

## Primer on Federal Government Contracting

*Brenda C. Swick*

**November 2, 2021**

With annual purchases of over \$100 billion in goods, services, and technology, contracting with the federal government can present a lucrative business opportunity for suppliers in Canada and abroad. However, the rules of doing business with the federal government are different from those in the commercial arena, and suppliers should take the time to understand the process, recourses, and contractual provisions to avoid costly mistakes.

### Governing Legislation and Trade Agreements

The federal procurement process is governed by the Financial Administration Act, the Government Contract Regulations, the Treasury Board Contacting Policy, the Department of Public Works and Government Services Act, Integrity Regime, the Canadian International Trade Tribunal Act, and Procurement Inquiry Regulations. All federal contracts are subject to standard terms and conditions set out in Standard Acquisition Clauses and Conditions (SACC) Manual.

The conduct of federal procurement is also subject Canada's government procurement obligations under a host of international and domestic trade agreements including the Canada Free Trade Agreement (CFTA), World Trade Organization Agreement on Government Procurement (WTO-GPA), the Canada-United States-Mexico Agreement (CUSMA), the Comprehensive Economic and Trade Agreement (CETA), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and the Canada-UK Trade Continuity Agreement (the Canada-UK TCA). In general, these agreements require the federal government to treat foreign suppliers of goods, services and technology in an open, transparent, and non-discriminatory manner when they participate in the federal procurement process. Conversely, these agreements also ensure that Canadian suppliers receive the same treatment when participating in procurements by foreign governments.<sup>1</sup>

### Procurement Process and Contract Award

For almost all federal contracts, Public Services Procurement Canada (PSPC), formerly Public Works and Government Services Canada, conducts the procurement and is also the Contracting Authority.

There is a myriad of procedures available for federal procurement ranging from formal tendering to negotiated procurements. Practically speaking, the leading forms of procedure are requests for proposals,

# Cassels

standing offers and supply arrangements. Short listing by way of requests for qualifications may be used in more complex, high-value solicitations. All federal government procurement opportunities are published on <https://buyandsell.gc.ca/>.

Procurement laws generally provide that to be considered for an award, a bid must comply with all mandatory requirements in the request for proposal. In general, an award is to be made to the qualified bidder whose bid is responsive to the terms of the request for proposal or solicitation and is more advantageous to the government considering only price and the non-price related factors included in the bid document. Bidders who are debarred, suspended, or declared ineligible may not receive a contract award. In addition, there are procedures to allow a department to establish prequalification requirements, which could have the effect of excluding non-qualified bidders.

The federal procuring entity must disclose all criteria by which it will evaluate bidders' responses. Government purchasers that use undisclosed criteria to evaluate bidders' risk of being found liable for doing so. Although government purchasers are allowed to include significant reservations in a request for proposal, it still has a duty to conduct a fair competition and avoid making changes to the evaluation criteria during the evaluation process to contract award.

Procuring entities are generally free to set their own requirements with some limited exceptions. Bidder submissions are generally evaluated based on, inter alia, the best value, which provides the procuring entity with more discretion to consider non-price factors in the evaluation of the bids.

## **Standard Terms and Conditions of Contract**

Standard government contractual terms and conditions found in the SACC Manual are incorporated by reference into procurement documents and resulting contracts. Although some terms and conditions counterparts are found in the commercial arena, a significant number of government contract clauses have no commercial equivalents.

### **Termination for Default**

This clause permits the government to terminate a contract for default where the contractor breaches the contract, i.e., fails to: deliver the supplies or perform the services within the time specified in the contract; make progress, thereby endangering performance of the contract; or perform any other material provision in the contract.

It also entitles the government to re-procure the supplies or services required under the terminated contract and charge the excess costs to the terminated contractor. The supplier will only be paid for items "accepted" by the government at the contract's price.

# Cassels

## **Termination for Convenience**

This clause permits the government to terminate the contract, at any time, without cause, when it is in “the government’s best interest.” Termination for convenience may not be due to any fault on the part of the contractor but protects the government’s interests by allowing it to cancel contracts for products that become obsolete or unnecessary. The government will make a compensation settlement for work performed, including a reasonable allowance for profit.

