

Public Procurement of infrastructure projects and energy projects

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1. What is the legal framework on public procurement in your country governing public purchases of energy projects and large-scale infrastructure projects? Are the relevant rules to be found in a broad public procurement package or are they found in separate legislation? Are there relevant thresholds obliging to apply public procurement rules to such projects? Are there any exemptions from the application of the public procurement rules provided for in the legislation for such projects?

1.1 Overview of public procurement law in Canada

In Canada, the laws relating to public procurement are found in the common law, legislation, and governmental guidelines and policies.

From a Canadian perspective, important variables to identify from the outset include: (1) which level of government is involved i.e. federal or sub-federal i.e. provincial or municipal; (2) which government entity (or quasi governmental entity i.e. a “Crown corporation”) is putting out the procurement call; (3) identity of the supplier; (4) value of the contract; and (5) whether the contract is characterized as a contract for the procurement of goods, services or construction.

Also, there are established principles at common law that apply to procurement more generally i.e. private and public procurement. Such principles include non-discrimination, transparency in the tendering process, competitive procurement, and fairness to all participants in the tendering process.

1.2 Federal level

At the federal level, government agencies conduct procurement in accordance with the Public Works and Government Services Canada’s *Supply Manual* (PWGSC Supply Manual), the Treasury Board of Canada’s *Contracting Policy*, and *Financial Administration Act* and *Government Contracts Regulations*. These reflect Canada’s commitments under various trade agreements.

1.2.1 Agreement on Internal Trade (AIT)

The AIT governs trade relations within Canada at both the federal and provincial levels. The AIT’s purpose is to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services, and investment within Canada and to establish an open, efficient, and stable domestic market. While the AIT does not apply to foreign companies, those with a corporate presence in Canada may be able to take advantage of these domestic rules. At the date of this Report, the relevant thresholds for government entities were CAD\$25,000 for goods, CAD\$100,000 for procurement of services and CAD\$100,000 for

procurement of construction. A higher threshold applies to procurement by Crown corporations: CAD\$500,000 for goods and services, and CAD\$5,000,000 for construction.

1.2.2 WTO Agreement on Government Procurement (WTO AGP)

Under the WTO AGP, the relevant thresholds for application of this international trade agreement are denominated in the IMF's special drawing rights units (SDRs). At the date of this Report, these were 130,000 SDRs for procurement of goods and services and 5,000,000 SDRs for procurement of construction. The federal government entities subject to the WTO AGP are set out in Annex 1 of the WTO AGP.

1.2.3 North American Free Trade Agreement (NAFTA)

Under NAFTA, the relevant thresholds applicable to federal government entities at the date of this Report were CAD\$25,000 for procurement of goods (Canada/US) or CAD\$80,400 (Canada/Mexico), CAD\$80,400 for procurement of services and CAD\$10,400,000 for procurement of construction. A higher threshold applies to procurement by Crown corporations: CAD\$402,000 for goods and services and CAD\$12,800,000 for construction.

1.2.4 Exemptions to public solicitation of bids

The PWGSC Supply Manual sets out the federal government's rules for when a non-competitive contracting process may be used; however, any such process must be fully justified by reference to the applicable exception to competitive bidding under the *Government Contract Regulations* of the *Financial Administration Act* or under the relevant national or international trade agreements. The listed exceptions in the *Government Contract Regulations* include: emergency situations posing an imminent threat to life or federal government property; contracts below a certain dollar threshold (CAD\$25,000, or CAD\$100,000 for certain architectural or engineering services); where it would not be in the public interest to solicit bids; and where only one person is capable of performing the contract.

With respect to the federal government's trade agreements, federal government entities may award a contract without soliciting bids only if one or more of the limited tendering reasons stated in the relevant trade agreement are applicable (NAFTA, Article 1016: Limited Tendering Procedures; WTO AGP, Article XV: Limited Tendering).

Exception is also made for defence procurement. Under the *Defence Production Act*, the federal government may procure defence supplies or projects without the need for a competitive process.

1.3 Provincial level

At the provincial level, each province has its own laws applicable to public procurement. These laws reflect each province's commitments under various trade agreements. Thus, the applicable public procurement rules not only differ from federal and sub-federal levels; they also differ between the various sub-federal levels (10 provinces and 3 territories).

1.3.1 AIT

All the provinces and territories in Canada except Nunavut (Nunavut has observer status) are subject to the AIT and the AIT thresholds specified in the previous section.

1.3.2 WTO AGP

Like the federal government, certain provincial government entities are subject to the WTO AGP. At the date of this Report the relevant thresholds were 355,000 SDRs for procurement of goods and services and 5,000,000 SDRs for procurement of construction. The provincial government entities subject to the WTO AGP are set out in Annex 2 of the WTO AGP.

