Update on Procurement Law in Canada
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Brenda C. Swick, Leila Rafi and John Boscariol
Overview

1. Overview of Procurement Law and Regulation
2. Update on Procurement Law Cases
4. Public Procurement Obligations in International Trade Agreements
   • Spaghetti Bowel
   • Canada EU Comprehensive Economic & Trade Agreement
5. Q&A
1. Overview of Procurement Law and Regulation

Procurement Law and Regulation

Governance

Trade Agreements
- NAFTA
- Agreement on Internal Trade
- CETA
- WTO Agreement on Government Procurement

Statutes, Regulations & Directives
- Agreement on Internal Trade
- Broader Public Sector Accountability Act
- MBC Directive
- BPS Directive
- MOU’s with Government

Internal Governance
- Internal Procurement Policies
- Corporate Compliance Obligations
- Judicial Review

Contractual Obligations

Non-Binding Procurement

Binding Procurements
- Contract A / Contract B

For example:
- Canadian International Trade Tribunal
Procurement Governance

- A public sector organization must be conscious of the "procurement regulatory framework" within which it is obliged to function.
- This can also apply, to some extent, with respect to highly regulated private sector entities.
  - Private sector bidders can be more effective in procurement processes if they understand the procurement regulatory framework within which the procuring authority functions.
Procurement Governance

- How do the various applicable “regulatory schemes” function as a whole to regulate the organization?

- Are there any trade agreements that apply to the organization/procurement at issue?
  - Spaghetti Bowl – next slide
  - Is the procuring entity “designated” as an entity subject to Agreement on International Trade, NAFTA, WTO GPA, Canada US GPA, CETA?
  - Is the purchase of a “designated good/service”?
  - Are the “monetary thresholds” exceeded?

- WHY IS THIS IMPORTANT?
  - Procuring entity needs to understand its obligations to bidders
  - Bidders need to understand their rights
  - Both need to understand the bid review mechanism
## Procurement Governance

### Spaghetti Bowl: Procurement

<table>
<thead>
<tr>
<th>Agreement</th>
<th>Applies to</th>
<th>Suppliers</th>
<th>Exemptions</th>
<th>Compliance requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canada–US Agreement on Government Procurement</td>
<td>provincial</td>
<td>US suppliers</td>
<td>Exempts provincial crown corporations</td>
<td>Requires compliance with the WTO Government Procurement Agreement</td>
</tr>
<tr>
<td>NAFTA–Chapter Ten</td>
<td>federal</td>
<td>US, Canadian and Mexican suppliers</td>
<td>Not applicable to provinces or municipalities</td>
<td>Canadian International Trade Tribunal (CITT) is the bid review mechanism; provides remedies/stop contract awards</td>
</tr>
<tr>
<td>WTO Agreement on Government Procurement</td>
<td>federal</td>
<td>Canadian and foreign suppliers</td>
<td>Not applicable to provinces or municipalities</td>
<td>CITT is the bid review mechanism</td>
</tr>
<tr>
<td>Agreement on Internal Trade (AIT)</td>
<td>federal, provincial and municipal &amp; MASH</td>
<td>Canadian suppliers</td>
<td>CITT is bid review mechanism for federal contracts only</td>
<td>Provincial dispute settlement mechanism for provincial / MASH</td>
</tr>
<tr>
<td>New West Trade Partnership Agreement (NWPTA)</td>
<td>B.C. Alberta and Saskatchewan provincial and municipal</td>
<td></td>
<td></td>
<td>State to state and private party bid review mechanism</td>
</tr>
<tr>
<td>Canada–EU Comprehensive Economic and Trade Agreement</td>
<td>federal, provincial, municipal, Crown corporations, MASH and utilities</td>
<td>EU and Canadian suppliers</td>
<td></td>
<td>CITT will be bid review mechanism for federal contracts and maybe some provinces Some provinces may have own bid review mechanism</td>
</tr>
</tbody>
</table>
Procurement Governance

- To understand the procurement governance framework of an organization, the following questions should be asked:
  - Are there any procurement statutes that apply to the organization (for example, the Broader Public Sector Accountability Act)?
  - Does the organization have internal procurement policies that it is obliged to follow?
  - What is the legal status of the organization and does it impact the applicable procurement regulatory framework?
    - For example, in Ontario is the organization an “agency”, “Ministry”, “broader public sector organization”, a “publicly funded organization” or a “designated broader public sector organization” or a “local board”?
    - Other provinces have same questions?
Procurement Governance

- **PROVINCIAL LEGISLATION & POLICIES**

- **Ontario**
  - Procurement Guideline for Publicly Funded Organizations in Ontario
  - Broader Public Sector Accountability Act
  - Broader Public Sector Procurement Directive

- **Northwest Territories (NWT)**
  - Procurement Guidelines
  - Financial Administration Manual (Policy 3012)
  - Vendor Complaint Process
  - Government Contract Regulations

