The Government Procurement Review

Third Edition

Editors
Jonathan Davey and Amy Gatenby

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Jonathan Davey and Amy Gatenby

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CONTENTS

EDITORS' PREFACE

We are delighted to introduce this, the third edition of *The Government Procurement Review*. It brings even wider geographic coverage than the second edition, now covering six continents and 27 national chapters (including the EU chapter).

The political and economic significance of government procurement is plain. Government contracts are of considerable value and importance, often accounting for 10 to 20 per cent of GDP in any given state. Government spending is often high-profile and has the capacity to shape the future lives of local residents.

Even as the economic climate improves, it is perhaps no surprise that, with austerity the watchword throughout the developed economies, governments seek to demonstrate more effective, better-value purchasing; nor that many suppliers view government contracts as a much-needed revenue stream offering relative certainty that they will be paid. A concern to simplify procurement procedures and increase opportunities for small and medium-sized enterprises is also prevalent, particularly in the EU.

The World Trade Organization's revised Agreement on Government Procurement (GPA) now covers the 28 EU Member States, Armenia, Canada, Hong Kong (China), Iceland, Israel, Japan, Korea, Liechtenstein, the Netherlands with respect to Aruba, Norway, Singapore, Switzerland, Chinese Taipei and the United States. Montenegro and New Zealand were invited to accede to the GPA on 29 October 2014. Eight other states have started the process of acceding (Albania, China, Georgia, Jordan, the Kyrgyz Republic, Moldova, Oman and Ukraine).

In last year's preface, we mentioned potential new, protectionist clouds on the procurement horizon with the European Parliament having approved measures that would prevent firms from bidding for larger public contracts unless their home country allows reciprocal access to EU firms. While the European Parliament viewed these measures as encouraging third countries to reciprocate in opening markets, some (including the International Chamber of Commerce) feared it would have the opposite effect, provoking trade wars. It seems, for the moment at least, that these proposals are not proceeding, which in the authors' view is to be welcomed.

Regardless of these possible difficulties, we expect that the principles of transparency, value for money and objectivity enshrined in the UNCITRAL Model Law on Public Procurement and in the national legislation of many states will continue gradually to have a positive effect.

The biggest single development internationally in the period since the second edition is undoubtedly the adoption of new EU directives and progress towards the required national implementation, Member State by Member State. The New Directives cover, respectively, mainstream public sector and utilities procurement (replacing the 2004 directives) and concessions, an area previously only partly covered by the EU regime. The new directives have been described as effecting evolution rather than revolution, but cynics, pointing to the lengthening of the directives and the addition of new procedures, query whether the originally stated aims of simplification and 'flexibilisation' (a word that could only have been invented in Brussels!) have really been achieved.

At the time of writing, only the United Kingdom has implemented the mainstream directive, with the deadline for transposition being 18 April 2016.

Incidentally, when reading chapters regarding European Union Member States, it is worth remembering that the underlying rules are set in the directives at EU level. Readers may find it helpful to refer to both the European Union chapter and the relevant national chapter, to gain a fuller understanding of the relevant issues. As far as possible, the authors have sought to avoid duplication between the EU chapter and national chapters.

Some national authors have reported significant increases in challenges to contract award decisions, and this is certainly the experience in the United Kingdom. While it is clear that there are considerable variations between jurisdictions in the willingness or ability of suppliers to challenge, it seems to us that the increased risk of challenge can help hold awarding authorities to account and is likely to encourage greater compliance with national procurement rules. It may be that, in jurisdictions where bringing procurement challenges is either difficult or expensive, further measures are needed to amplify this effect.

Finally, we wish to take this opportunity to acknowledge the tremendous efforts of the many contributors to this third edition as well as the tireless work of the publishers in ensuring that a quality product is brought to your bookshelves in a timely fashion. We hope you will agree that it is even better than previous editions, and we trust you will find it to be a valued resource.

Jonathan Davey and Amy Gatenby
Addleshaw Goddard LLP
London
May 2015

Chapter 5

CANADA

Theo Ling and Jonathan Tam[1]

I INTRODUCTION

Canada's legal framework for government procurement is based on a number of bodies of rules including trade agreements, statutes, regulations, case law, policies and custom. The legal framework does not apply uniformly across Canada. As a federation, Canada has two distinct jurisdictions of political authority: the nationwide federal government and 10 provincial governments. Canada also has three territories, which will not be discussed in this chapter. The legal rules that apply to government procurement at the federal level are different from those that apply to the provinces, and the rules that apply to public bodies at the provincial level differ from province to province.

