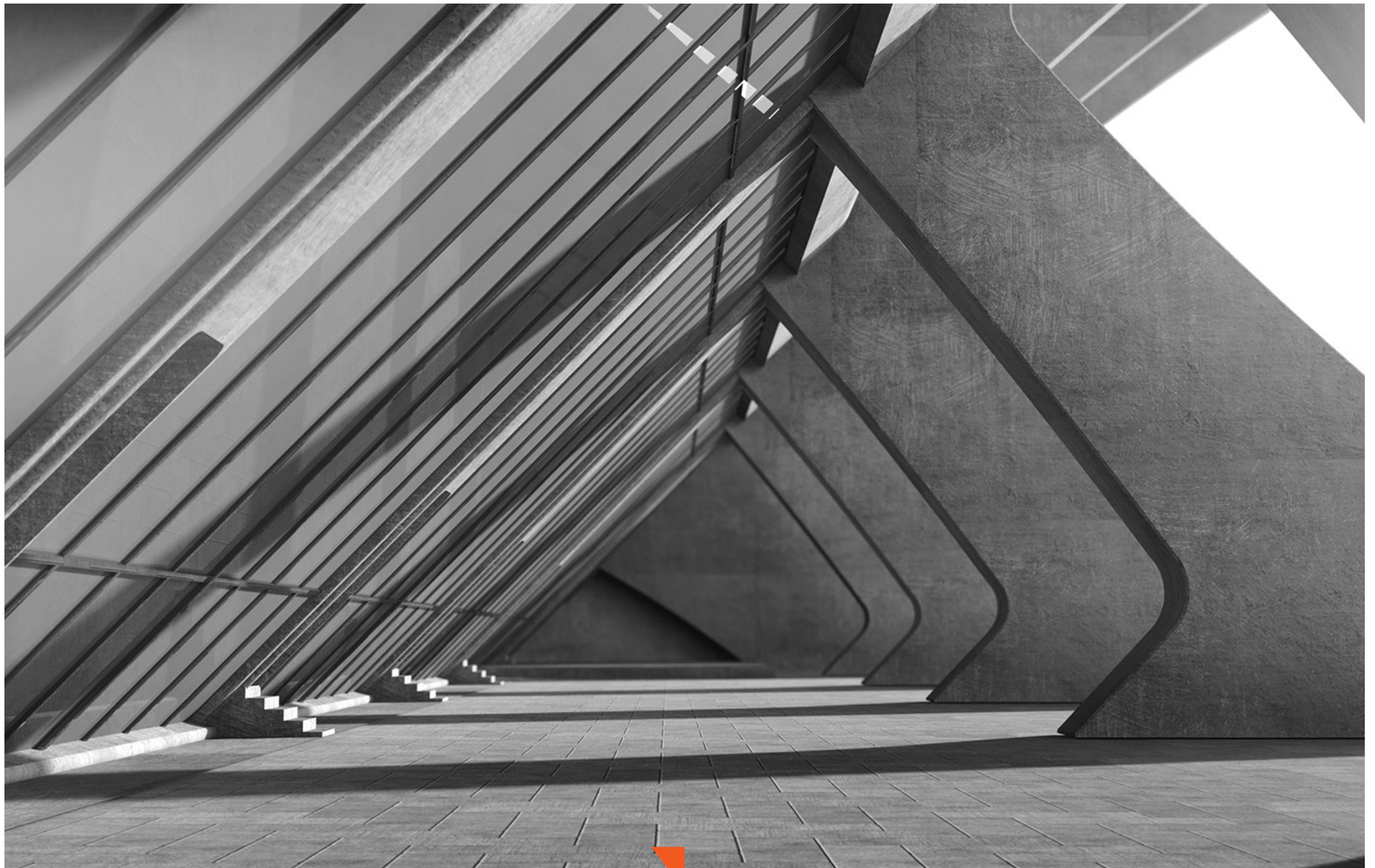

Government Contracts, Procurement and Tender Law in Canada

A COMPLETE GUIDE

FASKEN

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Table of Contents

Part I	**Pre-Solicitation Period**	**5**
	Early Engagement Sessions or Industry Days	5
	Draft Tender Documents	5
	Criteria for Future Contract Award	6
	Pre-qualification Processes	6
	Grounds for Exclusion	7
Part II	**Bid Preparation and Managing the Solicitation Period**	**8**
	Understanding the Requirements	8
	Attempting to 'Save' a Bid by Using Qualifying Statements	10
	Privilege and Waiver Clauses: Don't Rely on Them to Save a Non-Compliant Bid	10
	Canadian Common Law - The Duty of Fairness	11
	Clarifying Requirements During the Solicitation Period	14
Part III	**Bid Evaluation**	**16**
	The Bid Evaluation Process	16
	Preventing Bid Disqualification - Preliminary Bid Review Process	17
Part IV	**Contract Award, Debriefing and Disputes**	**18**
	Disputes	19
Part V	**Additional Information on Trade Agreements**	**20**
	Determining Coverage	20
	The Essential Rules	21
	Exceptions from the Trade Agreements	21
	Determining Requirements	22
	Evaluating Bids	22
	Contract Award	23
	Disputing a Procuring Entity Decision	24

Overview

The rules governing public procurement (e.g. procurement by governments) in Canada stem from a number of legal sources, including the common law, trade agreements and legislation. Public sector entities are also subject to various government- mandated policies with respect to their purchasing of goods and services[1].

In Canada, the common law of procurement has been established over several decades. The basic fundamental tenets of procurement by public entities - whether under the common law or trade law - are fairness (good faith), openness, and transparency.

Competitive procurement is the primary method used by public entities to procure goods, services, and construction.

