GOVERNMENT PROCUREMENT

By John Boscariol and Robert Glasgow

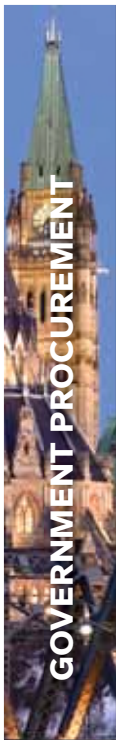
GOVERNMENT PROCUREMENT

Each year, federal, provincial, territorial and municipal governments in Canada purchase more than C$150 billion in goods and services.

Federal Procurement

Procurement by the federal government is subject to the requirements of the *WTO Agreement on Government Procurement* and Chapter 10 of the *North American Free Trade Agreement*. The leading legislation and policies that apply to federal contracts for goods and services include the *Financial Administration Act*, the *Government Contracting Regulations*, the Treasury Board Contracting Manual, the *Department of Public Works and Government Services Act*, and the Standard Acquisition Clauses and Conditions (SACC) Manual. Most purchasing for line departments is done by Public Works and Government Services Canada (PWGSC).

PROCUREMENT BY THE FEDERAL GOVERNMENT IS SUBJECT TO THE REQUIREMENTS OF THE *WTO AGREEMENT ON GOVERNMENT PROCUREMENT* AND CHAPTER 10 OF THE *NORTH AMERICAN FREE TRADE AGREEMENT*.



The contracting practices and contract awards of federal, provincial, and municipal, academia, school boards and hospitals are subject to the requirements of the *Agreement on Internal Trade*. 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 Procurement

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*. 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* requires the provincial government to follow the policies and directives established by the Management Board of Cabinet when undertaking procurements relating to the construction, renovation or repair of a public work. The Ministry

of Government Services is responsible for developing the procurement policy framework for the Government of Ontario, including guidelines. Procurement policies in Ontario include an electronic tendering system, no preference for local vendors and a conflict of interest policy. Further, procurements by broader public sector entities including school boards and hospitals are subject to the requirements of the Ontario Broader Public Sector Directive, which includes a Supply Chain Code of Ethics and 25 mandatory requirements.

Municipal Procurement

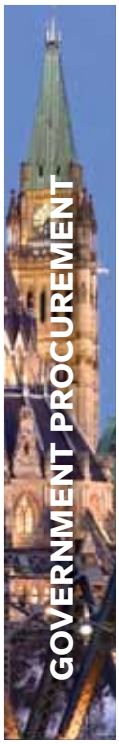
Municipal contracting processes are generally governed by common law and codified in municipal purchasing bylaws, contracting policies and purchasing procedures. Some provincial legislation such as the *Ontario Municipal Act* requires municipalities to maintain policies related to the procurement of goods and services.

Comprehensive Economic and Trade Agreement and the *Trans-Pacific Partnership*

Canada has recently signed the *Canada EU Comprehensive Economic and Trade Agreement* (CETA), which has significantly opened up provincial, utility and municipal procurements to European suppliers. This improved access will also apply to all Canadian suppliers, including Canadian suppliers that are subsidiaries or affiliates of foreign entities. The CETA imposes significant standards on the conduct of tendering processes and contract awards for federal, provincial and municipal procurements. The primary procurement obligations common to all the trade agreements include: non-discrimination based on country and/or province of origin; an open, transparent tendering process; a competitive procurement; and a fair procurement process. The CETA has been thoroughly vetted by both Canada and the EU and is expected to be implemented into Canadian law in early 2017.

THE PRIMARY PROCUREMENT OBLIGATIONS COMMON TO ALL THE TRADE AGREEMENTS INCLUDE: NON-DISCRIMINATION BASED ON COUNTRY AND/OR PROVINCE OF ORIGIN; AN OPEN, TRANSPARENT TENDERING PROCESS; A COMPETITIVE PROCUREMENT; AND A FAIR PROCUREMENT PROCESS.

Canada has also recently signed, but not yet ratified, the *Trans-Pacific Partnership Agreement* (TPP), which imposes further standards on the procurement process. A central aim of the TPP is to prevent procuring entities from discriminating between suppliers in the 11 Pacific Rim member countries. If ratified, the TPP would require Canadian governments to, among other things, use electronic procurement measures, ensure that notices of intended procurement are widely accessible, and provide suppliers with minimum time periods to respond to such notices. Suppliers should note that Canadian governments are not required to follow standardized procurement procedures when contracts fall below certain prescribed monetary thresholds, or when the subject matter of the contract is exempt from these procedures. The monetary thresholds are different for each of the trade agreements, may fluctuate year to year, and vary depending on the type of contract and in some cases the identity of the procuring entity.