On the federal level, the central piece of legislation regulating government procurement is the Government Contracts Regulations (GCRs)[2] issued pursuant to the Financial Administration Act (FAA).[3] The FAA contains general provisions applicable to federal government procurement, while the GCRs contain more detailed provisions. The federal government is also subject to binding and enforceable commitments made pursuant to trade agreements with other nations, such as the World Trade Organization's Agreement on Government Procurement (GPA) and the North American Free Trade Agreement (NAFTA), which are discussed in greater detail below. There are also numerous policies and directives that apply to federal government procurement. Public Works and Government Services Canada (PWGSC), which is the department responsible for the federal government's internal servicing and administration, develops, implements and maintains the Supply Manual, which specifies the procedures of procurement and includes standard clauses for the procurement process. The Supply Manual does not

1 Theo Ling is a partner and Jonathan Tam is an associate at Baker & McKenzie LLP.

2 SOR/87-402.

3 RSC 1985, c F-11.

have the force of law, and procuring authorities have no legal obligation to include the standard clauses contained therein. In addition to these and other statutes, policies and trade agreements, there is a compendious volume of case law that serves to define the rules and principles applicable to federal government procurement.

Different provinces have taken different approaches to procurement. Most provinces have enacted little legislation regarding government procurement and leave it largely up to public agencies to develop internal policies by which public purchasing will take place. Some provinces have enacted more comprehensive legislation. For instance, Quebec has enacted an Act regarding contracting by public bodies,[4] which, along with its regulations, prescribes specific rules that apply to public purchasing by all public agencies in Quebec. In the same vein but to a lesser extent, Nova Scotia, New Brunswick and Saskatchewan have enacted government procurement legislation of broad provincial application. Ontario has taken something of a hybrid approach. The Broader Public Sector Accountability Act, 2010[5] authorises an executive committee of Ontario to issue directives governing public procurement, which resulted in the Broader Public Sector Procurement Directive being issued in 2011. The Directive does not have the force of law but nevertheless applies to all designated public agencies in Ontario. The international trade agreements to which Canada is a signatory do not have the force of law in provinces. That said, the provinces have entered into domestic treaties among themselves; these treaties are binding and subject to dispute resolution processes. As is the case federally, each province has its own body of case law regarding government procurement.

One of the most significant contributions that the judiciary has made to the procurement framework in Canada relates to what is generally referred to as 'Contract A/Contract B'. Under this analytical framework, which applies to competitive procurement throughout Canada, a bidder enters into 'Contract A' with the procuring authority when it has submitted a compliant bid in response to a request for bids (or similar document). 'Contract B' refers to the contract to be awarded to the successful bidder. Public agencies enjoy a significant amount of freedom to establish criteria that bidders must satisfy to be eligible to bid on a contract, which correspond roughly with the 'terms and conditions' of Contract A. By the same token, public agencies are bound to the terms of Contract A and are therefore generally prohibited from, *inter alia*, awarding the contract to a non-compliant bidder, awarding a contract that differs materially from the one offered through Contract A and evaluating bidders on the basis of criteria that differ from those set out in Contract A. These obligations, which will be discussed in further detail below, flow from the fundamental principle that government procurement in Canada is to be open, fair and transparent, which is generally considered to support the principle of value for money.

4 CQLR c C-65.1.

5 SO 2010, c 25.

II YEAR IN REVIEW

In August 2014, the Government of Canada and the European Commission completed their negotiations over the Comprehensive Economic and Trade Agreement (CETA), and the text of the agreement was made public on 26 September 2014. The text of the agreement is not yet binding under international law and will only become so after a legal review and the completion of the ratification process. Assuming that CETA will be ratified in its present form, it is clear that CETA will affect virtually every sector of the economy on both sides of the ocean, including government procurement. The Ministry of International Affairs has previously stated that 'access to Canadian government procurement was one of the main reasons, if not the main reason, that the EU agreed to negotiate a trade agreement with Canada'.[6] On the Canadian side, CETA opens up procurement at the federal, provincial and municipal levels, making concessions by Canadian provinces and territories, which have yet to approve the treaty, necessary for CETA to succeed. CETA likewise opens up procurement at the central, regional and local level on the EU side.