Governments leverage procurements to achieve social, policy and economic benefits - which is why they cannot be viewed through the same lens as commercial arrangements. For the public buyer, procurements must:

- Be fiscally appropriate (in line with budgets; achieve good value for money or other financial objectives)
- Be consistent with government priorities, taking in to account a "whole of government" perspective
- Be conducted fairly and consistent with policies and trade obligations
- Achieve social, policy and economic objectives

Regardless of the amount of agility governments seek to bring to the procurement process, these broader objectives will necessarily lead to additional cost and complexity considerations for any procurement (for both government and suppliers). As government priorities change, so will the social, policy and economic benefits required to be achieved by the procurement process.

For ease of reference, this guide is broken in to 4 parts that follow the procurement process:

Part 5 of the Guide provides more detailed information on procurements subject to trade agreements.

We want to ensure our Guide provides information that is relevant to our readers.
Should you have any questions, comments or suggestions, please send them to:

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1. The rules governing private procurement (e.g. procurement by industry from industry) are less proscribed, and, in general, subject only to the common law.

PART I

Pre-Solicitation Period

Early Engagement Sessions or Industry Days

As part of the procurement planning process, a procuring entity may conduct preliminary investigations to assess the market's interest in its requirements (e.g. what it is that it needs) or its proposed procurement strategy. Research of open source information on the availability of goods, services or suppliers may be done directly or through a third party.

A positive trend amongst public sector buyers to improve the success of their procurements is the increasing use of early engagement sessions, even in advance of the drafting of the tender[2]. These sessions seek out industry feedback on the buyer's requirements – to determine whether industry has current capability to meet the requirements, is willing to develop the necessary capabilities if they don't exist, or to determine if the buyer's requirements are not possible for industry to meet and require modification.

Engagement sessions give suppliers the "context" for the upcoming procurement, offering an opportunity to gain advance understanding of requirements, to provide input into the process, to ask questions, to seek clarification, to meet government officials involved in the process and to see who potential competitors may be. For companies that might be interested in subcontracting for part of the work, engagement sessions also provide an opportunity for them to meet potential prime contractors who intend to submit a bid.

Draft Tender Documents

Procuring entities may release draft tender documents to obtain industry input into requirements, particularly for complex or novel acquisitions where the procuring entity wishes to determine if the marketplace can fulfill its needs (e.g. if the technology exists now and can be used as intended; if there are alternative solutions etc.).

Access to draft tender documents provides an invaluable opportunity for a potential supplier to gain an understanding of the requirements, to provide comments on the requirements to the procuring entity, to identify requirements that are unclear and to determine if one should invest time, energy and resources to submit a bid. Many of the "rules of the process" set out in the draft tender will stay consistent through to the final tender, as will elements such as bidder instructions, mandatory certifications, governing policies and "standard terms" for contracts. Accordingly, it is important to closely review these drafting documents and provide comments to the government entity. Once a final tender has been released, modifications are much more difficult to obtain.

Trade Agreements

Procuring entities are not required to engage in advance engagement sessions. However, if they do so, they must respect the trade agreement principles generally applicable to procurement.

2. For ease of reference in this Guide, we have used the term "tender" to refer to the various types of procurement documents (Request for Proposals, Request for Qualifications etc.) that a government entity might issue.

Criteria for Future Contract Award

Although it may seem premature, reviewing the criteria for contract award, particularly the evaluation criteria, is essential. If contract award criteria are vague or unclear, or if the criteria provide such a wide discretion to the procuring entity that the essential requirements of good faith or transparency of the procurement process are compromised or negated, this should be questioned at the outset of the procurement process.

Draft tender documents should be reviewed with the same degree of attention as is provided to any final tender documents, including engaging the subject matter experts who will be responsible for overseeing and preparing the final bid submissions.

Pre-qualification Processes

Procuring entities may use a pre-qualification process to down-select bidders either in advance of release of the formal tender or as the first phase of a solicitation process. Advance qualification of bidders can be a useful method to improve the efficiency of the ultimate procurement process, as it ensures that only those suppliers who possess the essential requirements participate in the actual tender process.

Pre-qualification can be used for individual contracts, to provide the procuring entity with a list of qualified suppliers for a future procurement, or to create a list of suppliers for more general supply arrangements of commercial goods or services that are required on a recurring basis or that can be supplied "as is" (e.g. temporary staffing arrangements, office supplies, food, fuel or basic computer equipment such as laptops). These arrangements may be identified with names such as "Standing Offers", "Supply Arrangements" , "Prequalification Lists" or "Vendor of Record" arrangements.

Trade Agreements

The rules for pre-qualification processes under the trade agreements are more prescriptive, and the pre-qualification process must meet the same requirements for fair, open and transparent procurements as the final tender process. Pre-qualification processes cannot be designed to be overly restrictive so as to unfairly limit competition in the future. The process can be conducted for a specific procurement (e.g. a one-time qualification process) or for future, yet-to-be determined procurements. In each case, the rules that apply to qualifications are different. Depending upon the trade agreement, the pre-qualification process may also be identified as "*conditions for participation*".

For a procuring entity wishing to create a list of pre-approved or registered suppliers for future but as yet unknown purchases, all trade agreements require that new suppliers must be able to qualify for these 'standing' supplier lists. This qualification process isusually required by trade agreements to be conducted annually, subject to certain limited exceptions.

The procuring entity must limit the pre-qualification requirements to those conditions that are essential for ensuring the supplier possesses the capacities and abilities necessary to undertake the requirements of the procurement (e.g. the contract). While each trade agreement will have its own specific requirements, common rules for pre-qualification under all of the trade agreements require that any conditions for qualification:

- Must be limited to those that are essential to ensure a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the procurement
- Cannot be unnecessarily restrictive, and not otherwise expressly excluded by an applicable trade agreement
- Must be set out in advance in the tender notice and/or tender documentation
- Cannot require a bidder to have prior contracts awarded by that procuring entity
- Must permit all qualified suppliers to participate in the procurement they have been pre- qualified for, unless notice was provided in the original request for pre-qualification that identified a limited roster of pre-qualified suppliers would be selected and the criteria that would be used to do so.

