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## PROCUREMENT PROS



**BUSINESS LAWYERS  
NAVIGATE THE  
PROCUREMENT  
MAZE AS IT  
DEEPENS**

Brenda Swick, McCarthy Tétrault LLP;  
Matthew Alter, Borden Ladner Gervais LLP

# Procurement Revolution

Procurement and tendering legal practice areas have come into their own in the wake of various scandals and the economic crisis. As Canadians open their markets and seek global ones, procurement practices become more complex

BY JULIUS MELNITZER

**T**HAT SCANDAL breeds attention is beyond dispute. In a commercial setting, it also invariably breeds a hue and cry for greater transparency and accountability. And although lawyers are hardly top of mind in the public eye when it comes to notions of transparency and accountability, it is to the profession that private and public enterprises frequently scurry in the search for ways to ameliorate the furor engendered by scandal.

So it is with procurement and tendering, areas of legal practice that have come into their own as the Information Age ravages the hallways of government and the closeted boardrooms of business. The federal government's sponsorship scandal, the Ontario government's eHealth debacle, the emergence of the "too big to fail" institution and the shadowy manoeuvring that led to the credit and economic crisis have all contributed mightily to what is becoming a nagging bureaucratic, political and corporate ache as society's power brokers are forced to take unfamiliar and repeated peeks over their shoulders.

"With the trend to specialization, larger firms that have a solid core of good contractual lawyers will increasingly focus on the front end of the contract, the call for procurement," says Matthew Alter of Borden Ladner Gervais LLP (BLG) in Toronto. "When you combine that with other government initiatives that are trying to avoid sole-sourcing nightmares



Photo: Don Dixon

and eHealth-type scandals, there will be increased call for lawyers with expertise in procurement, whether they're involved in drafting, interpreting, challenging bid outcomes or litigating."

Heavily regulated sectors, like health care, are particularly susceptible. "Clients in the health-care arena are concerned about procurement-related risks, because the regulatory emphasis on transparency and accountability means that just about any decision they make or action they take can end up on the front page," says Alter's colleague William Carter. "There's a lot of legal advice that goes into making these risks manageable."

And making the risks manageable is becoming difficult. The fact is that the body of laws that apply to hospital procurement in Canada has grown a lot in the past decade. Even laws that have been around for some time remain relatively obscure.

It is not general knowledge, for example, that the 1995 Agreement on Internal Trade (AIT), signed by the federal government and all the provinces, has a chapter on procurement that applies to health-care providers. "The AIT represents policy requirements to which all governments have subscribed," says Denis Chamberland at Baker & McKenzie LLP's Toronto office. "It has the force of law at the federal level, and the force of policy at the provincial and local levels."

Still, there's been a great deal of progress in the past few years, with much of it attributable to the lesson learned from the eHealth debacle. By way of example, for many years service providers in Ontario typically presented hospitals with standard form contracts and asked them to sign the documents as is. But that has changed significantly. "Since the eHealth Ontario affair in the summer of 2009, I doubt many hospitals just sign without conducting any legal review," Chamberland says.

In April 2009, the Ministry of Finance issued a Supply Chain Guideline, superseded in February

2011 by a Procurement Directive that includes the core of the guideline. As well, direction on a dispute-resolution mechanism will be released very shortly. "I think it's fair to say that much progress has been achieved in public procurement in the last two years," Chamberland says. "But people still need to recognize that procurement is a specialized area."

Educating hospitals, then, remains a priority for lawyers like Chamberland. "Because procurement is a dynamic



DENIS CHAMBERLAND  
BAKER & MCKENZIE LLP



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area, the laws in the public sector will continue to change quickly," he says. "It's a mistake for public-sector clients to adopt a defensive posture and bring the lawyers in only when there's a dispute. It's more useful to think of counsel as facilitators who can bring value to the procurement process — not to mention helping avoid some unpleasant surprises on the back end."