On 11 March 2014, Canada and South Korea announced that they had concluded negotiations on a new free trade agreement entitled the Canada–Korea Free Trade Agreement (CKFTA). The CKFTA will extend the commitments made by the two nations in the revised GPA. Furthermore, as discussed below, the CKFTA will grant suppliers of each nation access to the other nation's central government contracts over a C$100,000 threshold.[7]

On 1 October 2014, the Canada–Honduras Free Trade Agreement (CHFTA) and parallel agreements on labour and environmental cooperation entered into force.[8] The CHFTA establishes a number of rules intended to ensure that bid tendering for government procurement of certain goods and services on both sides is conducted in a non-discriminatory fashion. The rules apply on both sides to covered procurements greater than roughly C$76,600 and construction services contracts greater than roughly C$8,500,000.[9]

In addition to trade agreements, there have been a number of policy developments in the field of government procurement. For example, on 1 March 2014, PWGSC amended its Integrity Framework, which now mandates that procuring authorities require bidders and their affiliates to warrant that they have not, within the past 10 years,

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6 Parliament of Canada, 'Canada-European Union Trade Negotiations: 6. Government Procurement', 3 September 2010: www.parl.gc.ca/Content/LOP/ResearchPublications/2010-57-e.htm (last accessed 20 March 2015) at s 2.

7 Foreign Affairs, Trade and Development Canada, 'Canada–Korea Free Trade Agreement (CKFTA) – Overview', http://international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/korea-coree/overview-apercu.aspx?lang=eng (last accessed 20 March 2015).

8 Foreign Affairs, Trade and Development Canada, 'Canada–Honduras Free Trade Agreement (CKFTA) – Annex 17', www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/honduras/17-1.aspx?lang=eng (last accessed 20 March 2015).

9 CHFTA, Annex 17: www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/honduras/17-1.aspx?lang=eng.

been convicted, or pleaded guilty and have been absolutely or conditionally discharged, of certain offences that would cause their integrity to be called into question.[10] The prescribed offences include, *inter alia*, fraud, money laundering, bid-rigging, bribery, extortion, forgery, fraudulent manipulation of stock exchange transactions, insider trading, falsification of books, as well as foreign offences that the federal government deems to be substantially similar to the designated offences. If a party to a public contract subject to the Integrity Framework or any of its affiliates commits any of the designated offences, the Canadian government is entitled to terminate the contract, demand the immediate return of advance payments, and pursue any other available remedies against the breaching party. In the fall of 2014, the Russian affiliate of a major technological supplier to the Canadian government pleaded guilty to an offence under US anti-money laundering legislation, and the PWGSC announced that it was reviewing the impact of this development in light of the amended Integrity Framework.

2014 also marked the introduction of a number of changes to the government procurement regulatory framework. For example, the province of New Brunswick proclaimed a new Procurement Act and enacted new regulations thereunder.[11] Although the regulations are not yet in effect, they are significant because, among other things, they provide that the terms of a public contract may be negotiated between the procuring authority and a prospective supplier during the procurement process under certain conditions. This is a significant development because it marks a departure from the relatively inflexible Contract A/Contract B framework, under which procuring authorities may run the risk of violating the terms of Contract A by actively negotiating the terms of Contract B with bidders during the procurement process. Although Canadian public bodies typically draft the terms of Contract A to give themselves the authority to negotiate requests for proposal (RFPs) with bidders, the New Brunswick regulations represent one of the first instances of legislative means being used to incorporate a formal negotiation mechanism into the public procurement process.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

On the federal level, government procurement rules generally apply to procurements by federal government departments, corporations that were incorporated under a federal statute, corporations that receive the majority of their funding from the federal government and their agents. However, federal government entities that are creatures of statute and that are mandated to compete with the private sector are generally not subject to the public procurement laws.

Government procurement rules likewise apply in general to all public bodies at the provincial level. Although the details may differ from province to province, the procurement rules that have been developed by the Supreme Court of Canada apply

10 PWGSC's Integrity Framework: www.tpsgc-pwgsc.gc.ca/ci-if/ci-if-eng.html (last accessed 20 March 2014).

11 NB Reg 2014-93 under the Procurement Act, SNB 2012, c 20.

generally to all public bodies in Canada. This includes the Contract A/Contract B framework described above, and the corresponding duties that are incumbent upon the purchaser, such as the duty to conduct a fair competition.