## **Crown Liability**

Under the Policy on Decision Making in Limiting Contractor Liability in Crown Procurement Contracts, government contractors retain financial responsibility for losses arising as a result of the work under the contract and for liabilities arising from third-party claims. Although the Attorney General of Canada conducts all litigation for or against the Crown, b it may request that the contractor defend the Crown against a claim.

## **Contract Changes**

This clause enables the government to make unilateral changes to the contract during performance, so long as those changes fall within the contract’s scope. However, a change order cannot be issued to change the general nature of the contract. An equitable adjustment in price and delivery schedule is given if acceptable changes are ordered.

## **MFN Pricing**

Most-favoured customer pricing clauses are often incorporated by reference from the SACC Manual. They generally require a to the contractor to charge prices that are not in excess of the lowest price charged to anyone else, including the bidder’s most favoured customer, for the like quality and quantity of the goods, services or both.

## **Payments**

The contract will specify the payment terms and invoicing requirements, i.e., smaller fixed-price contracts pay the total lump sum at the end of the contract, while larger contracts may allow you to invoice monthly for partial or progress payments. The contractor must repay progress payments if the work is not performed and accepted.

## **Specifications**

The federal government contract will contain precise specifications. Suppliers are contractually bound to deliver the product or service described in the specifications. Failure to deliver a product meeting these

# Cassels

terms may result in termination of your contract by default. Prior to bidding it is therefore important to understand all of the specifications.

## **Inspection and Testing Clause**

The government may inspect and test the items delivered to determine if they conform to contract requirements and specifications. The government will not accept a contractor's product unless it passes inspection and is accepted. The type and extent of inspection and testing depend largely on what is being procured and should be stated in the contract.

## **Assignment**

Government contracts will typically prohibit the transfer of an existing contract to another supplier without the express written permission of the purchasing entity. The extension of an existing contract does not typically require a new procurement provided the original contract explicitly provides for an option to extend.

## **Audit Rights and Contract Cost Principles**

The contract will contain detailed provisions regarding when and to what extent costs can be recovered under a government contract. Before a contractor may recover a particular cost it must be (a) allowable, (b) allocable, and (c) reasonable. The government may be entitled to recover any costs initially paid to the contractor but ultimately found not allowable, reasonable, or allocable to the work performed under the contract.

Under certain circumstances, the government will have the right to audit a contractor's price proposal prior to negotiations. The government may also audit pertinent records, books, and other data of the contractor at any time up to five years after final contract payment.

## **Debarment**

Contractors are subject to the federal government's debarment regime set out in the Integrity Regime and Ineligibility and Suspension Policy.

In general, a supplier will be automatically ineligible to contract with the federal government if it is convicted of a listed federal offence. The list of offences is very broad, and includes "integrity" or economic offences related to fraud, bribery, falsification of documents, specific offences under the *Competition Act* and *Income Tax Act*, as well as offences for stock manipulation, insider trading and lobbying and foreign corrupt practices. A supplier that is convicted of a listed offence will be automatically ineligible to participate in federal contracting for a period of 10 years. The PSPC retains some discretion to reduce a supplier's period

# Cassels

of ineligibility by up to five years in appropriate circumstances through the use of an administrative agreement, provided that the supplier can demonstrate that it has co-operated with law enforcement or has taken steps to address the causes of the underlying conduct.

Canada has introduced a remediation agreement regime which permits Crown prosecutors to negotiate remediation agreements for certain criminal offences of an economic character, included those listed under the Integrity Regime, if it is in the public interest to do so. If a contractor voluntarily agrees to enter into a remediation agreement and a judge approves it, the contractor will be required to comply with the obligations imposed under the agreement in return for a stay of the charges. A remedial agreement will avoid the imposition of debarment on the contractor.

## **Defence Procurement**

The Defence Production Act gives the Minister of PWGSC the exclusive authority to acquire defence supplies required by the Department of National Defence and administer defence projects. The federal government has the right to invoke the National Security Exception (NSE) in any defence procurement. An NSE means that the federal government is exempt from trade rules requiring all bidders to be treated equally. It may also mean equipment must be made in specific countries and data must be stored or processed within Canada.

A Security Requirement Check List will form part of any defence contract. The SRCL identifies the security requirements for individuals, facilities and controlled goods and technology. The Contract Security Program provides security screening services for government contractors before they are entrusted with protected and classified information and assets of the government. The Controlled Goods Program administers the Controlled Goods Regulations. It is Canada's national domestic industrial security program to prevent the unauthorized transfer of tactical and strategic technology and assets, including missile technology, military equipment, and related intellectual property. Canadian and American contractors must be certified by the United States (U.S.)/Canada Joint Certification Program (JCP) to bid and work on contracts and conduct research requiring access to critical military technical data.