- **Yukon**
  - Contract and Procurement Regulation
  - Contracting and Procurement Directive

- **Nunavut**
  - Reference Guide to Acquiring Goods and Services with Public Money
  - Nunavummi Nangminiaqtaunik Ikajuuti policy

- **Prince Edward Island**
  - Public Purchasing Act
  - Supplier's guide to Goods procurement in the Government of Prince Edward Island

- **Nova Scotia**
  - Province of Nova Scotia Sustainable Procurement Policy
  - Public Procurement Act

- **New Brunswick**
  - Procurement Act

- **Newfoundland & Labrador**
  - Public Tender Act

- **Quebec**
  - An Act Respecting Contracting by Public Bodies
  - The Regulation Respecting Supply Contracts of Public Bodies
Contractual Obligations – “Binding” Procurements

- What is a “binding” procurement process?

- These are procurement processes that are intended to create a binding contractual relationship between the procuring authority and each bidder that submits a compliant bid

- Binding procurements intend to create a bidding contract or “Contract A”
  - Implied duties owed to bidder by procuring entity
    - The duty to provide disclosure
    - The duty to reject non-compliant tenders
    - The duty to conduct a fair competition
    - The duty to award the contract to the winning bidder
    - The duty to award the contract as tendered
Contractual Obligations – Ron Engineering

- Ron Engineering submitted a tender with bid security to the Province of Ontario. Under the terms of the tender, the bid security could be forfeited to Ontario if Ron Engineering did not enter into the contract.
- Ron Engineering’s bid was the lowest priced bid, and Ontario awarded it the contract.
- Ron Engineering tried to change its bid price because it made a mistake in calculating its price. It refused to sign the contract with the Province.
- The Province kept the bid security.
- Ron Engineering sued to recover the bid security, but lost.
- Tender documents can be contractual documents that create legal obligations:
  - The procuring authority’s tender documents may be an “offer” to enter into a contract regarding the tender process;
  - A bidder’s submission may be the “acceptance” of the procuring authority and the bidder (Contract “A”);
  - The contract between procuring authority and successful bidder is called Contract “B”
Contractual Obligations – “Binding” Procurements

1. **Bidder #1**
   - Submits a Compliant Bid
   - Procuring Authority Evaluates
   - Bidder is ranked first
   - Procuring authority presents contract to successful bidder for signature (award)
   - Bidder/Procuring Authority Sign Contract B

2. **Bidder #2**
   - Submits a Compliant Bid
   - Procuring Authority Evaluates
   - Bidder is ranked second
   - Bidder Rejected

3. **Bidder #3**
   - Submits a Non-Compliant Bid
   - Procuring Authority Disqualifies
   - Bidder is not ranked

**Procurement Documents Issued**
(For example, tenders, binding RFPS)

- An offer to enter into Contract A or the “bidding contract”

- An acceptance of Contract A and an “offer” to carry out Contract B. Contract A is created.

- A “Contract Offer” Contract A is NOT created

- An acceptance of Contract B offer, (subject to execution of Contract B)

- No Contract B is created

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Contractual Obligations: Key SCC Cases

- Number of SCC cases which inform the law of competitive procurement
  - 1981: Queen (Ont.) v. Ron Engineering & Construction (Eastern Ltd.,)
    - SCC establishes Contract A/Contract B
    - Goal: Preserving integrity of competitive bidding system
    - Contract A can only be formed between the procuring entity and compliant bidders
  - 2000: Martel Building Ltd. v. Canada
    - SCC finds implied obligation on procuring entity to treat all bidders within Contract A fairly, equally and consistently
  - 2007: Double N Earthmovers Ltd. v. City of Edmonton
    - When assessing compliance, no duty on owner to investigate representations on face of bid, although right to do so
  - 2008: Design Services Ltd v. Canada
    - Duty of Care by tendering authority does not extend to subcontractors
  - 2010: Tercon Contractors Ltd. v. British Columbia
    - SCC agrees in principle that exclusion of liability clauses are enforceable; though refuses to enforce a waiver clause with respect to damages arising out of a breach of Contract A
    - As long as the language of the exclusion clause covers the circumstances in issue and the clause was not unconscionable at the time that the contract was formed, a party will be bound by the clause unless they can establish “an overriding public policy” that “outweighs the very strong public interest in enforcement of contracts”
Procurement Process – When do key contract issues arise?