Paying attention to a pre-qualification process is important. Suppliers who do not qualify at the pre-qualification stage are thereafter excluded from participating in the eventual procurement process and may have to wait for a prolonged period of time before the pre-qualification list is re-opened to new suppliers.

Grounds for Exclusion

While a pre-qualification process sets certain requirements that must be met to participate in a procurement, all public procurements will provide that, if certain conditions exist, the bidder must or will likely be disqualified from competing in the solicitation process (even if they are otherwise capable of meeting the pre-qualification requirements or their bid is compliant with the terms of the tender). These types of exclusions will address issues of fundamental legislative or policy importance that would prevent a public entity from entering in to a contract with that bidder. For example, certain criminal convictions, fraud, bankruptcy, insolvency, repeated material performance failures on prior contracts, conflict of interest or collusion.

Trade Agreements

The trade agreements provide a non-exhaustive list of factors that are grounds for bidder elimination quite similar to the grounds noted above: bankruptcy, insolvency, false declarations, contract performance issues, criminal offenses, misconduct or failure to pay taxes. Procuring entities are not prohibited from adding additional grounds for exclusion, provided that this process and the identified grounds for exclusion remain in compliance with the trade agreements.

The grounds for exclusion in a tender will become material terms of any awarded contract, the breach of which usually entitles the contracting authority to terminate the contract. If you already hold a public sector contract, pay attention to the applicable policies for suspending or debarring contractors from bidding on future opportunities (such as, in the event of a breach of contract).

PART II

Bid Preparation and Managing the Solicitation Period

Throughout the Guide, we identify several reasons why bids fail. One of the most common causes arises during the bid preparation process, when a bidder fails to closely read the requirements, makes assumptions about vague or unclear requirements, or believes that the buyer can be swayed to accept an alternative to what was asked for.

If a draft tender was not provided in advance, the essential first step is to review the tender documents closely and in full, to ensure a clear understanding of the requirements, to identify requirements that are unclear, and to determine if one should invest time, energy and resources to submit a bid. Close review of the bidder instructions (including time limits for asking questions, and bid submission deadlines), mandatory requirements, mandatory certifications, governing policies and "standard terms" for contracts should be conducted well in advance of the bid submission deadline.

Whether the tender is subject to trade agreements or not - under Canadian law, it is the bidder that bears the responsibility to ensure they understand the requirements and to submit a responsive bid.

Once a tender is released:

- Achieving significant modification of the tender or its requirements is unlikely
- Communicating with government officials will be strictly controlled
- Public sector buyers are subject to strict rules – they cannot accept an alternative that does not meet the requirements, unless the tender expressly permits this to occur (and even then, the variations from the original requirement are not open-ended by any stretch of the imagination)

> Bidders are always responsible for ensuring they understand the tender requirements and submitting a bid that responds to those requirements.

Understanding the Requirements

The drafting of requirements and the development of a bid in response to these requirements is a complicated process. Inadvertent errors that skew requirements or scoring methodologies can occur through no fault of the drafter. Inherent assumptions about requirements can lead to inherent assumptions in bid preparation - either of which can negatively impact the bid evaluation and/or score. Failing to closely read the requirements to ensure a full understanding of what is required; or making assumptions about what a requirement means when it is unclear, are two of the most common - and fatal - bidding errors.

The subject matter experts on the bid preparation team should be able to determine, at a minimum, the basic elements for each requirement:

- *What* is the requirement
- *Why* is this a requirement
- *When* does the requirement have to be met

- *How* does the bidder demonstrate the requirement is or will be met
- Is the requirement *mandatory* or not

In addition to understanding the requirement, the team must also be able to clearly identify for each requirement:

- *What* is being evaluated
- *How* it is being evaluated
- *What* scoring methodology is being applied
- *How* is the score determined

> Unclear or vague tender requirements do not shift the bidder's responsibility to understand the requirements - the bidder's obligation remains solidly in place.

Mandatory versus non-mandatory requirements - critical differences

A mandatory requirement is a requirement that must be met in order for a bid to remain in the competition. Mandatory requirements are usually identified as requirements that a bid/bidder "must", "shall" or "will" meet.

Compliance with all of the mandatory requirements of a tender is one of the cornerstones for maintaining the integrity of the procurement process, and will be thoroughly and strictly evaluated. If not met, the bid will be disqualified, deemed non-responsive or rejected.

While the tender may permit or require a bidder to provide an explanation as to how they meet a mandatory requirement, at its most basic level a mandatory requirement is a "yes" or "no" proposition - the requirement is met or it is not. Typically, a mandatory requirement requires a response confirming that the requirement is met, without exception. If an explanation as to how a mandatory requirement is met is part of the tender requirements, the explanation cannot attempt to qualify compliance or provide that compliance is contingent on other factors or events. The explanation must still confirm that the mandatory requirement can be met.

Non-mandatory requirements will be identified in the tender documents using words such as "may" or "should" or described as "optional" or "value-added" offerings. Bidders are usually required to provide detail describing how they meet such a requirement. Non-mandatory requirements may be scored - the better the requirement is met, the greater the number of points awarded.

However, in any scenario where points are awarded, it is important to take note of requirements where a minimum number of points must be achieved (e.g. "minimum points to pass"). In these cases, the minimum points threshold operates as a mandatory requirement - failing to meet the point threshold can mean elimination of the bid from the competition.

> As a general rule, mandatory requirements must be met, without qualification.

