19.

Procurement

Trade Agreements

Government procurement in Canada has been subject to trade agreements for decades, and Canada's promotion of plurilateral and bilateral trade agreements remains very active. More-recent trade agreements, such as the Canada–European Union *Comprehensive Economic and Trade Agreement* (CETA), the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP), and the *Canadian Free Trade Agreement* (CFTA), which replaced the Agreement on Internal Trade (AIT), have introduced further access to international trade and expanded the application of various trade agreements to territorial, provincial, municipal, academic, school, and hospital sectors.

The Canada–United States–Mexico Agreement (CUSMA) is now in force (replacing NAFTA). Canada is not a signatory to the government procurement chapter and, as such, suppliers from the United States and Mexico will have to look to other trade agreements to support and enforce equal access to Canadian public sector markets.

Canada and the United Kingdom executed the Canada-United Kingdom Trade Continuity Agreement (TCA) as an interim measure to bridge the period of time between the UK exit from the EU and negotiation of a new trade agreement between the two nations. All of the provisions of Chapter 19 – Government Procurement for Canada that existed under CETA continue to apply, subject to those modifications to ensure alignment to a two-Party arrangement (e.g., changing references to the EU to the appropriate UK references; retaining the Canada-UK Joint Committee formed under CETA and the continuing application of decisions made by the Canada-UK Joint Committee that were made under CETA).

A more detailed explanation of the various trade agreements Canada has signed and implemented into law can be found in the International Trade chapter. More detailed information on how trade agreements impact public sector procurement generally can be found in the Fasken Procurement Guide.

Public Procurement

The rules governing public procurement in Canada stem from a number of legal sources, including trade agreements, legislation and the common law. In Canada, the common law on public procurement has been established over the past 30+ years. The fundamental principles applicable to public procurement are fairness, openness, and transparency.

In Canada, competitive procurement is the primary method used by public entities to procure goods, services, and construction. Procuring entities are not required to lower their legitimate operational requirements to increase opportunities for bidders who would otherwise not be able to succeed in a competition. But if a competition is to be held, the requirements must be defined in a manner that allows for competition.

More detailed information on public sector procurement in Canada can be found here.

Pre-qualification Process

In order to run more efficient procurement processes for complex projects or supply arrangements, procuring entities will use a pre-qualification process, sometimes referred to as an invitation to qualify (ITQ) or request for pre-qualification (RFQ). Pre-qualification processes do not necessarily obligate the government

buyer to issue a request for proposal (RFP) and solicit bids in the future but, rather, enables it to select suppliers with specialized expertise to respond to tenders that may be issued in the future. Qualified suppliers then participate in a selective tendering process as bidders.

Suppliers who do not qualify at the pre-qualification stage are thereafter excluded from participating in the eventual procurement process and in most cases will not be entitled to receive further information about the procurement (i.e., they will not get another "kick at the can").

Pre-qualification can be used not just for individual contracts but also on a more general basis, such as for standing offers or supply arrangements.

Standing offers and supply arrangements are often used for goods or services that can be priced on a fixed or firm price basis, are required on a recurring basis, and can be supplied "as is" (e.g., temporary staffing arrangements, office supplies, food, fuel, basic computer equipment such as laptops).

Procuring entities will use this approach to save time and money and to enable multiple government entities or departments to acquire goods and services without having to run their own individual procurements.

Standing offers and supply arrangements can (and often do) run over several years, although most trade agreements require that any standing offer or supply arrangement that lasts longer than three years must permit new suppliers to participate in a pre-qualification process.

Bid Solicitation Period

Once the solicitation period begins, bidders can only communicate in writing with the procuring entity identified in the procurement document. This approach is used to maintain the integrity of the procurement process (all information exchanged between the buyer and the bidders, is able to be shared with all bidders as it is in writing). If a question and answer period is provided, this is the last opportunity for bidders to understand the procurement requirements and to improve their bids before final submission. Communication is formal and limited, especially compared to early engagement opportunities. In many public sector procurements, attempts to communicate with government officials other than those identified in the procurement document could result in bid disqualification.

The guiding principle for questioning requirements in a procurement process is to take action and raise the concern. Taking a wait-and-see approach (i.e., "Let's submit the bid and see what happens") is problematic for two important reasons. First and foremost, once final bids have been submitted, there are no further opportunities for bidders to fix errors or ambiguities or to submit additional information (this is called "bid repair" and is generally prohibited). Second, the law for procurement in Canada is very clear: Bidders are responsible for understanding the procurement requirements; taking a wait-and-see approach in the face of procurement errors can prejudice a bidder's ability to challenge the procurement in a more formal venue, such as before a trade dispute panel.

The period for questions and answers typically ends at least a week before the final bid submission deadline. This is an intentional approach, based on the fairness principle, to ensure that all bidders have sufficient time to adjust their bids, if required, before the final bid submission deadline.

Bid Requirements

Trade agreements are particularly useful for understanding how bid requirements should be structured. Both CETA and the CFTA, for example, require that a procuring entity, when determining its requirements, must follow some essential rules. In instances where a procurement is not covered by a trade agreement, procuring entities may vary the requirements but will still ascribe to the overarching principles of fairness, openness, and transparency. As required by the trade agreements:

Procurements must be open to qualified suppliers. The circumstances under which a limited or non-competitive procurement can be conducted are restricted.