- Procurement Documents Issued to Bidders
- “In Market Period”: Q&As; Clarification and Amendment of Procurement Documents
- Submission of Responses by Bidders
- Compliance and Evaluation
- Identification of the Winning Bidder
- Negotiation
- Contract Award
2. Update on Procurement Law Cases

- **Rapiscan Systems, Inc. v. Canada (Attorney General), 2014 FC 68**

  - Even if no Contact A, government procurement decisions can still be subject to the administrative law remedy of judicial review if there is “an additional public element”
    - Award can be declared invalid and set aside; no damage award
    - Standard of review is reasonable
    - Rapiscan applied for but did not obtain an interlocutory injunction to stop contract award pending resolution
    - Important to understand procurement governance

- **CATSA governed by Canadian Air Transport Security Authority Act**

  - Mandate includes screening passengers and baggage
  - Responsible for authorizing contracts with screening companies and for procuring screening equipment
  - Section 8(5) of Act required that it established policies and procedures for procurement that ensure that the Authority’s operational requirements are always met and that promote transparency, openness, fairness and value for money in purchasing
  - Under Act, CATSA has Board which is responsible for passing by-laws concerning contracting policies
2. Update on Procurement Law Cases

- Since 2002 CATSA always purchased baggage screening equipment from Smiths
- 2006 CATSA habit of sole sourcing was criticized by Auditor General
- November 2009, nonetheless in 2009 CATSA issued another sole source award of $30M for screening equipment from Smiths
  - On grounds that even though Smith product higher in cost, it had better detection capabilities than Rapisacan
- Month later in Dec 2009, CATSA put new contracting procedure into place in accordance with section 8(5) of the Act
  - S. 7.2.1. called for open procurement process based on pre-defined statement of work/requirements and weighted evaluation criteria
- July 2010, Strategy Document prepared for purchase of multiview screening x ray machines for $40M
  - Strategy was to establish Standing offers with one or more suppliers of multiview x-ray machines. No non-competitive exception was designated
- August 2010, RFS was issued – to determine whether participating suppliers could meet CASTA business requirements
  - Meant to be a RFSO – but didn’t meet any of the Contracting Policy requirements
  - 3 companies made submissions– Rapiscan, Smiths, L-3
2. Update on Procurement Law Cases

- October 2010, Contract Review Committee recommended to Board that Standing Offer be awarded to Smith
  - Committee’s briefing note to Board stated that Smiths rated the highest in all categories
  - However, the Smiths model was not certified by the American Transportation Safety Administration, a mandatory requirement; this information withheld from Board
  - Committee’s briefing note to Board stated that Smiths rated the highest in all categories
    - However, the Smiths model was not certified by the American Transportation Safety Administration, a mandatory requirement; this information withheld from Board
    - Smith’s price was higher
  - Rapiscan’s submission was eliminated because it did not provide the required “three views”
    - However, the “three views” requirement was not a mandatory requirement and not event disclosed to the bidders
    - Rapiscan’s price not disclosed to Board
- Board voted and decided to award the SO to Smiths
- Rapiscan brought an application for judicial review of CATSA’s decision
Update on Procurement Law Cases

- Federal Court held Board’s decision was unreasonable
  - In light of CATSA’s operational requirements, the Court did not decide on a remedy but invited the parties to give further submissions regarding an appropriate remedy

- **Issues:**

  1. Is the matter coloured with a “public element” sufficient to bring it within the purview of the public law and therefore review by the Court on the rationale that
     - (i) It involves a breach of a statutory duty, or
     - (ii) It involves the integrity of government procurement processes? **YES.**

  2. If the matter is reviewable, what is the standard of review?
     - Reasonableness

  3. Did the Board’s decision meet the standard of reasonableness? **NO**
Findings

1. Is the matter coloured with a “public element” sufficient to bring it within the purview of the public law and therefore review by the Court on the rationale that
   - (i) It involves a breach of a statutory duty, or
   - (ii) It involves the integrity of government procurement processes? Yes.

Public Element

- Even when the purchaser is a government body, a procurement contract is generally commercial in nature and therefore does not permit recourse to public law remedies (Irving Shipbuilding Inc. v. Canada (Attorney General), 2009 FCA 166
- “An additional public element” is required for a public law remedy to be made available
Update on Procurement Law Cases

- In order to decide whether “an additional public element”:  
  - Court outlined considerations to help determine how tightly the decision is interwoven with procuring entity’s statutory powers/procedures: the closer that relationship, the more likely that a public law remedy will be available:

  - 1. Character of the matter for which review is sought: Is it private, commercial matter or is it of broader import to members of the public?

  - 2. The nature of the decision-maker and its responsibilities: Is it a statutorily recognized administrative body and charged with public responsibilities? Is the matter under review closely related to those responsibilities?