Attempting to 'Save' a Bid by Using Qualifying Statements

Mere irregularities in bids (for example, forgetting to execute a certificate) should not result in the disqualification of a bid that otherwise complies with all material conditions of a tender. However, bid qualifications, or modifications to the stated requirements of the tender made in a bid submission, are not "mere irregularities". Bids that differ in quantity and quality from the tender requirements or that attempt to qualify or modify the terms of the tender are typically considered to be counter-offers and are incapable of acceptance.

Even if the qualifying statements may not result in a bid being converted into a counter-offer, qualifications can create two significant problems:

For bidders	Qualifying statements in bids can render a bid non-compliant and incapable of acceptance.
For procuring entities	Accepting bids which modify or qualify tender requirements breaches the implied duty of fairness.

Public sector buyers are subject to strict rules in procurement – if the requirements are for a particular technical outcome or solution, then that is what the bid must be evaluated against. Accepting an alternative that does not meet the requirements, unless the tender expressly permits this to occur (and even then, there are limits to how much deviation a procuring entity can permit), amounts to acceptance of a non-compliant bid.

The underlying rational for rejecting qualifications of requirements in bids is fairly straightforward - the bidder who was permitted to submit a bid containing qualifications gains an unfair advantage over other bidders who, given the same opportunity, may have wished to also modify or qualify their bids or submit counter-offers.

> Before qualifying any requirement or offering a modification to a stated requirement in a bid submission, confirm that the requirement is not a mandatory requirement and that the rules of the tender permit bidders to do so.

Privilege and Waiver Clauses: Don't Rely on Them to Save a Non-Compliant Bid

Procuring entities may seek to balance the risk of the loss of an otherwise great bid by including a clause - usually referred to as a "privilege clause" - in the tender documents. Privilege clauses enable procuring entities to reserve a right to accept bids that may not respond one hundred percent to the tender requirements. However, it is important to note that the procuring entity it typically not required to exercise such rights – they are optional.

While this might seem to be a workaround, the Canadian courts have been clear for over 30 years that privilege clauses do not create a *carte blanche* for procuring entities or bidders. If a tender contains a privilege clause that permits a procuring entity to accept a non-compliant bid, it may not save the day, particularly if the bid's non-compliance results in a failure of the bid to address an important or essential requirement and there is a "substantial likelihood" that the bid defect would have been significant in the procuring entity's decision-making process.

Even in the face of a broad privilege clause, a court is unlikely to excuse the failure to comply with mandatory requirements on the basis that such an approach is arguably harmful to the public solicitation system, creates commercial uncertainty, and undermines the credibility and integrity of the solicitation process (e.g. if a mandatory requirement isn't actually mandatory, how is a bidder to know that, and how is a bidder to structure their bid?).

Procuring entities may also use "waiver of informality" clauses, allowing them to waive minor omissions or defects.

For example, in *Double N Earthmovers v. Edmonton (City)*,[3] the call for tenders required that serial and license numbers be provided for all equipment to be used by the bidder. The successful bidder failed to provide this information for certain pieces of equipment, but was awarded the contract when the City exercised its rights under the waiver of informality clause in the tender documents. An unsuccessful bidder sued the City of Edmonton and the matter made its way through the courts, eventually landing at the SCC.

In a split decision, the SCC, applying the material non-compliance test, held that the failure to include serial numbers was not something that could materially affect the price or the performance of the procurement. The court found that the City was not aware of the successful bidder's deceit until after it had accepted the bid and it had not colluded with the successful bidder during the bidding process to treat other bidders unfairly. Once the City accepted the bid, it was permitted under Contract A to waive this informality and award the bid to the successful bidder. The court identified that a procuring entity has no duty to investigate whether a bidder will comply with tender requirements, and can rely on the terms of the tender because each bidder is legally obliged to comply in the event that a bid is accepted.

For procurements subject to trade agreements, the rules applicable to compliant and non-compliant bids are more stringent.

> Privilege clauses or waiver clauses are not the solution to a poorly structured tender or bid.
>
> Even if a tender document contains a privilege clause, the exercise of the rights provided to a procuring entity in a privilege or waiver clause are optional – the procuring entity is not required to exercise this right even if all bidders are non-compliant.

Canadian Common Law - The Duty of Fairness

The origins of the legal framework applied to the tender process in Canada can be traced back to the 1981 Supreme Court of Canada (SCC) decision in *Ron Engineering*.[4] This case concerned a tender for a construction contract for the Government of Ontario's Water Resources Commission in the City of North Bay. The tender documents required a bid deposit at the time of bid filing. While the tender permitted for the return of the bid deposit, if a bid was withdrawn within sixty days of the opening of the bids, the deposit could be retained.

3. 2007 SCC 3.
4. *The Queen in Right of Ontario v. Ron Engineering*, [1981] 1 SCR 111 (Ron Engineering).

After the opening of bids, one of the bidders, Ron Engineering, identified a pricing error in its submitted bid, rendering its bid price considerably lower than the rest of the bidders. Ron Engineering sent a notice of its error and asked to withdraw its bid without penalty. The Commission refused, accepted the bid and submitted the contract for Ron Engineering's signature. Ron Engineering refused to sign, maintaining that since it had notified the Commission of its error prior to acceptance of the bid, the offer was not capable of being accepted. The Commission, relying on the bid deposit terms, retained Ron Engineering's bid deposit and accepted another bid.

The arguments made by Ron Engineering were fairly complex but in essence, Ron Engineering argued that because it had identified its error prior to acceptance, it had not withdrawn its bid and thus the right to retain the deposit was not triggered.

Ultimately, the SCC determined that the Commission was entitled to keep the bid deposit *because that is what the tender documents said*. The Court held that when a mistake was proven by the production of reasonable evidence after the bids were opened, the person receiving the bid was not prevented from accepting the bid or seeking to forfeit the bid because the test is applied at the time the bid is submitted and the rights of the parties have crystallized.