In addition, certain legislative instruments prescribing procurement rules specify the entities to which they apply. For instance, Quebec's Act regarding contracting by public bodies applies to, among other entities, municipalities, government departments, entities like universities, health institutions and social services agencies that are part of a group commonly referred to as the MASH sector, and bodies that are wholly or partly funded by the National Assembly of Quebec. Similarly, Ontario's Broader Public Sector Procurement Directive applies to most entities in the MASH sector as well as publicly funded organisations that received funds of C$10 million or more in the previous fiscal year from the government of Ontario. Markedly, municipalities are not covered by the Directive. In provinces where no public procurement legislation has been enacted, courts have stepped in to develop a regulatory public procurement framework that generally applies to all public entities.

ii Regulated contracts

All contracts for the supply of goods, services or works with the above-described public bodies are regulated by government procurement rules. Which rules apply depend on the contracting public body at issue and the type of contract at issue. For example, the GCRs apply to federal government entities and set out certain requirements that apply to all federal procurement contracts. However, some contracts, such as National Film Board contracts, Veterans' Land Act construction contracts and legal services contracts, are exempt from the bulk of the requirements in the GCRs.[12] These exempt contracts are nevertheless subject to certain core requirements, such as the contractor warranting that it has not been convicted without pardon of prescribed offences that would put into question the integrity of the contractor. Prescribed monetary thresholds regarding the value of the public contract may also determine the extent to which the government procurement rules apply, as will be touched upon below.

The procurement rules applicable to utilities are generally the same as for other procurement processes. Defence contracting, which is the realm of the federal government, is also generally subject to the same rules as those for other procurement processes, although exemptions to the duty of non-discrimination imposed by international trade agreements may apply where issues of national security are at stake. As many as three federal departments will be involved in major procurements of military services and equipment: Industry Canada, which is responsible for industrial and regional benefits (also known as offsets); the Department of National Defence, which defines the requirements of the acquisition; and PWGSC, which manages the procurement process, negotiates the contract and then manages it once signed.

Major military procurements may be subject to the Industrial and Regional Benefits programme, which requires successful bidders to make investments in advanced technology in certain sectors and areas of Canada in amounts sometimes equal to the

12 GCRs, s 3.

value of the specific contract. Where procurement is deemed to be subject to the federal Defence Production Act,[13] the underlying documents will be exempt from the rigorous disclosure requirements applicable under federal laws, which helps to ensure that sensitive technology and information are appropriately protected.

There are no financial thresholds below which public contracts are completely free from regulation. However, there are financial thresholds below which certain free trade obligations do not apply to federal government entities, as explained below.

At the federal level, the GCRs generally require bids to be publicly solicited for all contracts and thereby subject to full competitive public tendering where anyone who complies with the applicable requirements can bid. The exceptions to this are when:[14]

a the need is one of pressing emergency in which delay would be injurious to the public interest;

b the estimated expenditure does not exceed C$25,000 (and it would not be cost-effective to solicit bids) or C$100,000 for specific types of contracts;

c the nature of the work is such that it would not be in the public interest to solicit bids; or

d only one person is capable of performing the contract.

The rules are generally more flexible on the provincial level, where the circumstances in which public entities are not required to hold a competitive procedure will be governed by applicable trade agreements, legislation and, to a lesser degree, policies and directives.

Any changes to or transfer of the awarded contract must be conducted in accordance with the rules and procedures that the procuring authority established in the rules of the procurement. Generally, *bona fide* changes to the contract are permitted where the contracting parties mutually agree to them. The policies of public entities usually include rules that restrict the transfer of public contracts. For instance, the PWGSC Supply Manual contains clauses that impose limitations on a contractor's capacity to assign contracts without the consent of the purchaser.[15] The Canadian International Trade Tribunal, which adjudicates certain complaints with respect to the procurement process, has suggested that it does not object to contracts being assumed by a third party.[16]

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Framework agreements and central purchasing on behalf of other public authorities are viable and in some cases encouraged methods of procurement in Canada. In practice,

13 RSC 1985, c D-1.

14 GCRs, s 6.

15 'Standard Acquisition Clauses and Conditions (SACC) Manual', PWGSC, General Conditions, Standard Clauses and Conditions, 2010A, 2010B, 2010C, 2029, 2030, 2035 and 2040 under 'Assignment'.