That applies to the private sector as well. As post-recession activity revs up in Alberta, for example, it's becoming

apparent that industry didn't waste the recession. "Companies took the opportunity created by the recession's lull to understand their processes better and to become faster, smarter and stronger when the economy picked up," says Stephen Burns, a partner in the Calgary office of Bennett Jones LLP. "Whereas procurement may not have been a core focus in the past, the recession prompted a great deal of attention to risk management, and that included risk management in the procurement area."

The upshot was that companies accustomed to checking customers' credit status suddenly started looking at their supplier's stability. "We saw a renewed focus on vendors looking to ensure that suppliers didn't merely supply but were able to stand behind their products," Burns notes.

Purchase orders were reviewed, contracts closely scrutinized and new technologies such as real-time supplier qualification and information management systems deployed. "What emerged was supplier relationship management, which is analogous to customer relationship management," Burns says. "But instituting that wasn't an easy task, considering that some of our clients in oil and gas and related technologies may have 25,000 to 30,000 master service agreements."

Companies also took to managing some of the obligations and relationships between multiple suppliers and contractors, looking to ensure a harmonization of interests. "You wouldn't have seen that 15 years ago," Burns says.

Suddenly, in-house contracts groups were becoming more rigorous in their reviews. They also started adding personnel. "More and more commercial lawyers have become involved in procurement activity, both on the in-house and private Bar sides," Burns says. "We're busier than ever."

**OTHERWISE,** as Canada's strong economic position sustains the rejuvenation of the country's infrastructure through public-private

partnerships (P3s), media attention converges ever more intensely on the arrangements that typify these relationships.

“While P3 financial closings were difficult in the white heat of the recession, Canada remains one of the most active P3 markets globally,” says Alter’s colleague Bruce Reynolds. “The result is that this country’s infrastructure space is experiencing a convergence of players from around the world.”

Indeed, as Canadians seek markets around the world, we are increasingly forced to open our own. “For years, provincial and municipal procurement were protected from international competition,” says Brenda Swick at McCarthy Tétrault LLP’s Ottawa office. “For example, as part of our government’s response to the ‘Buy America’ program, US suppliers are for the first time able to bid on provincial contracts.”

The upshot is that procurement practice is becoming exponentially complex. Among other things, practitioners must comprehend the evolving subtle differences between tender and procurement formats; navigate different sourcing avenues such as open, sole-source, limited, and pre-qualifying; understand the various formats, including RFP, RFT, RFEI, RSQ, RFEI and electronic bidding; gain familiarity with the federal government’s centralized rules for public procurement and the workings of the Canadian International Trade Tribunal; grasp the various provincial governments’ largely decentralized rules; stay up-to-date on a host of existing and emerging interprovincial and international trade agreements whose importance is growing on the procurement front; and keep an eye on the ever evolving and often confusing plethora of procurement jurisprudence.

**ALL OF WHICH** is not to say that procurement practitioners are a homogeneous breed. “The procurement Bar in many ways resembles the construction Bar, where

you find barristers, you find solicitors, and you find lawyers who are both in the true sense of either term,” says Alter. “It’s a bit of an anomaly that the vast majority of reported tendering disputes arise in construction cases, and a lot of construction lawyers would call themselves part-time ‘procurement lawyers.’ It’s a term that you wouldn’t even have heard 10 years ago.”

But procurement lawyers can be found in many fields, not just



STEPHEN BURNS  
BENNETT JONES LLP



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construction. Information technology practitioners frequently become involved in outsourcing procurement, real estate lawyers in construction procurement, and health-care lawyers in hospital procurement.

For the most part, the pure solicitors draft tender calls and key provisions in procurement agreements, and help their clients evaluate bids and structure proposals. “In recent years,

clients have been calling us in at much earlier stages of the procurement process,” says Joel Ramsey at McCarthy Tétrault’s Toronto office. “Instead of getting a call to help negotiate a contract for a vendor who’s been selected, we’re being asked to help formulate an overall strategy. As vendors are becoming more sophisticated, so are purchasers, and they’re discovering that an investment in strategic expertise up front yields a better result on the back end.”