  - 3. The extent to which the decision is founded in and shaped by law, as opposed to private discretion:  
     - If the decision is authorized by legislation, it is more likely to be a public matter

  - 4. If decision based on abroad power to act that is founded upon something other than legislation such as general contract law/business considerations, more likely to be viewed as outside ambit of judicial review
Update on Procurement Law Cases

- 5. The body’s relationship with other statutory schemes or parts of the government:
   - If the body is woven into the network of government and is exercising a power as part of that network, its actions are more likely to be seen as a public matter

- 6. The extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity

- 7. The suitability of public law remedies:
   - If the nature of the matter is such that public law remedies would be useful, courts are more inclined to regard it as public in nature

- 8. Whether the matter has a very serious, “exceptional” effect on the rights or interests of a broad segment of the public
The Court held that most of these factors applied to colour the CATSA award with a “public element”

- Procurement of screening equipment for airports Canada-wide is clearly of broader import to the public
- The decision-maker is a federally created agency with public responsibilities
- A public law remedy would be useful
- The decision as guided by statutory constraints on CATSA’s contracting policies
  - *Canadian Air Transport Security Authority Act, s. 8(5)* required that CATSA “establish polices and procedures for procurement that promote transparency, openness, fairness and value for money in purchasing”.
1. Is the matter coloured with a “public element” sufficient to bring it within the purview of the public law and therefore review by the Court on the rationale that
   (i) It involves a breach of a statutory duty, or
   (ii) It undermines the integrity of government procurement processes? Yes.

   (i) The Court found no breach of a statutory duty by CATSA
   - The Act did not impose a statutory duty on CATSA to conduct its procurement processes so as to achieve transparency, openness, fairness and value for money
   - Statutory duty was only for CATSA to put measures into effect which will “promote” these objectives in light of operational requirements

   (ii) The Court did find that the conduct undermined the integrity of the government procurement process
   - (a) Was the Board unknowingly misled on significant issues?
   - (b) Do circumstances warrant application of public law remedies
Update on Procurement Law Cases

(a) Was the Board unknowingly misled on significant issues?

- Yes. The Board was misled by the Committee
  - Failure to Adhere to Contracting Procedures
    - Board never informed by management that it had derogated drastically from the Contracting Procedures
      - Drafted an RFS procedure that was neither fair nor competitive
      - Concealment of minimum requirements and performance requirements with the result of unfairly favoring Smiths
      - Simple dispensation of Smiths from mandatory TSA certification
    - Board’s lack of knowledge that Contracting Procedures Not Followed

(b) Do circumstances warrant the application of public law remedies

- Public law remedies are necessary to uphold the public interest and maintain good governance:
  - “Good governance requires remedies to ensure that public officers who provide advice and information to decision-makers, upon which decisions are made authorizing the award of procurement contracts, provide accurate and complete information in order to ensure that their processes are fair, open and transparent while providing value for money all in accordance with the objectives of maintaining good government contracting practices.”
Update on Procurement Law Cases

2. If the matter is reviewable, what is the applicable standard of review?
   - In procurement cases, appropriate standard of review is reasonableness
Update on Procurement Law Cases

3. Was the Board’s decision unreasonable? Yes

- The flawed decision of the Board was the direct result of the Committee’s failure to provide the proper information upon which to base its decisions – therefore Board failed to consider relevant factors
  - Some of the necessary information (Rapiscan’s price) had been withheld by the Contract Review Committee
  - The Board was incorrectly informed that Smiths met all the criteria
  - Many misleading actions undermined the integrity of CATSA’s procurement process,
  - Coupled with lack of adequate alternative remedy
    - “if [Rapiscan] seeks redress in the courts on the basis of contract, its argument based on a breach of the duty of fair and equal treatment are met with the submission that by responding to a RPS, there is no Contract A duty. Conversely, when it shows up seeking a judicial review of CATSA’s actions, it is told it must look to its contract remedies because of the commercial context of a procurement contract”.

- In light of CATSA’s operational requirements, the Court did not decide on a remedy but invited the parties to give further submissions regarding an appropriate remedy
Update on Procurement Law Cases

- **Rankin Construction v. Ontario 2014 ONCA 636**
  - The MTO issued tender documents for highway expansion that included a price preference/discount for Canadian steel and requiring bidders to declare any imported steel they planned to use
  - Rankin failed to declare some of its steel (H-Piles) as imported, and therefore wrongly obtained the price preference
  - The second lowest bidder complained; the MTO investigated and informed Rankin (21 days after the opening of tenders that its bid), that its bid was non-compliant and disqualified
  - Rankin sued the MTO for loss of profits (breach of Contract A) – Rankin was lowest either way
  - The action was dismissed at trial, and Rankin appealed
  - OCA dismissed appeal
Update on Procurement Law Cases

- Issues raised on appeal:
  1. Contract A was formed when Rankin submitted its bid
  2. The MTO did not have the right to investigate the bid for non-compliance
  3. The non-compliance was not so material as to require the MTO to reject the bid
  4. The tender documents state that the MTO could only reject bids within 10 days
  5. The exculpatory clause does not bar Rankin’s claim
**Update on Procurement Law Cases**

**Findings:**

1. Contract A did arise; non-compliance with the tender documents meant that the bidder may not be awarded Contract B, not that there was no Contract A formed
   - Based on the language in the tender documents, which specifically addressed the consequences (“may be rejected”) of another bid requirement, and included discretionary and exculpatory clauses
   - This intent was that a contract would arise upon submission of a bid, even if non-compliant