Major military procurements may be subject to the Industrial Technological Benefits (ITB) Policy administered by the Industry Science and Economic Development. The ITB Policy requires successful bidders to make investments in Canada an amount equal to the value of the contract.

## **Challenging Contract Awards**

A disappointed supplier has two basic options to complaint about a federal government procurement process. The supplier can complain to the Canadian International Trade Tribunal (CITT) for a breach of

# Cassels

Canada's obligations under applicable trade agreements. It may also file a claim for damages in the courts for a breach of contract under common law. In some circumstances it may also be possible to apply for judicial review of procurement or contract award before the Federal Court.

## **CITT Complaint**

Any aspect of the procurement process is subject to the bid protest regime administered by the CITT. The CITT hears complaints from suppliers regarding whether the federal government's procurement process or contract award is in compliance with the specific requirements under the applicable trade agreement.

Challenges may be brought on the grounds of a breach of one or more applicable international trade agreements, statutes, regulations, and contracts. Common grounds of complaint include improper tender documents, ambiguous evaluation criteria, restrictive or biased specifications or other requirements designed to favour one supplier, improper evaluation of the bids, use of undisclosed evaluation criteria, and arbitrary evaluations.

Under the bid protest regime, a supplier has two options: (1) it may object to the Contracting Authority (e.g., PSPC) and subsequently file a complaint with the CITT, if its objection is not resolved to its satisfaction; or (2) it may file a complaint directly with the CITT.

There are strictly enforced deadlines for filing an objection to the Contracting Authority or complaint to the CITT. Where an objection is made to Contracting Authority (e.g., PSPC) regarding a procurement, and relief is denied, a potential supplier may file a complaint with the CITT within 10 working days after the day on which the potential supplier had actual or constructive knowledge of the denial of relief. However, the objection to the Contracting Authority must have been made within 10 working days after the day on which the basis of the objection became known or reasonably should have become known.

Alternatively, a potential supplier may file a complaint directly to the CITT within 10 working days after the day on which the basis of the complaint became known or reasonably should have become known.

It is often a matter of interpretation as to when the basis of an objection became known or reasonably should have become known or when a complainant had actual or constructive knowledge of the denial of relief. It is therefore important for the complainant to document discussions with the Contracting Authority. The CITT tends to find that complainants became aware of the basis of their complaint at the time of its debriefing with the Contracting Authority.

If the CITT determines that a solicitation, proposed award or contract award does not comply with statute or an international trade treaty requirement, it may recommend that PSPC implement any combination of the following remedies: terminate the contract, issue a new solicitation, award a contract or award damages for lost profits. It may also recommend that PSPC pay all of the complainant's bid and proposal preparation

# Cassels

costs and all costs associated with filing and pursuing the complaint.

## **Breach of Contract**

Federal and provincial superior courts may also hear claims by bidders that procurements have been carried out in breach of their common law rights in contract or tort. All tender procurements by federal, provincial and municipal government are subject to the jurisdiction of the courts and to the judicial paradigm of "Contract A" and "Contract B" under common law. The courts have held that when a compliant bidder responds to a tender call, a notional contract called "Contract A" is formed. One of the terms of "Contract A" is that the bidder, if selected, is required to honor the terms of its bid by entering into "Contract B" which is the contract to perform the work in question. During the bidding process, the parties are governed by the explicit rules in the tendering documents. The purchasing government entity is also subject to a number of implied duties to "Contract A" bidders, including to conduct a fair competition, to make full disclosure of the evaluation criteria, to reject non-compliant tenders, to award the contract to the winning bidder and to award the contract as tendered. A breach of any of these implied duties by the contracting entity can result in an award of damages to the complainant unsuccessful bidder.

---

<sup>1</sup> To determine whether a federal procurement is subject to the trade agreements, potential suppliers must ask three questions: 1. Is the procuring government entity subject to the trade agreement? 2. Are the goods, technology and/or services being procured subject to the trade agreement? 3. Does the procurement value meet or exceed the minimum value thresholds that apply under the trade agreement?