16 Re IBM Canada Ltd (2003).

government entities in Canada employ procurement practices that run the gamut between centralisation and decentralisation. For example, New Brunswick's Procurement Act requires all provincial government departments and various other public bodies to purchase services and supplies through the Ministry of Government Services unless certain narrow exceptions apply.[17] On the other hand, public procurement on the federal level is conducted in a relatively decentralised manner. As long as the procurement processes conducted through such arrangements comply with the obligations referred to in this chapter, such as the duty to conduct a fair competition, the duty to disclose all material evaluation criteria, the duty to reject non-compliant tenders, as well as all applicable international trade obligations, procuring authorities and teams are free to establish framework and central purchasing agreements among themselves.

ii Joint ventures (JVs)

Structural and cooperative or contractual public-public JVs are both viable vehicles for procuring goods and services in Canada. Public bodies entering JVs may be found to be in a fiduciary relationship, which involves legal duties of fidelity and good faith. Public bodies seeking to avoid these duties may seek to structure their relationship as a 'buying group' instead. The common thread among these arrangements is that there are typically one or several parties who are responsible for procuring goods or services on behalf of the other participants. The precise obligations of the parties involved will depend on the form of legal vehicle assumed and the specific procurement framework in which the public bodies operate. Nevertheless, JVs, JV companies and buying groups are all bound by the rules on public contracting outlined in this chapter. Typically, all of the public bodies participating in a JV or buying group will be involved in the procurement process for which the JV or buying group was formed, obviating any concerns associated with one public body supplying another public body without a prior procurement process.

Public-private partnerships (PPPs) are subject to the procurement rules outlined in this chapter. Thus, the PPP generally must be competitively tendered by means of a procedure run in accordance with the rules and principles applicable to all public procurements.

Many levels of government in Canada have imposed rules that require procuring authorities to seriously consider PPPs as a delivery mode for a proposed project worth over certain monetary thresholds. For example, federal projects intended to develop an asset with a lifespan of at least 20 years and having capital costs of at least C$100 million must be subject to a business case to determine whether a PPP may be a suitable procurement option.[18] P3 Canada is the public body responsible for advancing the use of PPPs at the federal level.

17 Procurement Act, SNB 2012, c 20, s 2(1).

18 Treasury Board of Canada Secretariat, 'Notice on Policy on the Management of Projects', 21 November 2013: www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=27421&section=text (last accessed 20 March 2015).

V THE BIDDING PROCESS

i Notice

Federal government entities advertise contract opportunities electronically on the Government Electronic Tendering System. Public provincial contract opportunities may be advertised electronically on the following websites:

a Alberta: tendering and contracting opportunities;[19]
b British Columbia: e-Procurement in BC;[20]
c Manitoba: government tenders;[21]
d Newfoundland and Labrador: the Government Purchasing Agency;[22]
e New Brunswick: New Brunswick Opportunities Network;[23]
f Nova Scotia: Nova Scotia tenders;[24]
g Ontario: supply chain management;[25]
h Prince Edward Island: Prince Edward Island tender opportunities;[26]
i Quebec: Sub-Secretariat of Procurement;[27] and
j Saskatchewan: SaskTenders.[28]

ii Procedures

Public agencies are generally permitted to use a broad range of approaches, provided they comply with the requirements of Canada's trade agreements, the common law, and the agency's own internal policies and procedures. Typically, a public agency will establish internal policies and procedures governing the circumstances in which procurement may be conducted and the manner in which such procurement is to be conducted. These policies and procedures often provide guidance on the following procurement documents and procedures, *inter alia*:

a request for information, which is used as an information-gathering tool;
b request for expressions of interest, which is commonly used to identity which participants in the market are able and willing to provide goods or services;
c request for qualifications, which is used to pre-screen bidders based on a set of qualification criteria established by the public agency;
d RFP, which typically prescribes the outcome desired but not how the successful bidder will deliver the goods or services. The terms and conditions of the RFP typically vary significantly, depending on the needs of the public agency. The

19 www.infrastructure.alberta.ca/912.htm.
20 www.bcbid.gov.bc.ca/open.dll/welcome?language=En.
21 www.gov.mb.ca/tenders/index.html.
22 www.gpa.gov.nl.ca.
23 https://nbon-rpanb.gnb.ca.
24 www.gov.ns.ca/tenders.
25 www.doingbusiness.mgs.gov.on.ca.
26 www.gov.pe.ca/tenders/index.php3.
27 www.tresor.gouv.qc.ca/faire-affaire-avec-letat/les-marches-publics.
28 https://sasktenders.ca/content/public/Search.aspx.

proposals may be legally binding or non-binding, depending on the intent of the public agency; and

e tender, which is normally used when what is being acquired is well defined (often a commodity product) and all that matters is price.

Electronic bidding is permissible and offered on selected tenders.

iii Amending bids

As public entities enjoy a significant amount of freedom to define the rules of the bidding process, bidders should review the terms set out in the tender documents to determine whether there are any limits on amending submitted bids during the bidding process.

