

WHAT BUILDERS SHOULD KNOW ABOUT PUBLIC PROCUREMENT

Government contracts represent a big opportunity for many builders. However, builders who pursue public procurements may be surprised to encounter very different rules and procedures than private procurements.

This article seeks to explain some of these differences, and their implications, so that builders can better know what to expect in a public procurement.

WHAT IS PUBLIC PROCUREMENT?

Public procurement refers to when government entities engage in the procurement process. Public procurement originates from a wide range of organizations, including:

- The federal government;
- Provincial & territorial governments;
- Regional districts and municipalities;
- Ministries and government agencies;
- Government boards, councils, committees, and commissions;

- Publicly-funded academic, health, and social service entities;
- Public school boards;
- Crown corporations; and
- Government-owned commercial enterprises.

WHY IS PUBLIC PROCUREMENT DIFFERENT?

Government entities use tax dollars to purchase goods or services. In a democracy, citizens rightfully expect that tax dollars are invested wisely, effectively, and efficiently.¹ Many local governments in BC, for example, have internal procurement policies setting out their organization's requirements for purchasing. Such public entities may also be restricted in their procurement approach due to requirements imposed by funding agencies on whom they may be relying on for financing their project. Also, government entities are subject to additional obligations imposed through a complex system of trade agreements.

There are two broad categories of trade agreements: international and internal.

International trade agreements are agreements between Canada and other countries or economic blocs. For example, Canada has signed several multi-party international trade agreements including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership and the World Trade Organization Agreement on Government Procurement.² Canada has also signed trade agreements with Chile, Columbia, the European Union, Honduras, Korea, Panama, Peru, Ukraine, and the United Kingdom.³

Internal trade agreements are agreements between government entities within Canada, such as between provinces and territories. Examples include the Canadian Free Trade Agreement, Atlantic Procurement Agreement, and the New West Partnership Trade Agreement (NWPTA) between British Columbia, Alberta, Manitoba, and Saskatchewan.

HOW IS PUBLIC PROCUREMENT DIFFERENT?

Certain aspects of public procurement always apply. For example, government entities must always act fairly, transparently, and be accountable for spending.

However, some aspects of public procurement may be triggered by trade agreements. Trade agreements usually contain monetary thresholds which, once met, impose additional obligations on the government entity. The threshold is typically based on the size of a contract for goods, services,

or construction. For example, at the time of its initial adoption, the threshold amounts under NWPTA were \$75,000 for goods and for services, and \$200,000 for construction in respect of municipal contracts.

HOW DO TRADE AGREEMENTS AFFECT PUBLIC PROCUREMENT?

The specific thresholds and effects of each trade agreement are beyond the scope of this article. However, there are few common characteristics of trade agreements that affect public procurement which builders should be aware of.

Trade agreements may require more transparency and disclosure than usual. For example, a trade agreement may require government entities to use electronic systems, publish notices of its intent to procure, or publish details about winning bids.⁴

As a result, builders engaged in public procurement typically have more access to information, and it may be easier to determine whether a bid was handled fairly. On the other hand, information from a bid may be disclosed because of trade agreement obligations or access to information requests.⁵

Trade agreements may require an open and non-discriminatory procurement. This means that the government entity must hold a competition that is open to any eligible bidder, and not limited to those that reside or operate in the vicinity of the project, nor designed to prevent certain bidders from participating in the procurement. Sole sourcing is often limited or prohibited, as is

excluding builders from certain countries, or favouring local builders.⁶

An open and non-discriminatory procurement may give builders more opportunities to compete for contracts. On the other hand, builders face greater competition, including potentially from builders from around the world. In addition, builders with existing relationships and proven track records must compete just like any other builder.

Trade agreements may affect dispute resolution. Under a trade agreement, builders may have access to different rights and remedies than are typically available, such as through the courts. For example, under the NWPTA, aggrieved contractors may have access to, or be required to use, the internal bid protest mechanism. Finally, because public procurement involves the government, builders may be able to exert political pressure as an alternative strategy.

CONCLUSION

Builders who pursue public procurement should expect different rules and procedures than in private procurements. Depending on the size of the contract and the government entity involved, trade agreements may require more transparency and disclosure, an open and non-discriminatory procurement, and changes to dispute resolution. These differences present builders with both opportunities and risks that should be considered prior to pursuing a public procurement.

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Footnotes:

1. Maureen Sullivan. A Guide to Practical Procurement, 1st ed (Tellwell Talent, 2020) at 520.
2. Canada, Trade Agreements (Public Services and Procurement Canada: 2022) <buyandsell.gc.ca/policy-and-guidelines/Policy-and-Legal-Framework/Trade-Agreements#10> accessed 5 May 2023.
3. Ibid.
4. For example, see Comprehensive Economic and Trade Agreement, Canada and the European Union, 30 October 2016 (entered into force 21 September 2017) at Article 19.4 - 19.6.
5. Canada, CPTPP Explained (Global Affairs Canada: 2023) <international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/cptpp_explained-ptpgp_apercu.aspx?lang=eng> accessed 16 May 2023.
6. Freedom of Information and Protection of Privacy Act, RSBC 1996, c 165, ss 3-4.
7. For example, see Canada-United States-Mexico Agreement, Canada, United States of America, and Mexico, 30 November 2018 (entered into force 1 July 2020) at Article 13.9.



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Prior to law school, Sheldon earned a Bachelor of Business Administration degree with an emphasis on management at North Island College, where he received the President's Award for graduating at the top of his class. He was deeply involved in student government, sitting on the students' union board, provincial executive, and numerous college committees. In part due to these efforts, he was awarded the Lt. Governor's Medal Award for Inclusion, Democracy, and Reconciliation.

Sheldon hopes to use his experiences and passion for democracy to provide world-class legal services to the public.

Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

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