased.

An expedited procurement complaint process is in place at federal level for federal contracts, in which complaints are brought before...
the Canadian International Trade Tribunal (CITT). Detailed procedure prescribes the timely filing and manner of submitting complaints before the CITT.

Limitation periods depend on the applicable law in a given jurisdiction, in Canada an area that constitutionally falls within the jurisdiction of the provinces. In most provinces the basic limitation period for claims of breach of contract is two years from the time the claim arises or the time the claimant should have known of the existence of the claim, although different limitation periods may vary by province or subject matter of the claim.

In federal procurement, complainants have ten working days to file a complaint with the CITT after the day on which the basis of the complaint became (or reasonably should have become) known to them.

**Enforcement procedures**

Parties can resort to the provincial or federal courts. The applicable remedy is normally damages or a remanding of the award back to the procuring entity, if possible.

Federal procurement complaints lodged before the CITT are typically heard within 90 days of when the complaint is filed. Where a complaint is successful, the CITT may order that:

- A new solicitation for the designated contract is issued.
- The bids are re-evaluated.
- The contract with the awardee is terminated.
- The designated contract is awarded to the complainants.
- The complainant is compensated by an amount specified by the CITT.

**Statutes of limitation**

Limitation periods depend on the applicable jurisdiction. In most provinces the basic limitation period for claims of breach of contract is two years from the time the claim arises or the time the claimant should have known of the existence of the claim. In federal procurement, complainants have ten working days to file a complaint with the CITT after the day on which the basis of the complaint became (or reasonably should have become) known to them.

**REFORM**

18. Are there any proposals for reform of the procurement legislation? If so, when are they likely to be implemented?

The Canada EU Comprehensive Economic Trade Agreement 2013 (CETA) requires substantial reform of procurement practices by provincial and municipal entities as well as crown corporations, school boards, universities, hospitals and utilities. This will include the introduction of bid review mechanisms, which will allow Canadian and foreign suppliers to challenge procurements for non-compliance with the obligations in CETA and to obtain monetary damages for these breaches.
ONLINE RESOURCES

Canadian International Trade Tribunal
W www.citt-tcce.gc.ca

Description. This is the official website of the Canadian International Trade Tribunal.

Buyandsell.gc.ca
W https://buyandsell.gc.ca

Description. This website provides information on how to buy and sell for the federal government. It is created by Public Works and Government Services Canada (PWGSC) procurement professionals in the Acquisitions Branch and managed by the Office of Small and Medium Enterprises – Strategic Engagement.

Ontario Ministry of Government Services
W www.doingbusiness.mgs.gov.on.ca

Description. This is the official website of the Ontario Ministry of Government Services.

Québec: Marcan

Description. This is the website of MARCAN (MARket place CANada), which is an initiative of federal, provincial and territorial governments under the Agreement on Internal Trade. It provides links to websites that may publish tender notices for procurement opportunities within the Canadian public sector.

Government of Alberta: Alberta Purchasing Connection
W www.purchasingconnection.ca

Description. This website provides an easy to use tool that lets public and private sector users manage, advertise, distribute and download public purchasing opportunities for goods, services and construction in Alberta.

British Columbia: Logistics and Business Services
W www.pss.gov.bc.ca

Description. This is the website of Procurement Services and Supply Services, which offer procurement and supply solutions, using a combination of internal and private sector resources. Services can be customised to suit an organisation's needs.

Government of Saskatchewan: SaskTenders
W https://sasktenders.ca/content/public/Search.aspx

Description. This website provides the primary gateway for public sector tender notices for Saskatchewan.

Manitoba: Procurement Services Branch
W www.gov.mb.ca/mit/psb

Description. This website provides centralised procurement related services to provincial government departments and agencies.

Newfoundland Labrador Canada: Government Purchasing Agency
W www.gpa.gov.nl.ca/index.html

Description. This website advertises bidding opportunities relating to goods and services, as well as tender notices for construction and related services.

Biddingo.com
W www.biddingo.com

Description. This is a portal that connects suppliers that provide various goods and services to buyers from the provincial, municipal, education, crown corporation, housing, construction and healthcare sectors, and private companies from across Canada.

Merx: Canadian Public Tenders
W www.merx.com

Description. This website provides daily lists of public tenders from government organisations across Canada.
English, French

Professional qualifications. Ontario, 1987

Areas of practice. Public procurement; litigation; international trade.

Non-professional qualifications. Bachelor of Social Sciences (Honours, Economics), 1981; Bachelor of Law, Queen's University, 1985; Certificate in Public Procurement Law and Practice, Osgoode Hall Law School, 2014

Recent transactions

- Acting for a major software/technology provider in a bid protest under federal regime.
- Acting for an international defence contractor in radar procurement by Canadian Coast Guard.
- Acting for a Canadian shipbuilder in National Defence procurement of Arctic Offshore Patrol Ships.
- Acting for a major software company in large procurement by Canada Post of data centre facilities and application development systems.
- Acting for a pharmaceutical supplier to provincial hospitals.
- Acting for a leading foreign industrial group in the high technology sector in aerospace, defence and security.
- Acting for a technology supplier in procurements by provincial police forces of dispatch and security equipment and technology.
- Acting for a foreign waste disposal company in procurement by British Columbia government of waste disposal services.
- Appointed by the Government of Canada as an expert arbitrator in international trade disputes with the US under Chapter 19 of the NAFTA.

Languages. English, French

Professional associations/memberships. Chair of the ABA Section of International Law, International Procurement Committee.

Publications

- Anti-Assignment Clauses in Government Contracts, McCarthy Tétrault Update, March 2014.
- Speaker, Canada EU Comprehensive Economic and Trade Agreement (CETA), National Conference, Canadian Corporate Counsel Association, Calgary, April 2014.