Purchasers are generally not permitted to allow a bidder to rectify deficiencies in a bid after the deadline for bid submissions has passed. This flows from the obligation of purchasers to reject non-compliant tenders, which flows from the duty to run a fair competition. Where the rules of the bidding procedure permit suppliers to clarify aspects of their bids, such a right should only be used in limited circumstances for the *bona fide* clarification of a genuine ambiguity in a tender.

VI ELIGIBILITY

i Qualification to bid

Public entities enjoy a significant amount of freedom to stipulate any criteria that bidders must satisfy to be eligible to bid, and to define situations in which a bidder will be disqualified. This freedom is subject to certain restrictions. First, under the federal procurement framework and those of certain provinces, bidders are automatically liable to be disqualified if they have committed certain prescribed offences that would call into question their integrity (such offences will be listed in the tender documents). Some levels of government – notably the provincial government in Quebec – also implement a blacklist for suppliers with a track record of questionable conduct.

Second, where the bidder and purchaser have a conflict of interest, the bidder may be liable to be disqualified. Third, the eligibility criteria must comply with any applicable trade agreements. Fourth, purchasers have a duty to run a fair competition, and such a duty may be breached where purchasers establish eligibility criteria that unduly favour one or more bidders. Finally, there may be additional restrictions specific to certain levels of government. For example, the procurement regime in Quebec generally requires purchasers to specify in their compliance requirements that the filing by a supplier of several bids for the same call for tenders entails automatic rejection of all of that supplier's tenders.[29]

Once public entities have established the requirements to which bidders must comply, they must only consider compliant bids. Any deviation from this principle creates a risk of the procurement process being declared unfair, although some leeway is

29 See Regulation respecting supply contracts of public bodies, CQLR c C-65.1, r 2, s 7; and Regulation respecting service contracts of public bodies, CQLR c C-65.1, r 4, s 7.

permitted for bids that may not have strictly complied with all of the requirements but that have substantially complied with all material requirements of the tendering process.

ii Conflicts of interest

Purchasers are subject to a duty to avoid any conflict of interest that could compromise the integrity of the tendering process. This obligation flows from the duty of purchasers to conduct a fair competition when soliciting bids. Purchasers will typically specify in the tender materials any circumstances that constitute a conflict of interest sufficient to disqualify a potential supplier. Bidders should review the tender documents carefully to ensure that they do not meet any of these conflict of interest criteria. In addition, bidders may be subject to a positive duty to declare any actual, potential or perceived conflict of interest or else risk adverse consequences upon the discovery of the conflict of interest. Case law suggests that more than the simple appearance of a potential conflict is necessary to establish a conflict of interest at law.

iii Foreign suppliers

Public bodies may open RFPs to foreign suppliers and are required to do so under certain circumstances. Monetary thresholds referenced below are current as at the time of writing, and are revised periodically in accordance with their respective treaties.

As a signatory to NAFTA, Canada has agreed to provide suppliers of the United States and Mexico with equal opportunity to compete for certain contracts involving specified classes of goods and services bought by a prescribed list of over 100 federal government entities. NAFTA is not applicable to provincial or municipal governments or to private industry or private individuals. The value of the government procurement must meet certain monetary thresholds for the equal opportunity requirement under NAFTA to apply. With respect to procurements by federal government departments and agencies, the monetary thresholds are in most cases C$80,400 for goods, services or any combination thereof, and C$10.4 million for construction services contracts. With respect to federal government enterprises, the monetary thresholds are C$402,000 for goods, services or any combination thereof, and C$12.8 million for construction services contracts. As between Canada and the United States, the monetary threshold for the procurement of goods by departments and agencies is C$25,200.[30]

As a signatory to the GPA, Canada has agreed to provide suppliers of more than 40 trading partners in Europe, Asia and North America the right to bid without discrimination on a broad range of public sector tender calls by federal government entities. The GPA is not applicable to provincial or municipal governments, or to private industry or private individuals. The monetary thresholds applicable to procurements by federal

30 Treasury Board of Secretariat, 'Trade Agreements: Thresholds Update', www.tbs-sct.gc.ca/pubs_pol/dcgpubs/ContPolNotices/2013/13-5-eng.asp (last accessed 20 March 2015).

government agencies, departments and enterprises are C$200,900 for goods, services or any combination thereof, and C$7.7 million for construction services contracts.[31]

International free trade agreements, such as CETA, the CKFTA and the CHFTA, also prescribe monetary thresholds over which contracts must be offered to Canada's trading partners.