While the outcome may not be surprising, the paramount importance of *Ron Engineering* was the Court's determination that the tender process itself creates a *contract* between the procuring entity and each bidder who submits a compliant bid in response to an invitation to tender. This contract is known in Canadian tender law as "Contract 'A'."[5] The SCC gave full weight to the terms of the tender document (e.g. the rules for the tender process). The bid deposit, which was designed to ensure the performance of the obligations of the bidder under Contract 'A', was exposed to the risk of forfeiture upon Ron Engineering's breach of obligations by withdrawing its bid.

Cases at the SCC have further evolved the Canadian tendering framework since 1981, but the essential elements of *Ron Engineering* have not changed.

Essential Guiding Principles*

- Parties must always follow the rules set out in the tender.
- The tendering process can create contractual obligations ("Contract 'A'") and trigger a duty of fairness on the part of the procuring entity towards all compliant bidders.
- The key implied terms of Contract 'A' are:
  - to accept only a compliant bid; and
  - to be fair and consistent in assessment of bids.
- There is a difference between a bid which contains an informality and a bid which is materially non-compliant.
- If a bid is non-compliant or so qualified that it constitutes a counter-offer, no Contract 'A' exists and no duty of fairness is owed to that bidder.
- A broad privilege clause will not excuse the failure to comply with mandatory requirements.
- Over-application of the rights found in a privilege clause may run up against the duty of fairness which is owed when Contract 'A' is formed.

**non-trade agreement procurements*

5. The final written contract between the successful bidder and procuring entity is referred to as "Contract 'B'".

Trade Agreements

While each trade agreement may have additional requirements, and procuring entities are permitted to waive minor omissions or defects under trade agreements, there are essential requirements that are applicable to all trade agreements requiring that a procuring entity:

- Must implement processes that guarantee the fairness and impartiality of the procurement process and the confidentiality of bids
- Must ensure procurement processes are open and transparent
- Must provide a “level playing field” on which bidders compete
- Absent conditions satisfying a specific trade agreement exception, must provide a non-discriminatory process; meaning it must prohibit discrimination against goods, services, and suppliers of other Parties to the trade agreements, or from discriminating against domestic suppliers based on the degree of foreign affiliation or ownership

The general duties of fairness/good faith, openness and transparency exist “as of right” in trade agreement-covered procurements and apply to the entire procurement process. No “Contract ‘A’” is required to exist.

Clarifying Requirements During the Solicitation Period

Procurement law in Canada is very clear on this point - bidders are responsible for understanding the procurement requirements. If a question and answer period is provided, this the last opportunity for bidders to understand the procurement requirements and to improve their bids before final submission.

Once final bids have been submitted, the opportunity for bidders to fix errors or ambiguities in their bid, or to submit additional information is limited to non-existent. If a “cure period” may be provided for (sometimes referred to as a “rectification period”), the bid corrections that are permitted are typically limited in scope and bidders may be prohibited from submitting new information or augmenting their bids.

Bidders who take a ‘wait and see’ approach in the face of vague or unclear requirements, or who decide to submit vague responses to requirements - either because they do not understand the requirement or are trying to disguise the fact that they do not meet the requirements - instead of seeking clarification, commit one of the most common and most fatal bidding errors that results in bid disqualification. Failing to take advantage of the opportunity to obtain clarification during the solicitation process can also impact of the success of any bid protest by an unsuccessful bidder.

During the solicitation period, the communication process in most public procurements is strictly controlled and often limited to written communications. This limit is invoked in order to preserve the integrity of the procurement process, which is of concern whether or not the procurement is subject to trade agreements. Communicating with government officials other than as permitted is frequently identified in the tender as grounds for bid disqualification (and in some Canadian jurisdictions, can amount to lobbying).

In general, there is no limit on the number of clarification questions that can be submitted. Procuring entities expect questions. Questions should be submitted as early as possible. If the answer received doesn’t provide enough clarity (or leads to additional questions), this will leave time for follow-on questions, and ensures that adjustments to the final bid aren’t being rushed through at the last minute.

If a response from a procuring entity is unclear, it is entirely appropriate (and absolutely necessary) to submit further clarification questions. Even if a final solicitation is underway, procuring entities can still amend the tenders to provide clarifications or correct errors in the documentation. If a tender is modified, bidders must be provided sufficient time to respond to any changes to criteria before the solicitation period ends.

Substantive questions and answers will usually be shared with all bidders without revealing the source of the question, in keeping with the requirement to ensure all bidders have equal access to all information concerning the procurement and that no bidder receives information that other bidders do not receive. Most procuring entities will require that the questions be submitted on a non-confidential basis, to enable the question and response to be shared.

The question submission period will typically end several days (and sometimes, several weeks) prior to the date upon which final bids must be submitted to provide bidders with a “quiet period” within which to prepare their final bids for submission. Questions submitted after any final question submission date may not be answered.

Trade Agreements

The trade agreements add greater specificity to the above describe process, to ensure that the bidding process remains open, fair and transparent and to prevent a bidder from gaining an unfair advantage from receiving information relevant to the solicitation process that other bidders have not received.

The opportunity to submit questions during the solicitation period is provided specifically to enable bidders to meet their obligations to understand the requirements and submit a responsive bid.

PART III

Bid Evaluation

At the heart of the procurement process is the following rule: the procuring entity writes the rules of the solicitation process and the procuring entity and the bidder follow the rules - to a 'T'.

This rule is particularly important during the bid evaluation process - bidders have prepared and submitted bids based upon the stated requirements and in light of the identified evaluation criteria. Whether subject to trade agreements or not, procuring entities cannot change the rules once bids are in and the solicitation period has closed.

