

A. REGULATORY FRAMEWORK

Public Procurement in Canada is governed at all levels of government by a regulatory patchwork consisting of domestic and international trade agreements, statutes and regulations, as well as procurement and contracting policies, by-laws and tribunal rulings. In addition, the common law of competitive bidding applies to competitive procurement undertaken by government agencies. Together, this overlapping maze of law, regulation and policy presents a daunting challenge for procurement officers and suppliers alike.

This Primer focuses primarily on Federal Government procurement, but the same general principles of competitiveness, transparency, fairness and equal treatment apply to all public solicitations for the supply of goods or services at all levels of government (federal, provincial, municipal, etc.).

B. TRADE AGREEMENTS

At the top of the regulatory framework are domestic and international trade agreements to which the Government of Canada ("GoC") is a signatory. These include the *North American Free Trade Agreement*, the *Agreement on Internal Trade*, and the *World Trade Organization - Agreement on Government Procurement*. Established to reduce barriers to trade between governments, these Trade Agreements ("TAs") require government entities (e.g. PWGSC and GoC departments and agencies) to comply with detailed rules and procedures across all stages of the procurement process from requirements definition, bid submission and evaluation, through Contract award and post-award debriefings.

Not all TAs apply to each GoC department or agency, and not all procurements of goods and services are covered by each TA. The various TAs include Annexes that assist in identifying their application.

North American Free Trade Agreement (NAFTA)

NAFTA is perhaps the best known and most widely cited TA within the procurement community. Established to liberalize trade between Canada, the U.S. and Mexico, NAFTA Chapter Ten governs most GoC solicitations above the current monetary threshold. As of January 1, 2006, the monetary threshold for most *goods* procured by GoC departments and agencies is \$32,400; and \$84,000 for most *services*. The monetary threshold for most *goods* and *services* procured by GoC Enterprises (Crown Corporations) is \$420,000.

Solicitations above these thresholds must comply with the NAFTA rules governing open and selective tendering, requirement specifications, tendering procedures, supplier qualifications, evaluation criteria and bid challenge procedures. Theoretically, subject to the requirements of any other TA, the *Government Contracts Regulations*, and federal procurement policy, GoC departments and agencies may solicit and purchase goods or services below these thresholds from any capable supplier without restriction. The Canadian International Trade Tribunal (C.I.T.T.) is established as the bid challenge authority for federal government procurements pursuant to Article 1017 of NAFTA.

Agreement on Internal Trade (AIT)

The AIT is a domestic TA signed by the federal and provincial governments for the purpose of lowering internal trade barriers. Chapter Five of the AIT sets out specific rules and requirements for government procurement. The general principle is that of open tendering (i.e. competitive bidding) accessible to all Canadian suppliers. As with NAFTA, the AIT has its unique rules governing the biasing of technical specifications, supplier qualifications, bid evaluation, and the like. And like NAFTA, the AIT applies to most (but not all) provincial entities, and to most (but not all) procurements. The monetary thresholds remain unchanged in 2006, i.e. \$25,000 for goods; \$100,000 for services.

Unlike NAFTA, there is no bid challenge authority in the AIT. The net effect is that suppliers cannot initiate complaints related to provincial government procurement with the C.I.T.T.. If a supplier believes that a provincial entity has awarded a contract unfairly, or has breached any rule of competitive bidding, its only legal recourse is to the courts. In many cases, however, suppliers will attempt to redress perceived inequality or unfairness through political channels. The irony is that while the AIT was intended to lower trade barriers between provinces and that the federal government's participation was largely symbolic, any *federal* government procurement that otherwise meets NAFTA or WTO-AGP requirements but fails to comply with the AIT, may be challenged at the C.I.T.T., whereas a *provincial* procurement cannot be.

World Trade Organization - Agreement on Government Procurement (WTO-AGP)

The WTO-AGP replaced the GATT *Code on Government Procurement* in the 1996 Uruguay Round of multilateral negotiations. It was patterned largely on NAFTA. The scope and principles governing procurement in the WTO-AGP are substantially identical to NAFTA. The monetary thresholds in 2006 for both *goods* and *services* is \$245,000. Like NAFTA, suppliers can challenge a federal government procurement for breach of the WTO-AGP at the C.I.T.T..

Compliance with all TAs by GoC departments, agencies and enterprises is mandatory. Breach of any substantive TA rule by the procuring entity can result in a C.I.T.T. challenge. (See The Grey Book ***C.I.T.T. Challenges & Strategies***).

C. GOVERNMENT CONTRACTS REGULATIONS (GCRs)

As a practical matter, the GCRs have the broadest regulatory application to federal government procurement. With very few exceptions, the GCRs govern all GoC purchasing activity. As regulations, the GCRs are law binding on both the Crown and contractors. The GCRs establish the general requirements of “competitive” bidding and “transparency” as the governing principles of federal government procurement.

There are a few limited exceptions to the competitiveness requirement which allow for “sole sourcing”, the most common being where the expenditure (for goods or services) does not exceed \$25,000. This is where the mysterious \$25,000 threshold number familiar to most government suppliers comes from. The other common exception is where “only one person” is capable of performing the contract. This exception, however, is typically limited to cases where, due to intellectual property rights and licensing restrictions, only one supplier has the legal right to work on the product or deliver the service. The GCRs, together with the TAs, are the primary regulatory foundation upon which both the **Treasury Board Contracting Policy** and **PWGSC Supply Manual** (each of which incorporates policies, procedures and practices intended to give operational effect to these legal requirements) are built.

D. TREASURY BOARD CONTRACTING POLICY (TBCP)

The TBCP expands on questions of probity and fairness, lays down conditions for use of the exceptions in the GCRs, and sets out the GoC’s policy for government contracting, requiring that all such contracting be carried out in a manner that (a) stands the test of public scrutiny; (b) ensures the pre-eminence of operational requirements; (c) supports long-term industrial, regional and economic development; and (d) complies with the TAs. The TBCP can be viewed at the Treasury Board website: <http://www.tbs-sct.gc.ca> .

E. PWGSC SUPPLY MANUAL

Public Works and Government Services Canada (PWGSC) is the “common service agency” for the GoC with primary authority for the procurement of most goods and services on behalf of other GoC departments, agencies and enterprises. The complex matrix of legal rules and requirements established by the TAs and GCRs are reflected and expanded upon in the **PWGSC Supply Manual**. The Supply Manual should be every supplier’s “first stop” whenever any question arises relating to RFPs, Standing Offers, SACC clauses, solicitation processes, or any other procurement-related requirement.

<http://www.pwgsc.gc.ca/acquisitions/text/sm/sm-e.html>

The above outline of the federal procurement regulatory framework is intended as a basic introduction for suppliers and Procurement Officers only. It is not intended as legal advice. Consult your solicitors if you have any specific question.

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