This is particularly so in the case of P3 arrangements. “Front-end legal involvement in RFPs is one of the areas unique to P3 practice,” says Ramsey’s colleague Gordon Willcocks. “In other types of project, clients often manage the RFP process without a lot of help, but P3 requires a higher level of sophistication in such areas as procurement law and the transparency demands on the parties.”

The skill set required is in many ways fundamental. “You need to understand contracts and their interpretation, the role of equity, and the terms of the procurement process,” says Alter, who fits into the hybrid category of procurement lawyer. “At the provincial level, there’s no standardized umbrella, so you don’t deal with statutory interpretation much, but if you’re dealing with municipalities, for example, you must be able to deal with the governing bylaws. You also have to deal with internal guidelines on a case-by-case and owner-by-owner basis.”

Ramsey opines that “just plain good commercial lawyering” is at the heart of the procurement solicitor’s practice. “For example, there’s simply no substitute for clearly written RFP instructions, something that takes not only drafting expertise but an understanding of a client’s business in considerable depth,” he says.

Yet building a procurement practice isn’t easy. “Procurement is something that business people used to do internally, and it takes a considerable amount of trust for them to bring in external legal help,” Ramsey says. “But it’s definitely a growth area if you have

the expertise to provide cutting-edge strategic advice.”

**BUT THE CUTTING** edge seems to get edgier all the time. At the forefront of the rapid developments in procurement practice are various existing and emerging international and interprovincial agreements.

The three key agreements that impact on procurement practice are the AIT, NAFTA and the World Trade Organization Agreement (WTO) on Government Procurement. The AIT’s goal is to provide Canadian suppliers with equal access to federal and provincial procurement [see sidebar “Foreign Bidders Beware,” p. 49]. It provides a non-exhaustive list of discriminatory practices, dictates a transparent tendering process, and imposes procedural disciplines for failure to comply.

NAFTA guarantees “no less favourable treatment” to service suppliers from any of the three signatory states. Chapter 10 of the agreement is also the first international agreement on government procurement to require that open and non-preferential procedures govern construction contracts meeting a threshold amount.

The WTO Agreement covers international procurements and is now applicable to provincial and federal governments. But while the CITT adjudicates disputes with the federal government, at press time the provinces had still not met their obligation to formulate appropriate bid review mechanisms. “Provincial governments are scrambling to bring themselves into line,” Swick says.

But what’s clear is that the playing field for international procurement has changed drastically at the provincial level. “Provincial procurement had always been sacrosanct, but Stephen Harper managed to commit the provinces to the Agreement,” Swick says. “I believe that this will provide a big boost to procurement practice, partly because foreign governments see Canada as a place where the local economy doesn’t have the ability to

supply nearly all of the needs of our various levels of government.”

According to Swick, the recent Japanese WTO complaint regarding discrimination against foreign concerns relating to Ontario’s feed-in tariff under the 2010 *Clean Energy Benefit Act* is just the tip of the iceberg on the horizon of procurement disputes (even though Japan didn’t rely specifically on the procurement aspect because it hasn’t itself signed the Agreement).



JOEL RAMSEY  
MCCARTHY TÉTRAULT LLP



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Disputes, of course, are where the litigators come in. However, it’s not as though counsel in the procurement area were short of work absent the international complications. “I’ve heard it said that Canada is the most litigious jurisdiction in the English-speaking world for tendering disputes,” Alter says.

The reason is that – courtesy of the Supreme Court of Canada’s 1981

decision in *R. (Ont.) v. Ron Engineering* – the Canadian procurement model envisages the formulation of a contract, rather than an invitation to treat, at the tender stage.