2. The tender documents did not expressly or impliedly bar investigation of a non-compliant bid

3. Notwithstanding Contract A, the MTO was not required to accept the bid in spite of the non-compliance
   - Even though non-compliance was a “formality” that could be waived, the MTO was not required to waive it, and its decision not to waive was reasonable
Update on Procurement Law Cases

4. MTO was not limited to 10 days to inform of bid rejection
   - Although a provision in the tender documents appeared to require rejection of bids within 10 days, the documents also gave the MTO 30 days to inform the successful bidder; having to inform all unsuccessful bidders within 10 days would create an inconsistency
   - Rather, the 10-day provision only applied to rejecting unbalanced tenders

5. The exculpatory clause was not unconscionable or contrary to public policy
   - Rankin was a sophisticated party, and the market would “take care of” overly broad exclusionary clauses in any event
Update on Procurement Law Cases

- Topsail Shipping Company Ltd. v. Marine Atlantic Inc. 2013 NLTD(G) 163
  - Marine Atlantic, a federal Crown corp., ran ferry services between Newfoundland and Labrador
  - The Province was considering taking over the service, so Marine Atlantic did not want to issue a public tender call for a long-term contract; instead, it asked three providers to submit proposals for a short-term arrangement
  - Topsail’s proposal was the lowest price, but it did not win
  - It brought an action claiming breach of the duty of fairness under Contract A, alleging that Marine Atlantic had engaged in contract discussions with its competitor during the bid process
    - Marine Atlantic brought a summary dismissal motion on the grounds that the solicitation was an RFP, and no duty of fairness under Contract A was owed
    - Topsail argued there was a Contract A because it was one of the pre-qualified bidders and was owed a duty of fairness
Update on Procurement Law Cases

The court found the terms were unclear, and considered 13 factors that determine whether the bidding process created Contract A and the corresponding duty of fairness:

1. The irrevocability of bids
2. The formality of the process
3. Whether bids are solicited from selected parties
4. Whether the identity of bidders is confidential
5. Whether there is a deadline for submitting bids
6. Whether a security deposit is required
7. Whether evaluation criteria are specified
8. Whether there is a right to reject proposals
9. Whether there was a statement that it was not a tender call
10. Whether the work is definitely going to proceed
11. Whether compliance with specifications was a condition of bids
12. Whether there was a duty to award Contract B
13. Whether Contract B had specific, non-negotiable conditions
Update on Procurement Law Cases

- Notwithstanding that the solicitation lacked many of the key Contract A indicators, the court concluded that there was a Contract A, and a corresponding duty of fairness.
  - It found that the duty of fairness had been breached when Marine Atlantic negotiated performance terms with a competing bidder instead of awarding to Topsail as low bidder.

- New Integrity Provisions applicable to prime bidders bidding on Federal Government Contracts
- Effective March 17, 2014, PWGSC amended the Integrity Provisions of its standard contracting terms
  - Amendments significantly broaden the scope of certifications that bidders must provide in bids
  - Amendments affect the eligibility of bidders to bid on federal contracts and give additional rights to the Government to terminate contracts that include the new provisions
Federal Integrity Provisions

- **Essential Provisions**
  - Bidder must certify that it and its “affiliates” have not been convicted of, or have been absolutely or conditionally discharged from, any of the following offences in the **10 years prior** to bid submittal:
    - paragraph 80(1)(d) (*False entry, certificate or return*), subsection 80(2) (*Fraud against Her Majesty*) or section 154.01 (*Fraud against Her Majesty*) of the *Financial Administration Act*, or
    - section 121 (*Frauds on the government and Contractor subscribing to election fund*), section 124 (*Selling or Purchasing Office*), section 380 (*Fraud*) for fraud committed against Her Majesty or section 418 (*Selling defective stores to Her Majesty*) of the *Criminal Code*, or
    - section 119 (*Bribery of judicial officers, etc*), section 120 (*Bribery of officers*), section 346 (*Extortion*), sections 366 to 368 (*Forgery and other offences resembling forgery*), section 382 (*Fraudulent manipulation of stock exchange transactions*), section 382.1 (*Prohibited insider trading*), section 397 (*Falsification of books and documents*), section 422 (*Criminal breach of contract*), section 426 (*Secret commissions*), section 462.31 (*Laundering proceeds of crime*) or sections 467.11 to 467.13 (*Participation in activities of criminal organization*) of the *Criminal Code*, or
Federal Integrity Provisions

- section 45 (Conspiracies, agreements or arrangements between competitors), section 46 (Foreign directives), section 47 (Bid rigging), section 49 (Agreements or arrangements of federal financial institutions), section 52 (False or misleading representation), section 53 (Deceptive notice of winning a prize) of the Competition Act, or
- section 239 (False or deceptive statements) of the Income Tax Act, or Excise Tax Act, or
- section 3 (Bribing a foreign public official), section 4 (Accounting), or section 5 (Offence committed outside Canada) of the Corruption of Foreign Public Officials Act, or
- section 5 (Trafficking in substance), section 6 (Importing and exporting), or section 7 (Production of substance) of the Controlled Drugs and Substance Act.
Federal Integrity Provisions