As had been noted elsewhere in this Guide, review of the evaluation criteria should be done as early as possible, even when tender documents are provided in draft form. Questions should be submitted to seek clarification if requirements are vague, unclear or appear geared to favour a particular supplier.

The Bid Evaluation Process

Procuring entities will usually reserve a right to seek clarification from bidders with respect to their bids following final bid submission. However, it is important to keep in mind several critical points:

- The exercise of this right is *discretionary*
- The "clarification process" is a limited-scope event, intended to address issues such as determining where information is located in a bid if it cannot be readily accessed
- Procuring entities are not required to seek clarification of a bidder's bid and even if they do seek clarification, bidders do not usually get to modify their bid or provide entirely new information.

Minor irregularities such as administrative or non-material errors can be fixed following the close of the solicitation period. However, permitting bidders to submit entirely new information to correct errors or omissions following the close of the solicitation period is considered "bid repair", and is generally limited and may, in certain cases, be entirely prohibited.

Trade Agreements

For trade agreement covered procurements, the evaluation of bids (as with most things) is more prescriptive.

The tender documentation must include:

- All information necessary for a supplier to submit a responsive bid, including technical specifications and plans
- All evaluation criteria
- How the evaluation will be conducted, including weighting and rating (unless price is the only criterion)

Once the solicitation period closes, the procuring entity must evaluate bids against the criteria set out in the tender. The trade agreements do not remove an evaluator's discretion in performing an evaluation; however that discretion must be exercised within the rule set of the tender itself and within the trade agreement parameters. Evaluation criteria cannot be changed following the close of the solicitation period. Use of any criteria that is not set out in the tender is considered to be use of undisclosed evaluation criteria, and is a breach of the trade agreements.

In both trade agreement covered and non-covered procurements, procuring entities may require that the financial information for a bid is submitted separately from the rest of the bid, to ensure that the evaluation of the technical aspects of the submitted bids is not influenced by the cost of the bid (e.g. to maintain the integrity of the bid process).

Trade Agreements

Trade agreements permit correction of minor irregularities such as administrative or non-material errors following the close of the solicitation period. However, the rules surrounding submission of new information to correct errors or omissions following the close of the solicitation period are even more strict. New information that is submitted following the close of the solicitation period can be considered "bid repair" and, if so, is prohibited.

Once the solicitation period closes, the opportunity to improve the bid is over.

Procuring entities are not required to seek clarification of errors, omissions or ambiguities in a bid during a bid evaluation, even if they have reserved a right to do so.

Preventing Bid Disqualification - Preliminary Bid review process

Procuring entities may provide for a preliminary bid review process, in advance of final bid submission. This process permits bidders to submit their bids for a preliminary review against specific mandatory requirements in advance of the solicitation period close. This can be a useful approach in more complex procurements where the bidder pool may be limited and a procuring entity wants to ensure that a bid is not disqualified as a result of a bidder inadvertently missing an administrative requirement that can be readily corrected (such as, for example, failing to sign required certifications). This does not eliminate the bidder's obligation to submit a responsive bid or procuring entity's obligations to fully evaluate the final bid submission (the draft bid cannot be relied upon if there is a discrepancy between the draft and final bids), but may assist, as noted, with avoiding the need to eliminate an otherwise acceptable bid as a result of an inadvertent error.

PART IV

Contract Award, Debriefing and Disputes

Contract Award

Once the winning bid has been selected, procuring entities will usually advise all bidders of the outcome. Even if a bid is disqualified during the initial mandatory requirement review, procuring entities may choose to wait until the final winning bid is selected before notifying bidders that they were not successful.

Consequently, if a prolonged period of time has passed since the close of the solicitation period, or if the estimated contract award date has come and gone, it is worthwhile to contact the procuring entity to determine the status of the evaluation process.

For procurements not subject to trade agreements, it is essential to review and understand the contract award criteria to ensure a clear understanding of how contract award will be determined as the parameters can be quite different from those under trade agreements.

Trade Agreements

For procurements subject to trade agreements, the procuring entity is required to award the contract to the supplier that the procuring entity has determined is capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the tender notices and tender documentation, has complied with the essential requirements (as disclosed in the tender documentation and tender notice) and submitted the most advantageous bid; or, if price is the sole criterion, the lowest price.

The time to understand the contract award criteria is well in advance of the closing date for the solicitation period.

Debriefs

Once contract award has occurred, it is important to seek a debrief from the procuring entity. A debrief matters - even if the bid was successful. Learning what did and did not work in a bid is important for future competitions, particularly with respect to lost points. Information provided in a bid that was scored low may not have determined the final outcome in one situation, but it could very well mean the difference between a win or a loss the next time around.

If a bid fails, it is crucial to know whether this was as a result of something that was misinterpreted, misunderstood or missed entirely (and thus can be prevented in future bids), or the result of an evaluation error or use of an undisclosed evaluation criteria on the part of the procuring entity.

The debrief should explain why a bid was not successful. A debrief is also important when deciding whether or not to challenge the award.

If the bid was improperly evaluated, a decision whether to protest the award has to be made quickly, particularly for procurements subject to trade agreements or formal bid protest mechanisms, as the timeline for bid protests under those options is usually short (10 days).

Whether a debriefing is provided by a procuring entity not subject to trade agreements is entirely at the discretion of the procuring entity.

Trade Agreements

All procuring entities subject to the trade agreements are required to provide a debrief (in writing or verbally, at their option) and will usually identify the time period within which a debriefing must be requested in the tender documents.

Debriefings are important - whether or not the bid was successful.

Disputes

The court system in Canada is generally available to bidders, subject to those constraints that may be provided for in the tender. The timelines for bringing a complaint will be determined by the rules of the court to which the complaint is brought.