Against that background, the modern era of increasing tender litigation, comprised primarily of rejected suitors challenging a tendering authority’s or owner’s bid award, finds its origins in the Supreme Court 1999 ruling in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.* “This was a case in which the court was required to balance an owner’s right to award a tender to its preferred contractor against the need to ensure that bidders compete on a level playing field, so that the integrity of the tender process is preserved,” Alter explains.

The court ruled that while an owner could build a privilege cause into a tender that allowed it to award the contract to someone other than the lowest bidder, the owner did not have the right to award the contract to a non-compliant bidder. “Much litigation followed the *M.J.B.* decision, testing the requirements of compliance,” Alter says. “And even though Canadian courts eventually said that compliance did not have to be perfect as long it was substantial and material, there has been no end to challenges when the contract doesn’t go to the lowest bidder.”

One year later, in *Martel Building Ltd. v. Canada*, the high court ruled that tendering authorities and owners owed a duty of fairness to tenderers that was not obviated by a privilege cause.

“When you combine *M.J.B.* and *Martel*, what you get is a raft of complaints saying that owners have breached their duty of fairness by awarding contracts to non-compliant bidders,” Alter says. “So procurement litigation, which was just a blip on the radar of real estate and construction lawyers, took on a life of its own — and particularly so in the provincial arena, where there are not for the most part any centralized rules for public procurement or a specialized tribunal like the CITT at the federal level.”

**IN 2009**, the Ontario Court of Appeal built on *Martel in Maystar General Contractors Inc. v. Newmarket (Town)*. The court ruled that an owner's good faith was not a defence to breach of contract; that an owner cannot undermine the bidding process by purporting to accept a bid with an uncertain price or encourage contractors to believe they can communicate with owners after the fact to clarify or explain inconsistencies in their bid; and that owners were not permitted to "correct" bid prices and make an uncertain price certain.

In the result, the Town of Newmarket's tender instruction permitting it to "waive discrepancies, errors or other defects" in a bid, did not allow it to accept an unbalanced, irregular or informal bid. "*Maystar* re-affirmed the obligation on owners to preserve the integrity of the bidding process, by treating bidders fairly and equally and reject materially non-compliant tenders," Alter says.

In 2010, the Supreme Court of Canada re-entered the fray in *Tercon Contractors Ltd. v. British Columbia*. The court ordered the BC government to pay \$3.5 million in lost profits to a road construction company that lost its bid for a \$35-million road project when the government ignored its own tendering rules by awarding the contract to an ineligible bidder. "*Tercon* is the most important tendering decision of the last 10 years and has significant implications for owners and contractors," says Sharon Vogel, a construction lawyer at BLG in Toronto. "And even though the decision deals with a public-sector procurement, it is applicable to the private sector as well."

The government had relied on a broad exclusion clause that prohibited compensation claims by bidders. But the court held that *Tercon's* claim did not fall within the exclusion because the government had acted in a way that was "completely outside the process" by awarding the contract to a non-pre-qualified bidder despite the RFP's stipulation that only pre-qualified proponents could bid.

## Foreign Bidders Beware



In 2009, the Supreme Court of Canada ruled that an unsuccessful bidder on a procurement conducted by the federal government must be a "Canadian supplier" in order to have standing to bring a complaint before the Canadian International Trade Tribunal (CITT) based on the Agreement on Internal Trade (AIT).