Other agreements facilitate trade among governments within Canada and their corresponding public entities. These include the Agreement on Internal Trade, of which the federal and all provincial and territorial governments are signatories; the New West Partnership Trade Agreement, which applies to the British Columbia, Alberta and Saskatchewan governments; the Atlantic Procurement Agreement, which applies to the New Brunswick, Newfoundland and Labrador, Nova Scotia and Prince Edward Island governments; the Quebec–New Brunswick Trade Agreement; and the Ontario–Quebec Trade and Cooperation Agreement.

There is no requirement that foreign suppliers set up a local branch or subsidiary, or have local tax residence to do business with public bodies. Nevertheless, public bodies may choose to establish such criteria during the procurement process if doing so would not breach their free trade obligations or other duties (e.g., duty to conduct a fair competition), if any.

VII AWARD

i Evaluating tenders

Public entities issuing a call for tenders must disclose all criteria by which the purchaser will evaluate bidders. Purchasers that use undisclosed criteria to evaluate bidders risk being found liable for doing so. Although purchasers are allowed to include significant reservations in a call for bids, courts may not enforce such reservations if doing so would be at odds with the duty to run a fair competition. Changes made to evaluation criteria during the bidding process can likewise result in a breach of the purchaser's legal duty to run a fair evaluation process.

Public entities are generally free to establish the terms by which they will evaluate bids. Where the estimated price of the contract is likely to be low, public entities typically evaluate bidders based on the lowest priced bid. Otherwise, public entities generally evaluate bidders based on the best value, among other things, which gives them more leeway in taking into account other attributes besides just the price of the bid.

It is up to public entities to establish the rules that govern the award of a contract to a selected supplier. Purchasers are under a general duty to award the contract as tendered. Suppliers may be found liable where the awarded contract deviates in a material respect from the contract terms contemplated by the call for tenders. Purchasers are also required to distinguish the selection of one or more preferred bidders from the actual award of the contract in question. If the purchaser stipulates that it will negotiate with a number

31 PWGSC, 'Supply Manual', Section 1.25.10: https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/section/1/25/10 (last updated 11 December 2014; last accessed 20 March 2015).

of preferred bidders before awarding the contract, then it is entitled to do so as long as it also complies with its other obligations, such as its duty to be fair to all bidders.

ii National interest and public policy considerations

As previously noted, procuring authorities enjoy significant freedom to determine which considerations they will take into account when deciding who will be awarded a contract. Procurement authorities have the duty to disclose these considerations in the tender documents and are generally not permitted to take any considerations that have not been disclosed into account when evaluating bids. This duty flows from the general duty of procuring entities to conduct a fair competition. Consequently, national interest, local, social and environmental considerations can be and often are taken into account by procuring authorities.

The main restrictions on favouring domestic suppliers during the procurement process are imposed by trade agreements. For example, the GPA, which binds the federal government, imposes an obligation of non-discrimination and transparency on government procurement. Nevertheless, exceptions exist with respect to, *inter alia*, national security and national defence purposes (Article XXIII). Likewise, Article 1018(1) of NAFTA exempts 'protection of […] essential security interests' and procurements 'indispensable for national security or for national defence purposes'.

VIII INFORMATION FLOW

Public entities holding a competitive bidding process are subject to a duty to disclose all material information about the contemplated contract to all bidders. In general, what is deemed material for the purposes of the disclosure duty is any information that could influence a bidder's decision to bid or influence the price quoted by the bidder. As noted above, this also includes criteria that the purchaser will be relying on when evaluating bids.

Public entities often provide unsuccessful bidders with the opportunity to learn why they lost a contract and why another bidder won. Pursuant to freedom of information legislation, the federal, provincial and in some cases municipal governments and their agents are required to furnish certain information upon request to persons entitled to such information. In many cases, this includes information about why the public entity awarded public contracts to certain parties and not others. Debriefing unsuccessful bidders gives them an opportunity to improve their bids on future tenders and keeps purchasers accountable with respect to their obligations.

Subject to the specific rules of a particular procurement process, public entities are generally under no obligation to notify unsuccessful bidders of the outcome before contract signing.

Public entities are required to balance their disclosure obligations with their confidentiality obligations. Bidders are entitled to privacy interests over information disclosed during the procurement process, with the strength of those interests strengthening in proportion to the sensitivity and confidentiality of the information at issue. Courts have recognised that releasing supplier information may impair the willingness of others to participate in public procurement processes. Courts have

ordered the disclosure of documents with confidential information redacted from them. Confidentiality obligations are stricter during the bidding process, but a more balanced approach to confidentiality and transparency is taken after the contract has been awarded.