In Canada, there is no general statutory prohibition preventing aggrieved bidders from seeking a judicial remedy with respect to a public procurement, whether or not subject to trade agreement coverage, although certain public entities may not be subject to certain types of legal claims under applicable law and there may be shorter limitation periods.

If a trade agreement does not apply to a public procurement, the procuring entity may provide an internal dispute process or access to a procurement ombudsman.

The timelines applied by government entities to raise disputes are typically short, even if not subject to trade agreements. The time period can start to run as early as the day unsuccessful bidders are notified a contract has been awarded.

PART V

Additional Information on 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)[6], 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 expanded the application of various trade agreements to territorial, provincial, municipal, academic, school, and hospital sectors.

One of the ways the parties to trade agreements seek to accomplish the elimination of trade barriers between them is to commit to promote open trade opportunities when it comes to their own purchasing activities. These commitments and obligations are typically covered in the "government procurement" chapter of the trade agreement. Each trade agreement will define who is considered a covered entity, what goods or services (including construction services) are covered and when they are covered.

Although a signatory to the Canada-United States-Mexico Agreement (CUSMA), Canada is not a party to the government procurement chapter. As such, no procurements by any Canadian government entity are subject to its rules. US-based suppliers will seek remedies under the World Trade Organization - Agreement on Government Procurement (WTO-AGP) and Mexican suppliers, under the CPTPP.

Determining Coverage

Determining trade agreement coverage for a procurement is a 3-step process:

1. **Who is covered?**
   The trade agreements do not always identify the covered government entities by name (e.g. the Department of National Defence, the Canada Space Agency). Often, the sub-central level (e.g. not federal) covered entities are included by reference to their official status (e.g. "departments", "ministries", "agencies" etc.) or on the basis of government ownership or control.

   Note that if a government entity is acquiring goods or services through a designated procurement authority, it is the government entity who will be using the goods or services that is assessed to determine whether the trade agreements (and which trade agreements) apply, not the buying authority.

6. On July 1st, 2017, the AIT was replaced by the Canadian Free Trade Agreement (CFTA) and on September 21st, 2017 the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) came in to effect.
Canada and the United Kingdom (as of the date of publication) are working towards a Canada/UK trade agreement, following the UK's withdrawal from the European Union and removal from CETA coverage. Until this new trade agreement is concluded, Canada and the UK have agreed to a Canada/UK Trade Continuity Agreement, which reflects the terms and thresholds of CETA (with necessary adaptations).

2. **What is covered?**
   Trade agreements do not all follow the same approach - some trade agreements are inclusive (listing only what is covered) and others are exclusive (everything is covered unless specifically excluded).

   Note that for inclusions and exclusions, there are always further exceptions. For example, purchases that might typically be covered may be excluded if they are being purchased for specific activities.

3. **When is it covered?**
   If a purchase is below a trade agreement financial threshold, the purchase is not subject to the trade agreement - even if the entity and the good or service are otherwise covered.

For each procurement, determining if it is covered by trade agreements is a 3-step analysis:

Who is covered

What is covered

When is it covered

The Essential Rules

One of the significant commitments made under trade agreements is to level the playing field for potential government suppliers. Each agreement provides rules intended to ensure open, fair, transparent and non-discriminatory procurement opportunities for potential suppliers. While each trade agreement may have additional rules, the 'essential rules' found in all trade agreements require procuring entities to:

- Implement processes that guarantee the fairness and impartiality of the procurement process and the confidentiality of bids
- Ensure procurement processes are open and transparent
- Provide a "level playing field" on which bidders compete
- Absent conditions satisfying a specific trade agreement exception, must provide a non-discriminatory process; meaning it must prohibit discrimination against goods, services, and suppliers of other parties to the trade agreements, or from discriminating against domestic suppliers based on the degree of foreign affiliation or ownership.

All trade agreements seek to ensure open, fair, transparent and non-discriminatory procurement opportunities.

Exceptions from the Trade Agreements

As noted earlier, trade agreements will provide specific exceptions of entities, goods or services that are excluded from coverage - either generally or in specific circumstances. Exceptions of general application are set out within the government procurement chapters (e.g. they apply to all signatories). For exceptions particular to each signatory, they will be set out in Schedules or Annexes to the trade agreement. Exceptions permit the government entity to conduct procurements in a way that would, under the usual rules, be considered a breach of the trade agreement. Parties will negotiate these exceptions when negotiating the trade agreement and may thereafter modify these exceptions only in accordance with the process outlined in the trade agreement.

For example, Alberta and Manitoba, have ceded all original exceptions to the CFTA with respect to procurement rules (and also in other trade-related areas covered by the CFTA). The removal of the CFTA exceptions also impacts the New West Partnership Trade Agreement (NWPTA) - a trade enhancement agreement between British Columbia, Alberta, Saskatchewan, and Manitoba.

Exceptions to the trade rules must be provided for within the trade agreement. Absent an express exception, trade agreement-covered procurements must follow the trade agreement rules.

Determining Requirements

Procuring entities are entitled to determine their requirements, subject to the specific rules of the trade agreements. Procuring entities are not required to lower their legitimate operational requirements to increase opportunities for bidders who otherwise would not have been able to succeed in a competition. As noted by the Canadian International Trade Tribunal (CITT), procuring entities are entitled to “express any real and reasonable needs”, including future needs (e.g. a legitimate operational requirement).

All trade agreements set parameters for what requirements can or cannot be included. For example, procuring entities must state fully and clearly their requirements in the procurement documentation (e.g. no hidden requirements); must base their requirements on international or national standards (if available), and must set out their requirements in terms of performance or functional requirements (e.g., quality, safety, dimensions, process/methods of production) rather than design or descriptive characteristics[7].