Procurements must be non-discriminatory. All suppliers must be treated equally, and procuring entities cannot discriminate against suppliers from other countries if trade agreements apply (unless there is an express exception provided for in the trade agreement). For example, every trade agreement Canada has implemented provides for an express exception to create set-aside programs for Indigenous businesses in Canada.

Procurements must be transparent. All tender documentation necessary for bidders to prepare and submit a bid must be made available to all bidders. This includes evaluation criteria and bid requirements or conditions.

Procurements must not impose arbitrary conditions to qualify. A procuring entity must not require compliance with conditions and qualifications unless they are essential to ensure that the bidder has the legal, financial, and commercial ability to undertake the procurement. For example, a procuring entity may require prior experience if such experience is essential to meet the requirements of the procurement. However, if a procurement is subject to a trade agreement, a requirement that bidders, as a condition to participation, must have previously been awarded a contract by the procuring entity is prohibited.

Technical specifications must be properly applied. Specifications must be based on international or national standards and set out in terms of performance or functional requirements (e.g., quality, safety, dimensions, process/methods of production) rather than design or descriptive characteristics.

Common Contractual Requirements

Much the same as is experienced in other jurisdictions, the terms of a contract issued to a successful bidder are not just those of the contract itself. Applicable legislation may provide government entities with additional statutory rights or provide for terms and conditions that are deemed to be included in every contract executed by the government even if they are not specifically identified.

Information and records created in the performance of a contract are typically subject to government audit and also to access to information legislation in accordance with the generally held principle in Canada that records under the control of the government should be available to the public (subject to limited exceptions). Government data will be subject to applicable privacy laws. These are two common areas in which terms will be deemed to be included by legislation in a contract even if they are not identified within the document itself. These provisions cannot be contracted out of by the parties to the contract (i.e., an “entire agreement” clause cannot exclude statutory rights and responsibilities that would otherwise apply).

Pre-approval of subcontractors is often required before a subcontractor can begin working on any government-related work. There are many reasons for this requirement, the two principle reasons being that governments have to be aware of the entities with whom they are "doing business" and are required by law to ensure that they know to whom government information may be provided, particularly when sensitive government information is involved.

As with many other jurisdictions, Canadian government procuring entities tend to use template clauses and conditions. Although the process may be burdensome, the government template requirements serve an important purpose: They increase the efficiency of bid evaluation and contract management.

Codes of Conduct and Vendor Performance Programs

Many procuring entities have implemented or are in the process of implementing codes of conduct or vendor performance programs that apply to their procurements, and most reserve their right to verify the information provided in bids at any point in time, including after contract award. If information submitted by a bidder is found to be misrepresentative (whether knowingly or unknowingly), most public sector entities reserve a right to disqualify bidders or terminate any awarded contract for default.

Suppliers that are subject to vendor performance programs may be rendered ineligible to bid on future requirements (disbarred) for varying periods of time, which can extend from months to years.

Renegotiating the Pricing for a Publicly Tendered Contract

While unforeseen circumstances may require a renegotiation of the work or fees under a contract, a fundamental principle of competitive procurement is that bidders have the option to choose whether or not to submit a bid for work and are presumed to have understood the work and the associated cost(s) to fulfill the contract they have been awarded.

Procuring entities are not under a positive legal obligation to assess whether a bidder can deliver the work for the price quoted – even if the amount is significantly lower than all other bids submitted. While it would be prudent for a procuring entity to confirm with a bidder that an extremely low price quoted is correct, there is no obligation on the part of a procuring entity to do so (absent indications of wrongdoing, such as collusion).

To impose such an obligation in scenarios where a low bid is submitted runs the risk of stifling commercial competition. A bidder may decide to bid a low price in order to gain a foothold in the marketplace or to increase its market share. Those decisions are for the bidder to make.

Consequently, absent a reasonable explanation as to why the costs no longer reflect the work, renegotiating of pricing is highly unlikely and difficult to achieve.

Options for Unsuccessful Bids

While even successful bidders should consider seeking a debrief, bidders that are unsuccessful in a procurement competition should always do so. It is important to take note of any time limits that apply to a debriefing process, as they can be very short. The debrief should explain why a bid was not successful. However, a debrief is also important when deciding whether or not to challenge the award.

Federal government procurements that are covered by trade agreements must provide unsuccessful bidders with access to the Canadian International Trade Tribunal (CITT). The benefit of bringing a complaint to the CITT is that the total period of time for the procurement review process (from the filing of a complaint to the release of the CITT's decision) is 90 days. Parties can ask for an expedited hearing (45 days), or the CITT may extend the total procurement review process by up to 135 days, but the matter is usually resolved within the 90-day time frame. Of significant importance is that the complaint must be made within a 10-day period from when the aggrieved bidder knew or reasonably ought to have known the basis for a complaint.

Under Canada's internal trade agreement – the *Canadian Free Trade Agreement* (CFTA) – each provincial and territorial government is required to provide an administrative or judicial review procedure through which a complaint may be filed. For example, a complaint regarding an Ontario government procurement must be submitted to the Program and Policy Enablement Branch of the Ministry of Government and Consumer Services. Suppliers located in Canada's four western provinces (British Columbia, Alberta, Manitoba and Saskatchewan) have access to a formalized Bid Protest Mechanism (BPM). As with the federal government procurement complaints process, the timelines for raising a procurement dispute are typically short.

If a trade agreement does not apply to a procurement, there are other available dispute processes, such as complaints to a procurement ombudsman or commencing a legal action.