- According to Brenda Swick at McCarthy Tétrault's Ottawa office, the decision in *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)* has far-reaching consequences for foreign bidders on federal government contracts:
- A non-Canadian supplier whose contract is not covered by the NAFTA or the WTO Agreement on Government Procurement (WTO-AGP) procurement provisions has no recourse to the CITT at all but only to normal judicial review. That supplier's Canadian competitors do, though, have recourse under the AIT, the NAFTA and the WTO-AGP, as well as under normal judicial review.
- If, however, NAFTA and WTO-AGP apply to the contract, the foreign supplier can go to the CITT but can only invoke the protections of these statutes, but not those of the AIT.
- Non-Canadian bidders on federal government contracts not covered by NAFTA or the WTO-AGP ought to ensure that their bids are made through and fulfilled by their Canadian subsidiary or an entity with a "place of business in Canada."
- If the goods are excluded from the scope of coverage under the NAFTA and WTO-AGP, the foreign supplier now only has limited recourse to the Federal Court by way of judicial review of the contract award.
- The consequence of limiting standing under the AIT to Canadian suppliers is a double bifurcation of the bid complaint system in that Canadian suppliers have standing to make AIT-related complaints to the CITT, but their non-Canadian competitors cannot. Successful non-Canadian suppliers are now required to intervene to defend their awards in proceedings before the CITT but would not have an equal right to pursue remedies before it if they were unsuccessful.
- A non-Canadian supplier will no longer be able to rely on the protections afforded under the AIT, which are in certain aspects different and more demanding than those of the NAFTA or WTO AGP.
- The SCC decision in *Northrop* may itself be a "discriminatory measure" subject to challenge under the NAFTA and WTO Agreement on Procurement.

On the one hand, *Tercon* favours owners because it abrogates the doctrine of fundamental breach and narrows the circumstances in which courts will strike a clause excluding liability for an owner's behaviour.

The doctrine of fundamental breach applies where defendants have acted so extremely as to deny plaintiffs substantially their entire benefit under a contract. In such cases, courts will impose liability for the breach even if

the contract excludes liability in no uncertain terms.

On the other hand, the decision favours contractors because it leaves open to them the possibility of challenging exclusion clauses after their bids have failed. While noting that such cases would be “rare,” a unanimous SCC instructed judges to refuse to enforce exclusion clauses where there exist societal values seeking to curb abuses of freedom of contract and where those values outweigh the “very strong” public policy favouring freedom of contract.

But while the court was unanimous in enunciating these in principle, it split 5–4 on whether to enforce the broad exclusion clause in *Tercon*, which prohibited bidders from recovering claims occurring “as a result of participating” in the tendering process. The majority ruled that the clause did not apply to the “participation of others,” namely the ineligible bidder who received the contract. The minority reasoned that *Tercon* had clearly participated in the process, and that the Ministry’s conduct was not so egregious “as to engage some overriding and paramount public interest” in curbing contractual abuse.

“Considering how seriously the court split, you have to question whether the case provides helpful guidance for the future,” Vogel says. “To the contrary, we may well see an upsurge in tendering disputes because the uncertainty raises the prospect of getting around exclusion clauses.”

At the very least, *Tercon* will change drafting practices. “The split in *Tercon* highlights the need for careful drafting of exclusion clauses,” says Dan Leduc at Ogilvy Renault LLP’s Ottawa office. “We can expect owners and those seeking RFPs or tender submissions in common-law provinces to use more restrictive language.”

**HOWEVER ALL THIS** may be, there’s a recurring irony. “While recent Supreme Court of Canada decisions in this area have clarified certain issues the court faced, these decisions have also unintentionally created or contributed to other legal issues, which the parties have seized upon in subsequent disputes,” Alter says.

But it’s not just the Supreme Court. Ontario’s Divisional Court recently made a mighty contribution to the healthy future of procurement litigation when it ruled in *Bot Construction Ltd. v. Ontario (Ministry of Transportation)* that disgruntled bidders could challenge tender awards by way of judicial reviews against the Crown even where contracts contained a *Tercon*-like exclusion clause. While the Court of Appeal reversed on another ground, it left open the question of the availability of judicial review. “So now there’s another potential tool called judicial review in the arsenal of rejected bidders,” Alter says.

But, if the truth be told, judicial or legislative pronouncement is frequently the very nature of the beast that drives many practice areas. When it comes to procurement law, however, there’s a case – so to speak – that the bulk of the story has yet to be told. 🐾

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