Each trade agreement will also provide for a list of expressly prohibited requirements. Some of the prohibited requirements that are common to all of the trade agreements are:

- Favouring the goods or services of a particular supplier or suppliers specific to the procuring entity’s jurisdiction
- Using pre-qualification requirements, setting bidding time lines or goods and services delivery requirements or applying technical requirements so as to eliminate bidders from the competition
- Evaluating bids using undisclosed evaluation criteria

Procuring entities may set their requirements, but these requirements must be legitimate and comply with the trade agreement rules.

7. Although a product-specific branding requirement is generally not considered a legitimate operational requirement, this is subject to exceptions where the procuring entity can demonstrably justify the use of the branded specification in the particular circumstances.

Evaluating Bids

Once the requirements have been finalized, how bidders will be evaluated against the requirements is also subject to trade agreements rules - all of which are focused on ensuring that the procurement is fair, open and transparent. For example:

- Tender documentation must fully disclose all of the evaluation criteria prior to the close of the bid solicitation period, including:
  - ✓ All information necessary for a bidder to submit a responsive bid, including technical specifications and plans
  - ✓ All evaluation criteria
  - ✓ All details of the evaluation, including weighting and rating (unless price is the only criterion)
- Bids must be evaluated only against the criteria set out in the tender documentation.

The trade agreements do not remove an evaluator's discretion in performing an evaluation; however that discretion must be exercised within the rule set of the tender documentation itself and within the trade agreement parameters for evaluations.

- Use of any criteria that is not set out in the tender documentation is considered to be use of undisclosed evaluation criteria, and is not permitted.

This should be distinguished from activities used by a procuring entity for bid verification purposes (for example, confirming references).

- Changes to any evaluation criteria after an tender documentation has been issued must be done in advance of the closing of the solicitation period so that bidders can revise their bids to meet the revised or new requirements. This should be done through a written tender documentation amendment to ensure certainty.
- Bidders must have sufficient time to respond to any changes to criteria before the solicitation period ends. The more complex the new criteria or the more material and/or significant the change to the criteria, the longer a bidder should have to revise and submit its bid.

> Evaluations must be conducted only against evaluation criteria that has been disclosed to bidders in advance of the closing of the solicitation period.

Contract Award

Procuring entities are required to provide public notice of contract award and offer a debrief to any bidder who requests one.

Public notice of the award does not mean the contract itself has to be posted. For a debrief, the procuring entity is permitted to set a time limit within which a debrief must be requested, and may determine how it will provide the debrief (orally, in person, by letter etc.).

> Always seek a debrief, and pay attention to deadlines - debriefs must usually be requested within a specified period of time from disqualification or contract award.

Disputing a Procuring Entity Decision

All trade agreements require signatories (i.e. governments) to have in place an administrative or judicial review procedure for bidders to assert a breach of the government procurement chapter or a failure of a party to comply with a government's implementation of the obligations under the government procurement chapter.

The dispute processes of the different trade agreements are similar, if not identical, to each other:

- In structure, to allow bidders access to an administrative review process or judicial review
- Setting minimum time periods within which a complaint or challenge must be lodged by a bidder
- Permitting governments to determine and limit costs that can be awarded

Formal bid dispute mechanisms have been implemented by the federal government, and a limited sub-set of the provincial/territorial governments.

There is no significant body of jurisprudence (courts or trade dispute panels) in Canada regarding the various trade agreement government procurement chapters other than as provided by the Canadian International Trade Tribunal (CITT) for federal procurements.

Federal government procurements that are covered by trade agreements provide unsuccessful bidders with access to the CITT. The CITT provides all parties with an expedited review process. The total period of time for the procurement review (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. 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. The provinces of British Columbia, Alberta, Manitoba and Saskatchewan currently provide a non-binding procurement dispute process under the New West Partnership Trade Agreement (NWPTA).

In 2019, the provinces of British Columbia, Alberta, Saskatchewan and Manitoba implemented a Bid Protest Mechanism for specific procurements. None of these processes provide for final decisions that are enforceable equivalent to a court order.

Federal Government	The current Canadian International Trade Tribunal (CITT) has been in place for decades, and is empowered to investigate all complaints by potential suppliers that the federal government's procurement practices violated free trade agreement rules. It is Canada's only trade review tribunal in Canada. In 2019, the federal government implemented a regulatory change to the reviewing authority of the CITT, seeking to remove the CITT's reviewing authority for procurements subject to the "national security exception" under all trade agreements. Whether this regulatory change exceeded the authority of the Governor-in-Council to make regulatory changes remains open to debate. https://www.fasken.com/en/knowledge/2019/07/van-removing-the-citt-from-the-review-of-canadas-national-security-exception
Sub-central Governments	As of 2020, only British Columbia, Alberta, Manitoba and Saskatchewan (via an agreed-to Bid Protest Mechanism provide a non-binding procurement dispute process.
Canadian Courts	Other than the decisions available at the federal level from the Canadian International Trade Tribunal (CITT), there is no significant body of Canadian jurisprudence regarding the government procurement chapters of the trade agreements.
Timing	For non-judicial disputes, the minimum time period provided to bidders within which to make a complaint under all trade agreements is ten (10) days from the date the bidder knew or reasonably should have known the basis for its complaint. The Bid Protest Mechanism and the Procurement Regulations that govern the CITT all impose this 10-day time limit and, at least at the CITT, this time limit is strictly enforced.. https://www.fasken.com/en/knowledge/2019/10/beat-the-clock-10-critical-days-for-procurement-disputes-under-the-trade-agreements In the litigation or administrative (judicial) review context, the time period within which to raise a complaint will be determined by the rules applicable to the court selected by the bidder.

Time limits for seeking a review of a procurement decision are extremely short and strictly enforced.

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