Defence Procurement and the Controlled Goods Program

With regard to Canadian defence procurement, the *Defence Production Act* (DPA) gives the Minister of PWGSC the responsibility to administer the DPA and the exclusive authority to buy or otherwise acquire defence supplies and construct defence projects required by the Department of National Defence. There are security requirements for individuals, facilities and 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 assets of the government. The Controlled Goods Program is Canada's national domestic industrial security program and prevents the proliferation of tactical and strategic technology and assets, including missile technology, military equipment and related intellectual property. McCarthy Tètrault LLP is registered to receive controlled goods and technology under the Controlled Goods Program. The Joint Certification Program protects unclassified military critical technical data from common adversaries but allows the data to be transmitted to private U.S. and Canadian entities that have a legitimate need for them.

THERE ARE A MYRIAD OF PROCEDURES AVAILABLE FOR FEDERAL PROCUREMENT RANGING FROM FORMAL TENDERING TO NEGOTIATED PROCUREMENTS.

Tendering Formats

There are a myriad of procedures available

for federal procurement ranging from formal tendering to negotiated procurements. Practically speaking, the leading forms of procedure are requests for proposals, standing offers and supply arrangements. Short listing by way of requests for qualifications may be used in more complex, high-value solicitations. Specifications should be drafted in such a manner that competition is maximized, unless a restrictive requirement is necessary to meet the government's legitimate operational needs. Procurement laws generally provide that to be considered for an award, a bid must comply with all mandatory requirements in the request for proposal. In general, an award is to be made to the qualified bidder whose bid is responsive to the terms of the request for proposal or solicitation and is more advantageous to the government considering only price and the non-price related factors included in the bid document. Bidders who are debarred, suspended or declared ineligible may not receive a contract award.

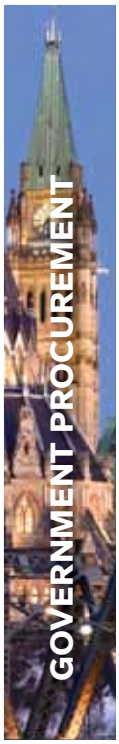
The Integrity Regime

In order to be eligible to do business with the federal government, bidders must comply with PWGSC's Integrity Regime (Integrity Regime). Under the Integrity Regime, suppliers are ineligible to bid on contracts when they, or their board members, have been convicted or discharged in the last three years for any of the following offences under Canadian law or a similar foreign offence:

- payment of a contingency fee to a person to whom the *Lobbying Act* applies;
- corruption, collusion, bid-rigging or any other anti-competitive activity under the *Competition Act*;
- money laundering;
- participation in activities of criminal organizations;
- income and excise tax evasion;
- bribing a foreign public official;
- offences in relation to drug trafficking;
- extortion;
- bribery of judicial officers;
- bribery of officers;

- secret commissions;
- criminal breach of contracts;
- fraudulent manipulation of stock exchange transactions;
- prohibited insider trading;
- forgery and other offences resembling forgery; and
- falsification of books and documents.

All suppliers are required to provide a certification on bidding that the company, its directors, and its affiliates, and their directors, have not been charged, convicted, or absolutely/conditionally discharged of any of the above offences or similar foreign offences in the past three years. As part of this certification, all suppliers will be required to provide a disclosure of all foreign offences similar to the above listed offences that they or their affiliates and their directors have been convicted of in any foreign jurisdiction. This is a disclosure requirement that necessitates rigorous diligence and monitoring systems to allow for speedy disclosure at the time of bidding. Providing false or misleading certifications is, in and of itself, cause for debarment.



Suppliers who are debarred from bidding are ineligible to bid for 10 years from the date of determination. However, if a debarred supplier addresses the root cause of the offence or co-operates with government authorities fully, it can obtain a reduction in this debarment time. The length of the debarment may be reduced by up to five years, but will also require an administrative agreement whereby law enforcement may monitor the supplier's ongoing behaviour.

The debarment period runs in perpetuity for those suppliers that are convicted of committing fraud against the federal government under either the *Criminal Code of Canada* or the *Financial Administration Act*. All such suppliers will be permanently debarred until a record suspension is obtained.