- Furthermore, the bidder must certify that no one will receive a benefit under the contract (including subcontractors and employees) who has been convicted of an offence listed in paragraphs (a) or (b) unless they have obtained a pardon (now called a “record suspension”) or has had their capacities restored by the Governor in Council.
Federal Integrity Provisions

- If a bidder is unable to provide certifications, the bidder is ineligible for contract award.
- If the contractor or affiliates is convicted of a prescribed offence during the term of the contract, the Government reserves the right to terminate for default on terms unfavorable to contractor.
  - Important to have due diligence measures in place to mitigate against government exercising this option.
- Bidder must also certify that in the 10 years prior to bid submittal, neither it nor any of its affiliates have been convicted of, or have received discharge from, “any foreign offence that Canada deems to be of similar constitutive elements” to the prescribed offences.
  - Convictions or discharges from offences in other countries (US or EU) will result in debarment from bidding on Government of Canada contracts.
- Bidder are also required to ensure that their subcontracts include “Integrity Provisions no less favourable to Canada that those imposed in the contract.”
- Where bidder of affiliate have been convicted, the bidder is required “to certify for itself and for its Affiliates that due diligence measures have been put in place in order to avoid the reoccurrence of such convictions.”
Federal Integrity Provisions

- “Affiliate” is broadly defined to include sister companies, parents, subsidiaries and their directors and officers
  - For the purpose of these Integrity Provisions, everyone, including but not limited to organizations, bodies corporate, societies, companies, firms, partnerships, associations of persons, parent companies and subsidiaries, whether partly or wholly-owned, as well as individuals and directors, are Contractor's Affiliates if:
    - directly or indirectly either one controls or has the power to control the other, or
    - a third party has the power to control both.
  - Indicia of control, include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity created following the acts or convictions and any conditional or absolute discharges specified in these Integrity Provisions which has the same or similar management, ownership, or principal employees, as the case may be.
Meaning of *De Jure* Control

- Under the CBCA one company is affiliated with another company if one of them is the subsidiary of the other or both are subsidiaries of the same company or each is controlled by the same person.

- Once two companies are affiliated with the same company at the same time, they are deemed to be affiliated with each other.

- Under corporate statutes in Canada legal control occurs where one holds over 50% of the voting securities of a company (where vote extends to elect a majority of directors).

- Common law provides that other items may be relevant in determining control including provisions of constating documents; by-laws; or unanimous shareholders agreements which limit the ability of a shareholder to elect directors, reduce powers of directors or provide for something unusual which alters control of the company.
Meaning of *De Facto* Control

- Control not only determined by equity ownership but can be based on *de facto* control of a company (actual control)

- **Canada Revenue Agency** has provided that *de facto* control goes beyond legal control and may exist without the ownership of any shares and can take many forms (i.e. ability of a person to change the board of directors or reverse its decisions; make alternative decisions concerning actions of the company in the short, medium or long term; to terminate the company or its business or to appropriate its profits and property)

- Common law provides that to establish *de facto* control a person must have a clear right and ability to effect a significant change in the board or the powers of the board or influence the shareholders in a direct way who would otherwise have the ability to elect the board

- Factors to examine include: direction over management policies; shared resources; shareholder agreements; the requirement to obtain a special majority approval for certain decisions; veto rights and other contractual arrangements (including whether a company has provided negative covenants in favour of another)
Key Anti-Corruption Enforcement and Compliance Issues

John W. Boscariol
Expanding CFPOA Enforcement

- Four convictions
  - Hydro Kleen (January 10, 2005) - $25,000 (plea)
  - Niko Resources (June 11, 2011) - $9.5 million plus probation (plea)
  - Griffiths Energy (January 25, 2013) - $10.35 million (plea)
  - Nazir Karigar – Cryptometrics (August 15, 2013) – 3 yrs in jail (trial)

- Further charges laid against individuals, prosecution proceeding
  - 7 in connection with SNC Lavalin
  - 3 foreign nationals in connection with Cryptometrics (Karigar)

- Over 35 ongoing investigations – SNC Lavalin, Nordion, Blackfire
Expanding CFPOA Enforcement

- Focus on individuals – officers, directors, employees
- New enforcement opportunities from June 19, 2013 CFPOA amendments
  - Nationality jurisdiction
  - Books and records offences – for purposes of bribery or concealing bribery
  - Increased jail time from 5 to 14 years
  - Planned removal of facilitation payment exemption
- PWGSC Integrity Framework (March 1, 2014)
- Enhanced Corporate Social Responsibility Strategy to Strengthen Canada’s Extractive Sector Abroad (November 14, 2014)
- Extractive Sector Transparency Measures Act (December 16, 2014)
- Rise of the whistleblower
Application of Other Anti-Corruption Regimes to Canadians