1.3.3 Inter-provincial trade agreements

There are also various inter-provincial trade agreements in place at the sub-federal level. These include the *New West Partnership Trade Agreement* (NWPTA) among the provinces of British Columbia, Alberta and Saskatchewan, and the *Atlantic Procurement Agreement* among the Atlantic provinces.

1.3.4 Exemptions to public solicitation of bids

In addition to exceptions set out in provincial laws, the provinces are subject to the WTO AGP's limited tendering rules set out in Article XV of the WTO AGP. In most provinces, any public procurement contract valued at CAD\$100,000 or greater will be subject a competitive process.

2. Is this legal framework based on international agreements and commitments, like the EU Directives?

1.4 Federal level

The federal government's procurement laws reflect Canada's international obligations, primarily under the WTO AGP, NAFTA and domestically under the AIT. With limited exception, most federal government departments, agencies and enterprises are bound by the WTO AGP, NAFTA, and AIT.

1.5 Provincial level

Until recently, the provincial governments were not subject to WTO AGP commitments. While trade and commerce is a federal responsibility under the

Canadian Constitution (*Constitution Act 1867*), many areas including energy and infrastructure projects within a province are provincial areas of responsibility. Thus treaty making at the international level is complicated by the fact that Canada's federal government cannot bind the individual provinces on subject areas where it lacks jurisdiction. Recently, all ten provinces and two of the three territories (Nunavut has observer status under the WTO AGP), agreed to open up their procurement processes to suppliers from other countries. Nevertheless, there continue to be exceptions. Annex 2 of the WTO AGP sets out those provincial entities, which are and are not subject to the WTO AGP obligations. Since such commitments are extended on the basis of reciprocity, other signatories must provide equivalent access at the sub-federal level.

3. If based on international agreements and commitments, have your county added any specific procedures and tools to the national legislation directed to the procurement of energy projects and large-scale infrastructure projects?

There is little in the way of sector specific rules applicable to energy projects and large-scale infrastructure projects. The rules of general application apply to such projects.

4. Which, if any, is the procurement procedure envisaged in the legal framework for the procurement of energy projects and large-scale infrastructure projects? What is the most commonly used procurement procedure within the legal framework for the procurement of energy projects and large-scale infrastructure projects? Are conditions for use of various procurement methods clearly established

Most procurement processes take the form of calls for tender, requests for proposal (RFP), standing offers, supply arrangements and short lists. Most large energy and infrastructure projects are procured by way of a call for tender or an RFP process. Sole sourcing is permitted under exceptional circumstances or if the contract value is below a certain threshold.

5. What are the award criteria (in public procurement procedures) most commonly used for energy and large-scale infrastructure projects? Are the Lowest price or the most economically advantageous tender most common? Are circumstances related to quality, time and output evaluated?

In Canada, the public procuring entity has wide discretion to create its own award criteria (which might include lowest price, etc.), provided that the procurement process is transparent and fair to all bidders. Thus, evaluation criteria must be

clearly set out in the procurement documents and evaluation of submitted bids must be made on such basis. Bids must be complete and compliant with the procurement call requirements, and submitted prior to the deadline.

6. Do the public procurement rules regulate relations between the investor, the contractors and subcontractors?

The public procurement rules in Canada are applicable to the public entity and the supplier entity. Private entities are not subject to the public procurement rules as purchasers, though they will be required to comply with the government entity's rules when they are suppliers in the procurement process. The exception to this is when a private entity is procuring on behalf of a government entity, in which case, even as a purchaser, the public procurement rules would apply.

7. Are there works concession procedures used for the procurement of energy projects and large-scale infrastructure projects? And if so, are there one or several specific procurement procedures envisaged for this in your national legislation?

There are no rules or procedures specific to concessions in Canada. However, the rules of general application will apply.

8. According to your experience, how often do foreign bidders participate in award procedures related to energy projects and large-scale infrastructure projects in your country?

Foreign bidders frequently participate in public procurement processes in Canada; however, they usually do so through a Canadian incorporated subsidiary.

9. Are the model contracts for the construction works commonly used (at national as well as international level, like the FIDIC Books)? If so, which are the most commonly used model contracts for the procurement of energy projects and large-scale infrastructure projects? Are the model contracts specifically designed for public procurement?

The federal government and provincial governments usually use their own standard form documents.

To the extent other forms are used, commonly used forms include: the Canadian Construction Documents Committee (CCDC), a national joint committee that has developed standard form construction documents; the Canadian Construction Association; and the Royal Architectural Institute of Canada. While these

standard forms are primarily used in private procurement, there is no reason they could not be used in the public procurement process.