IX CHALLENGING AWARDS

i Procedures

A supplier that seeks to complain about a federal government procurement process has a number of choices, which can be taken simultaneously, serially or individually. To begin with, it can sue under the common law of Canada (typically for breach of contract and any applicable tort grounds). The supplier can also sue for breach of the GCRs. The supplier can also complain to the Canadian International Trade Tribunal (CITT) for a breach of Canada's obligations under applicable trade agreements such as NAFTA, the Agreement on Internal Trade (AIT) and the GPA.[32]

The GCRs and Canada's trade agreements all contain different language, meaning that the federal government is subject to a host of obligations that may look similar in substance but diverge in nuanced ways. It should also be noted that the CITT's procedural approach to complaints is significantly less formal than that of courts. In sum, a dissatisfied supplier suing the federal government has at its disposal a range of choices with respect to complaints procedures.

A supplier that seeks to complain about a provincial government procurement process is generally limited to suing under the common law of Canada and pursuant to any specific provincial public contracting regulations. A supplier may be able to seek redress for a breach of the AIT, which is an internal trade agreement among the different levels of government in Canada. However, there is no dedicated dispute resolution mechanism for breaches of the AIT by provincial entities. Suppliers looking for redress under the AIT may avail themselves of government-to-government protest procedures, any applicable dispute resolution process that has been established by the particular public body at issue and courts. Public bodies' internal policies do not have the force of law, and so breaches of these policies cannot found a lawsuit. Nevertheless, breaches of policies can be relevant to determining whether some wrongdoing occurred. The rules of the procurement process may also include a dispute resolution process.

Awards are challenged primarily by parties who bid on the contract at issue.

The CITT hears complaints regarding procurement involving the federal government covered by NAFTA, the AIT, the GPA and certain other international trade agreements. Section 6 of the Canadian International Trade Tribunal Procurement Inquiry Regulations[33] provides that a complaint must be filed with the CITT within 10 working days from the date on which the potential supplier first became aware, or reasonably should have become aware, of its ground of complaint to either object to the contracting authority or file a complaint with the CITT. The CITT provides quick

32 Canadian International Trade Tribunal, 'Mandate': www.citt.gc.ca/en/mandate (last updated 10 June 2014; last accessed 20 March 2015).

33 SOR/93-602.

remedies, usually issuing its decision within 90 days of the complaint having been made. Costs vary depending on the complexity of the matter.

Besides communicating directly with the contracting authority, courts are the preferred forum for all other procurement-related complaints. Limitation periods on judicial proceedings differ depending on the court and jurisdiction. The Limitations Act (Ontario) assigns a basic limitation period of two years.[34] Costs vary depending on the complexity of the matter.

ii Grounds for challenge

Challenges may be brought on the grounds of a breach of one or more applicable international trade agreements, statutes, regulations and contracts. Breach of contract encompasses a number of grounds that are unique to the procurement framework, such as breach of the purchaser's duty to conduct a fair competition, to make full disclosure of, *inter alia*, evaluation criteria and to reject non-compliant bids. A purchaser's failure to disclose material information and honour the representations made in its tender call can also give rise to concurrent tort claims.

iii Remedies

The CITT has the power to postpone the award of a contract, to order a procurement to be undertaken again or to award damages to a complainant. Courts have more sweeping powers that include the granting of injunctions, setting aside contracts, ordering procurements to be undertaken again and awarding damages to the complainant.

Apart from civil liability for breaching government procurement rules, bid-rigging is a criminal offence under Canada's Competition Act.[35] Bid-rigging occurs when two or more persons agree that, in response to a call for bids, one or more will not submit a bid, withdraw a bid or submit a bid arrived at by agreement, and the person requesting the bids is not informed beforehand about the agreement made between the parties. Parties found guilty of bid-rigging may be liable to a fine in the discretion of the court, imprisonment for a term of up to 14 years, or both.[36]

X OUTLOOK

CETA (see Section II, *supra*) is undergoing a legal review to ensure that the text states clearly and unambiguously what the negotiators intended, as well as to ensure that the agreement is internally consistent. The text will then be translated into over 20 languages for the benefit of all EU Member States. Signature and ratification of the treaty may take several years. A central point of contention will be the extent to which provincial governments approve of the treaty. Apart from CETA, it will be interesting to monitor whether other provinces in Canada or the federal government follow New Brunswick's example by enacting regulations that render the public procurement process more flexible.

34 Limitations Act, 2002, SO 2002, c 24, Sch B, s 4.

35 RSC 1985, c C-34.

36 Ibid., s 47.

Appendix 1

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