- US Foreign Corrupt Practices Act applies to
  - US companies and individuals (citizens and residents)
  - Companies that have issued securities that have been registered in the United States or who are required to file periodic reports with the SEC
  - Non-US companies and individuals that cause, directly or through agents, acts in furtherance of the corrupt payment to take place within the territory of the United States
    - Clearing US dollar transactions, communications through US servers, meetings in the United States
Application of Other Anti-Corruption Regimes to Canadians

- UK Bribery Act, 2010
  - UK companies and individuals (citizens and residents)
  - non-UK companies carrying on part of their business in UK
  - Any person committing an act or omission forming part of a bribery offence which occurs in the UK, regardless of nationality
  - Dealings with “associated persons” (performing services for or on behalf of a UK company)
Application of Other Anti-Corruption Regimes to Canadians

- Developing or host countries now stepping up anti-corruption enforcement against foreigners
  - China – GlaxoSmithKline (UK)
  - Cuba – Tokmakjian (Canadian)
Challenges: Implementation

- RCMP, courts, Crown emphasizing importance of
  - Having more than a paper policy
  - Risk assessment
    - Compliance policy
    - Internal controls
    - Transactional due diligence
    - Evaluation and monitoring of third parties
  - Documented evidence of implementation
- Applies to corruption of foreign and domestic officials
What Is Our Risk?

- Risk assessment factors include
  - What are our government touch-points?
  - In what countries are we active?
  - To what extent do we use third parties?
  - What are our existing compliance and ethics policies?
  - How do we compensate employees?
4. Public Procurement Obligations in International Trade Agreements

- Federal contracts subject to many international procurement treaties – since 1994
  - NAFTA Ch. 10; WTO GPA, AIT and others
  - Binding dispute settlement
    - Bid review mechanism is Canadian International Trade Tribunal
    - Disappointed foreign or Canadian bidder (can even be potential) can file complaint to CITT
    - CITT may award the complainant
      - Costs incurred in filing and proceeding with a complaint
      - Bid preparation costs
      - Such remedy as it considers appropriate, including
        - the re-solicitation of the designated contract,
        - that the contract be terminated and be awarded to the complainant
        - that the complainant be compensated for the loss of the contract or for the opportunity it lost (lost profits)

- Canada is signing more trade treaties where trading partners demanding access to sub-federal level procurement
  - CETA
    - Being fuelled by EU suppliers who want access to “the entire” Canadian procurement
4. Public Procurement Obligations in International Trade Agreements

- Canada is now signing more trade treaties where trading partners demanding access to previously protected sub-federal level procurement
  - Canada EU Comprehensive Economic and Trade Agreement (CETA)
    - Being fuelled by EU suppliers who want access to “the entire” Canadian procurement market
    - No longer just federal procurements - Now drilling down to sub-federal provincial and municipal procurement, crown corps, utilities & MASH

- Why?
  - Significant public purchasing dollars at sub-federal level
  - More than $100 billion is spent annually by all governments & MASH
Public Procurement Obligations in International Trade Agreements

- **Canada-EU Comprehensive Economic Trade Agreement (CETA)**
  According to the EU, “The public procurement market access offer that Canada has made is the most ambitious and comprehensive offer Canada and its Provinces have ever made to any partner, including the US. The outcome regarding the inclusion of provincial and territorial governments, regional and local government entities, including agencies, crown corporations, and the MASH sector is highly satisfactory.”

- **Bottom Line:** Procurements at sub-federal will become
  - Much more competitive
  - More scrutinized
  - More susceptible to challenge by foreign suppliers
Public Procurement Obligations in International Trade Agreements

- **STATUS OF CETA**
  - September 2014 – text of the Agreement released
  - Legal Scrub – final legalized text – March 2015
  - Translation
  - Ratification in Canada - federal
    - Legislative package introduced into House of Commons –2015
    - Committee hearings
      - Opportunity to appear
        - Important to shape implementation to protect and promote your interests
    - Implemented into Canadian law –2016
      - Legislation will have to be changed
  - Provincial Implementation
    - Important to shape implementation to protect and promote your interests
  - Must be ratified by European Parliament
Public Procurement Obligations in International Trade Agreements

- **CETA Procurement Obligations**
  - Bigger than NAFTA; WTO GPA
    - Similar obligations to these agreements but extends application to sub-federal entities
    - Much more intrusive than AIT

- **Nondiscrimination**
  - Canadian sub-federal entities must not discriminate against European suppliers in their procurements
    - In law or in fact
    - Lots of case law on this

- **Substantive Rules**
  - Procurements must be conducted in a “transparent, fair and impartial manner”
  - Tender documentation shall include a complete description of “all evaluation criteria that the entity will apply”
    - Predict these 2 requirements alone will be basis for vast majority of procurement challenges under CETA
## CETA Thresholds (CDN$)

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<th>Trade Agreement</th>
<th>Government Entity</th>
<th>Crown Corporations</th>
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<td>Services</td>
<td>Construction</td>
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Public Procurement Obligations in International Trade Agreements