10. Please briefly describe the how do the model contracts regulate the contractual liability of the contractor Are models of liability similar to those applied in case of Turn-Key Contracts, design-build contracts or build contracts (where the design is provided by the procuring entity) commonly used?

For complex projects, the federal government usually employs a design-bid-build methodology. A design consultant is initially retained through a competitive proposal process, to design the project and prepare design and construction tender documents. Once the design is complete, the construction work is put out for tender. Following the selection of the winning bid, the construction phase begins. While this methodology involves a lot of upfront work, it allows for the refinement of the design and scope of work prior to putting the work out for tender. Unlike the turn-key or design-build models, the government will have separate contracts in place with each of the design consultant and with the general contractor. i.e. two points of responsibility as opposed to one.

11. To what extent are external lawyers engaged to draft, or otherwise involved, contract notices and/or contract documents in the case of procurement of energy projects and large-scale infrastructure projects?

Use of external legal counsel is highly dependent on the complexity of the project, size and capacity of the in-house teams. The federal government and provincial government have large in-house teams that can handle public procurement documentation. On very large and complex projects external counsel will usually be retained. Similarly, the extent to which external counsel is used by a supplier will depend on the depth of such supplier's in-house legal department.

12. Is it, in your country, common to appeal against award decisions related to procurement of energy projects and large-scale infrastructure projects? What is the authority relevant to recognize the appeal (common court, arbitration court, other)?

In Canada a losing bidder may appeal an award to the Canadian International Trade Tribunal (CITT) for matters relating to the compliance of federal government entities with the relevant trade agreements. Appeals to the CITT must be brought within 10 working days of the award. The remedies available to the CITT include cancellation of the contract, re-evaluation of the bid, retendering the procurement process, award of contract to complainant and award of damages.

A further appeal of the CITT's decision may be made to the Federal Court of Appeal. The provinces have similar appeal processes in place.

With respect to appeals on the basis of common law grounds, any federal or provincial court of inherent jurisdiction may undertake judicial review of the award.

Appealing an award cannot be characterized as very common in Canada; however, there are defined processes in place and each year the CITT hears approximately 50 to 100 complaints.

13. From your experience – what would you indicate as the most problematic issue while awarding public procurement for such projects and on the other hand what would you call the biggest achievement/improvement made of the legislation implemented during last years for such projects.

A recent development in Canadian trade law is the signing of the *Canada EU Comprehensive Economic Trade Agreement (CETA)*, which should have the effect of liberalizing trade opportunities for EU companies to participate in Canada's federal and provincial public procurement processes, and for Canadian companies to access similar opportunities in the EU internal market. Each side has carved out various exceptions. While the CETA contract value thresholds are approximately equivalent to the WTO AGP thresholds and NAFTA (in relation to construction, not goods and services) thresholds, such thresholds are not as low as those in the AIT for domestic Canadian companies.

14. What are the most commonly used/provided by the public procurement laws instruments for securing of the performance of the contracts?

At both the federal and provincial levels, it is common for performance to be secured by a bid bond and a performance bond. The federal and provincial governments use standard form templates, which are available on their respective websites.

15. Is it possible to sign the contract for the procurement of energy projects and large-scale infrastructure projects in other than national language?

Canada has two official languages, French and English. Federal government agencies must comply with the *Official Languages Act*, which provides that members of the public may communicate with and receive services in either official language. Relating to procurement, this generally means that in relation to procurement by the federal government, a supplier may receive solicitation documents and bid in either official language.

Public procurement by the Quebec provincial entities requires documents to be in French under the *Charte de la langue française*.

Public procurement by other provinces in Canada, are usually in English.

16. Is there a legal or regulatory requirement for public disclosure of the information related to the award procedure?

The federal government's Guidelines on the Proactive Disclosure of Contracts requires disclosure of all new contracts awarded over \$10,000. It maintains and updates the list on a quarterly basis. The provincial governments have in place similar disclosure requirements.

The federal government must also comply with the advance contract award notice (ACAN), whenever the government wishes to sole source a contract. The ACAN provides 15 days' advance notice to the public of the government's intention to award such a contract.

Although both the federal government and the provinces have in place access to information laws, the government is generally not required to disclose its entire procurement file due to the potential harm it could cause to third parties. If an access to information request is made, the government may redact commercially sensitive information to protect third parties. e.g. pricing information that would be harmful in the hands of a competitor.

Most public procurement processes provide for the debriefing of unsuccessful bidders. This is normally in the form of a letter that provides the name of the successful bidder, total estimated cost of the contract, unit rates if applicable, non-confidential information on the relative strengths of the successful bid, and reasons why the unsuccessful bidder was not selected.