The federal government also has the ability to suspend a supplier for up to 18 months immediately upon that supplier being charged with or admitting guilt to any of the above listed offences or a similar foreign offence or until charges or pleas resolve such offences. The Integrity Regime does not explicitly extend this suspension provision to violations by affiliates of the supplier.

The Integrity Regime prohibits suppliers from subcontracting with debarred entities. Knowingly entering into such a subcontract will debar the supplier for five years. This prohibition is likely to be assessed on the basis of strict liability, and as such all contractors should implement due diligence procedures specifically directed at the compliance of any potential subcontractor with the Integrity Regime.

If an affiliate of a supplier has committed one of the above listed offences or a similar foreign offence, PWGSC can debar the supplier. The Integrity Regime requires that the affiliate be assessed by an independent third party retained by the supplier to determine whether the supplier had any participation or involvement in the underlying offence. If the supplier can show that it had no such involvement, it will not be debarred. Entities are deemed to be affiliates when one controls the other, when both entities are controlled by a common third party, or where direct control does not exist between the entities, but various prescribed indicia of control are present.

The federal government retains the ability to grant limited Public Interest Exceptions to the requirements under the Integrity Regime. These can only be granted where a debarred supplier must be retained and no other reasonable options exist. Factors that influence the granting of a Public Interest Exception include the inability of other suppliers to actually perform the contract, emergent circumstances, national security concerns, or potential material injury to the financial interests of the government if the exception is not granted. A permanently debarred supplier is not eligible for this exception.

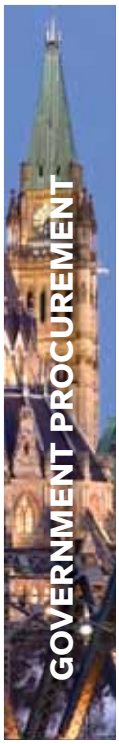
If, during the course of an ongoing supply contract, the supplier is convicted of one of the above listed offences or a similar foreign offence, the federal government is entitled to terminate the contract. The federal government is not obligated to terminate the contract, and suppliers are entitled to submit arguments as to why the contract should not be terminated. In the event that the federal government chooses not to terminate the contract, it must put in place an administrative agreement providing for independent third party monitoring of the contract.

Bid Challenges and Complaints

Purchasing undertaken by the federal government is subject to Canada's bid challenge regime under the jurisdiction of the Canadian International

Trade Tribunal (CITT), which is authorized to investigate compliance of federal purchasing entities with the trade agreements. The CITT requires that a complaint be filed within 10 working days of the date the complainant knew of, or should have known of, the grounds for the complaint.

If the CITT determines that a solicitation, proposed award or contract award does not comply with statute or an international trade treaty requirement, it may recommend that the contracting entity, usually PWGSC, implement any combination of the following remedies: terminate the contract, issue a new solicitation, award a contract or award damages for lost profits. It may also recommend that the contracting agency pay all of the complainant's bid and proposal preparation costs and all costs associated with filing and pursuing the protest.



Provincial and municipal authorities have their own bid protest mechanisms. Federal and provincial superior courts may also hear claims by bidders that the solicitations have been carried out in breach of their common law rights in contract or tort. All procurements by federal, provincial and municipal entities are subject to the jurisdiction of the courts and to the concept of "Contract A" and "Contract B" under common law. The courts have held that when a compliant bidder responds to a tender call, a notional contract called "Contract A" is formed. One of the terms of "Contract A" is that the bidder, if selected, is required to honor the terms of its bid by entering into "Contract B," which is the contract to perform the work in question. However, during the bidding process, the parties are governed by the explicit rules in the tendering documents. The purchasing government entity is also subject to a number of implied duties to "Contract A" bidders, including to conduct a fair competition, provide proper disclosure, reject non-compliant tenders, award the contract to the winning bidder and award the contract as tendered.

In recent years purchasing entities have increasingly attempted to avoid forming "Contract A" by drafting "non-Contract A" bid solicitations. If no "Contract A" is formed, the resulting duties do not arise and no breach of contract claim for damages can be brought. In addition, this process gives more latitude for bidders and purchasers to engage in a negotiated RFP process. While such a process would usually seem to eliminate a major source of liability bidders should be aware of two points. First, even if there is an express disavowal of "Contract A" courts have found

that, under certain circumstances “Contract A” can be formed. Second, where no “Contract A” is formed there is an increased likelihood that the procurement may be challenged via an administrative judicial review process.

FOR MORE INFORMATION, PLEASE CONTACT:
John Boscariol
416-601-7835
jboscariol@mccarthy.ca