- **Tendering Procedural Rules**
  - Must publish “notice of intended procurement”
    - Commitment to create a single point of electronic access for ALL notices of procurement opportunities within 5 years of entry into force

- Specific rules on the conduct of procurements by electronic means

- Detailed requirements for 3 types of tendering procedures
  - *Open* tendering Procedures – all interested suppliers may bid
  - *Selective* tendering procedures – only prequalified suppliers may bid
  - *Limited* tendering procedures – sole source
Public Procurement Obligations in International Trade Agreements

- Rules for qualifications of suppliers
  - Must be restricted to those that are “essential” to ensure that the supplier has the legal and financial capacity and the commercial and technical capabilities to undertake the procurement
  - May require relevant “prior experience” but not require that the prior experience be in the territory of the procuring entity
    - Slippery slope
Public Procurement Obligations in International Trade Agreements

Evaluation Criteria
- “All evaluation criteria” must be disclosed in the tender documentation including “the relative importance of such criteria” (except where price is the sole criterion)
- No hidden evaluation criteria and no undisclosed weighting
  - Account for over 50% of CITT cases

Rules on Technical Specifications
- Prohibits biased technical specifications
- Cannot used technical specifications to create “unnecessary obstacle to trade”
- Specifications should be described in terms of functional and performance requirements; and by particular design, brand or type
- If impractical, and design or description included, then language must allow products that are “equivalent” to the brand described
4. Public Procurement Obligations in International Trade Agreements

→ Sole Sourcing
→ MORE DIFFICULT - must meet 2-part test
  1. Must not be done to avoid competition or in a manner that discriminates against EU suppliers and
  2. For one of the following reasons:
     1. Goods/services can only be provided by one supplier and no reasonable alternative or substitute exists due to
        1. Protection of patents copyrights or other exclusive rights, or
        2. Due to an absence of competition for technical reasons
     2. For additional deliveries by the original supplier that were not included in the initial procurement where a change of supplier
        1. Cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, software, services or installations procured under the initial procurement; and
        2. Would cause significant inconvenience or substantial duplication of costs of the procuring entity
     3. As is strictly necessary where for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the goods/services cannot be obtained in time using open tendering procedures
Public Procurement Obligations in International Trade Agreements

- **Sole Sourcing (cont’d)**
  - If sole source used, procuring entity must prepare a report **and publish it**
    - outlining the value and kind of goods/services sole sourced
    - indicating the circumstances and conditions that justified the sole source award
4. Public Procurement Obligations in International Trade Agreements

- **Domestic Review Procedures**
  - All of this already happens at federal level:
    - The bid review mechanism for federal contracts is the Canadian International Trade Tribunal
  - Canada and Provinces must introduce “timely, effective, transparent and non-discriminatory” procedure to allow disappointed EU supplier to challenge a contract award or the process
  - Complaint must be heard by either an impartial administrative body or a judicial authority that is independent of the procurement entity
  - If review body is not a court, its decision must be subject to review by the courts or its review must be conducted in a manner which meets prescribed procedures including
    - Right to be heard for all parties
    - Right to access to all relevant documents
    - Reasons for decision/recommendation
Public Procurement Obligations in International Trade Agreements

- **Domestic Review Procedures**
  - Suppliers must have “sufficient time” to submit a challenge which cannot be **less than 10 days from the time when the basis of the challenge became known or reasonably should have become known to the supplier**
    - 50% of cases filed to CITT never heard because timelines missed
  - Not easy to win – but can be disruptive and time-consuming
  - Must introduce procedures for
    - “Rapid interim measures” to preserve the ability of the supplier to participate in the procurement
    - Complainant may ask for a stop contract award suspending procurement process pending resolution of dispute
Public Procurement Obligations in International Trade Agreements

- CETA = More competition from EU suppliers for large contracts
- Will make it more difficult for procuring entity to sole source
- Whether you are the procuring entity or supplier
  - UNDERSTAND WHICH TRADE AGREEMENTS APPLY TO YOUR PROCUREMENT
  - UNDERSTAND THE OBLIGATIONS OF THE PROCURING ENTITY
  - UNDERSTAND THE REMEDIES UNDER THE AGREEMENT
- Will require procuring entity to shoulder the administrative costs associated with rules:
  - defending action, if challenged before bid review mechanism
- Put procuring entities in jeopardy of their procurement processes being slowed/derailed by having to
  - deal with an order suspending the procurement pending the resolution of a complaint
  - implementing remedy of review body
- New and not new - all of this already happens at the federal government contracting level which has been subject to international trade agreements since 1994
Questions? Comments?
Contacts

Brenda Swick  
Partner  
416-601-7545  
bswick@mccarthy.ca

Leila Rafi  
Partner  
416-601-7987  
lrafi@mccarthy.ca

John Boscariol  
Partner  
416-601-7835  
jboscariol@mccarthy.ca