

Defence infrastructure projects in Canada: considerations for contractors and subcontractors

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In June 2022, the Canadian government announced a \$4.9 billion dollar plan to upgrade Canada's North American Aerospace Defense Command (NORAD) continental defence systems. This initiative is part of a larger Canadian strategic plan to bolster defence by spending \$40 billion over 20 years. Delivering the next generation of defence capabilities will require significant investment in existing and new defence infrastructure within the country. However, unlike traditional public infrastructure projects, defence infrastructure projects can generate novel challenges that contractors must account for before bidding or beginning work.

In this article, we will highlight and provide practical insights on three key considerations unique to defence infrastructure projects that contractors and subcontractors who work on or anticipate competing for defence-sector construction projects must consider.

Code of Conduct for Procurement

The [Code of Conduct for Procurement](#) (the Code) was initially published in 2007. The Code is designed to ensure that government contracting is conducted to the highest standards of integrity and in an open, fair and transparent manner that complements existing acts and regulations. The Code is intended to be a single point of reference, which clearly communicates the minimum acceptable conduct when contracting with the Canadian government.

The Code was most recently updated in 2021 following consultations with federal departments and international agencies. These updates incorporated human and labour rights, environmental protection, prohibitions of discriminatory practices, and protection of the rights of Indigenous Peoples requirements for vendors and their subcontractors.

In summary, the Code imposes responsibilities in the following areas:

- Ethics and professionalism, including a duty of good faith and honest performance;
- Avoidance of conflicts of interest (in performing the contract);

- Environmental protection;
- Prevention of abuse and harassment, in order to ensure that all interactions with workers uphold the principles of dignity and respect;
- Upholding human rights and labour standards, including providing written terms of employment (in a language understood by the employee), prohibition of discrimination on protected grounds, freedom of association and collective bargaining, and the provision of an anonymous and confidential grievance mechanism;
- Protection of Indigenous rights; and
- Provisions to curtail human trafficking, forced labour and child labour.

The Code applies to all vendors and their sub-contractors who respond to bid solicitations, and/or provide services to the Government of Canada through Public Works and Government Services Canada. Failure to comply with the Code could mean bid disqualification or termination of an awarded contract.

Mandatory security requirements

Unlike traditional public infrastructure projects, defence sector infrastructure projects may involve national security interests and generally require contractors to comply with stringent organizational, facility and personnel security requirements. The nature and extent of a contractor's security screening requirements depend on the security level assigned to materials and information that the contractor will receive or work near. Government requests for proposals and contracts themselves stipulate the level and type of security clearance required for each project.

Generally, most defence procurement projects require that the contractor bidding for, or working on, a project obtain a Designated Organization Screening (DOS). A DOS designation is required for a contractor to work on, and in some instances bid on, contracts which are designated as "protected". When a contractor may be working with or near classified material or information, the contractor must either apply for a Facility Security Clearance (FSC) or upgrade an existing DOS designation.

In addition to an organizational security clearance, individual employees must also obtain specific security clearances if their respective roles bring them into contact with or near assets, information, or material that is either protected or classified.

Obtaining an organizational or individual security clearance is a required step toward working on defence sector construction projects. However, contractors should be aware that obtaining and maintaining DOS and FSC designations may place tremendous strain on a company's document control, accounting and project reporting resources.

Practical considerations

The Code:

- The Code imposes complex requirements that potential bidders must follow in order to win and work on government projects. Contractors looking to compete for work in this sector must first assess and possibly update internal policies on

environmental protection and Indigenous rights, as well as create new policies around confidential reporting guidance for employees.

- More importantly, the Code applies very broadly. Contractors, especially those with international supply chains, will have to take steps to ensure that material or services provided by them or supplied by their subcontractors comply with the Code. Before bidding, steps must be taken to verify the integrity of the supply chains that will form part of the bid process. Failure to do so could mean disqualification or termination of an awarded contract.

Security:

- Both a DOS and FSC designation take time to apply for and process. Contractors considering bidding on a Canadian government contract should confirm whether a DOS designation is required to bid and if so should take steps to obtain the designation prior to the bid deadline. In addition, the process to apply for a DOS and a FSC designation is complex. Errors in the process can cause delays which could jeopardize a contractor's ability to compete for or execute an awarded contract. To reduce risk and increase the likelihood of obtaining DOS and FSC designations, contractors should consult experienced advisors as early as possible.
- Potential consequences with disclosure of protected and/or classified information during the execution of a defence construction contract can be significant. As such, attendant with DOS and FSC designations are a series of specific and potentially onerous document safeguarding, classification, storage and destruction protocols that must be followed in order to maintain either designation. These requirements are stringent and are not comparable to typical project reporting or document control requirements found in public and private construction contracts. As a result, contractors should evaluate internal document control capabilities and, as needed, train personnel on security requirements. In addition, contractors may need to develop new systems that ensure compliance with both physical and cyber security protocols.
- In addition to organizational security clearance requirements, ensuring that project personnel, especially those in key positions, can successfully obtain appropriate security clearance is a critical first step that contractors considering bidding or working on defence projects must undertake in order to properly build out a bid team/project execution team.

Defence Production Act considerations

Defence sector infrastructure contracts may also be subject to the [Defence Production Act, RSC 1985, c D-1 \(the DPA\)](#). The DPA provides the Crown with extensive powers with respect to defence contracts and subcontracts to ensure that the Crown has the ability to effectively marshal defence sector resources in both peace time and war time. Below are examples of DPA provisions that should be considered before a contractor decides to bid on a defence sector project:

- Under section 24 of the DPA, the Crown may adjust amounts owed or payable to a contractor if it determines that the total amount paid or payable to the contractor exceeds the fair and reasonable cost of performing the contract together with a fair and reasonable profit.

- Also, section 22 of the DPA serves as a bar to claims for damages or compensation stemming from termination or rescission of a defence contract prior to its completion.
- In addition, while audit rights are common in most construction and public infrastructure projects, the DPA, however, codifies what are traditionally contractual rights into legal obligations. Specifically, sections 13 and 23 of the DPA provide the Crown with extensive audit rights and require a contractor to keep detailed accounting records.

Finally, as Canadian provinces continue to rollout and implement prompt payment and adjudication legislation, contractors working on a defence construction project will not be able to utilize these provisions to require prompt payment on contracts with the Government of Canada. The Government of Canada passed its own prompt payment legislation in June 2019, known as the [Federal Prompt Payment for Construction Work Act](#), however this statute is not yet in force. Regardless, federal prompt payment legislation will only apply to construction projects on federal real property and, as a result, it may not apply to all defence-sector projects.

Takeaways

Canada's historic investment in defence infrastructure over the next 20 years represents a significant opportunity for the construction sector. However, novel reporting and security requirements, additional compliance exposure, and potential delay in resolving disputes are some key risks that contractors and subcontractors must consider before bidding.

BLG routinely acts for sector leading businesses in the defence and construction industries. Please reach out to any of our construction or defence and security lawyers below if you have any questions regarding how the *Defence Production Act*, the Code of Conduct for Procurement could impact your business.

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