



Aboriginal procurement

past, present, future

by Cathryn Kallwitz

WITHIN EACH OF THEIR RESPECTIVE POLICIES, with little to no exception, all levels of government within Canada have an aspiration to further economic development through the conduct of their purchasing – often highlighting specific populations and objectives.¹ As the federal government's Procurement Strategy for Aboriginal Business (PSAB) turns fifteen years old, and circumstances within Canada and abroad continue to bring new dimensions to procurement for all public sector entities, it is an opportune time to reflect on how "Aboriginal procurement" has been defined and to consider where practices may lead in the future.

The federal PSAB was implemented in 1996, pursuant to the Treasury Board's Contracting Policy. It mandates that any procurement by subject entities valued greater than \$5,000 and destined for an Aboriginal population be 'set-aside' for bidding exclusively by qualified Aboriginal businesses. In addition to this mandatory provision, any procurement of any value, regardless of location, may also be 'set-aside' for Aboriginal businesses on a voluntary basis.² In the second year of PSAB's implementation, performance objectives were established and annual performance measurement of procurement volumes with Aboriginal suppliers was initiated.

The PSAB program was designed to increase Aboriginal business representation in supplying government procurement requirements, with an overall aim of the program to increase the number of Aboriginal suppliers bidding for, and winning, federal contracts.³ In addition to the 'set-aside' provisions for specific contracts, the PSAB promotes sub-contracting with Aboriginal businesses by 'prime' contractors⁴, opportunities for entrepreneurship, and the establishment of joint ventures and partnerships between Aboriginal and non-Aboriginal businesses; towards the program's objectives.

The federal PSAB was created following Canada's signature to the North American Free Trade Agreement (NAFTA) (1994). Within the text of this agreement are a number of exclusions

to the bidding requirements for openness of opportunity to **all** suppliers from the signatory nations; enabling the 'set-aside' of the 'open' bidding requirements to competition **only** among bidders from identified groups within a single member country. While the broad exclusion may include, for example, small and medium enterprises and women-owned businesses, as is the case in the United States; Canada interpreted this exclusion singularly within its context, for procurement with Aboriginal suppliers.⁵ And thus, the federal PSAB was born.

A similar exception exists to Canada's intra-national trade agreement – the Agreement on Internal Trade (AIT) – signed by the federal government and each of the provinces and territories⁶ for "measures adopted and maintained for Aboriginal Peoples" (s. 1802). Many of Canada's provinces and territories have long established policies of 'local buy' or 'northern preference', which, whether focusing specifically on procurement with Aboriginal Businesses or on regional development within particular territories, have aimed at supporting public sector business with Aboriginal suppliers.⁷

In addition to the established policies, public sector entities continue to learn and expand policy and processes to do business with Aboriginal suppliers as operational opportunities arise. A recent example can be drawn from the Government of Nova Scotia, whose remediation of the Sydney Tar Ponds – a large scale, multi-year and multi-dimensional project – has resulted in the establishment of a project-specific strategy for Aboriginal business which continues to be examined for opportunities for broader implementation.⁸ Provincial power authorities and other entities are also seeking to further Aboriginal procurement objectives within their practices.⁹

Recent discussions on the Agreement on Government Procurement (AGP) between Canada and the US led to the development of a new Annex 2 to NAFTA and the Canada-US agreement under the WTO-AGP. This annex effectively brings the procurement activities of Canada's sub-central entities – that

1. For example, the contracting policy of the federal Treasury Board (TB) highlights in section 2.2 that "Government contracting shall be conducted in a manner that will: ... (c) support long-term industrial and regional development and other appropriate national objectives, including aboriginal economic development..."). This objective is balanced with operational imperatives, probity, and value for Canadians.

2. For more information, see TB Contracting Policy Notices 1996-2; 1996-6; 1996-10; and 1997-6; available online at: <http://www.ainc-inac.gc.ca/ecd/ab/psa/lks-eng.asp> and Interpretation Bulletin; available online at: <http://www.ainc-inac.gc.ca/ecd/ab/psa/pubs/inb/inb-eng.asp>.

3. Department of Indian Affairs and Northern Development (DIAND), "Interpretation Bulletin", 19 Jan. 2009, available online at: <http://www.ainc-inac.gc.ca/ecd/ab/psa/pubs/inb/inb-eng.asp>; and DIAND, "FAQs", 3 Nov. 2008, available online at: <http://www.ainc-inac.gc.ca/ecd/ab/psa/faq-eng.asp#100126>.

4. See more below on the impact of international trade obligations on domestic government procurement policies.

is provinces, territories, and the municipal, academic, schools and hospitals (MASH) sector – within the jurisdiction of these agreements.¹⁰ Within this Annex, the Aboriginal and treaty rights recognized and affirmed by Canada's Constitution¹¹ are specifically identified as not being affected by the obligations of the international agreements. While appropriate legal counsel would need to confirm, this event could be interpreted to mean that PSAB-type programs implemented by government entities across Canada, or similar measures aimed at enhancing Aboriginal procurement (for example, those undertaken pursuant to Comprehensive Land Claims Agreements – CLCAs) enable a focus of procurement activities to Aboriginal businesses where appropriate. It is important to note that this affirmation is made in the new Annex applicable to Canada's sub-central entities. While it could be assumed this provision would apply equally to the national level, this will be a development to watch.

As a result, the federal PSAB and other organizations are currently re-examining their policies with an eye to renewal, or looking at developing their own practices. Since its inception, the federal PSAB has reported relatively positive results, with modestly increasing volumes (number and dollar-value) of government procurement contracts being awarded to qualified Aboriginal businesses year over year.¹² It is interesting to note since the year 2000 that over half of the contracts reported as awarded to Aboriginal Businesses annually have resulted from 'incidental' set-asides (i.e., those procurement processes open to all businesses where the successful supplier was an Aboriginal business) compared to specific set-aside procurements. This finding is seen as an indicator of the program's impact from early years and underscores the importance of spreading awareness of Aboriginal business capacity to fulfill Crown procurement contracts.

At this time, as retirement and associated replacements change the ranks in the public administration, awareness is a key component of the federal PSAB strategy. The Procurement and Aboriginal Business Promotion Directorate (PABPD) of the Department of Indian Affairs and Northern Development (DIAND) has been undertaking significant efforts to raise this awareness with new audiences across the country, through on-demand training sessions, the PSAB National Training and Exhibition¹³ and participation in events such as the Assembly of First Nations' Yukon Region's Building on Success Conference.¹⁴

These events bring together Aboriginal Businesses from within regions or across the country, with representatives from the public sector, with an emphasis on those within PABPD itself. Connection of Aboriginal Businesses with PSAB coordinators and others whose role it is to promote Aboriginal business and procurement with their public sector colleagues is an important step to enhancing knowledge of the marketplace and the diversity of goods and services provided by Aboriginal suppliers. Efforts are also underway to link the federal Aboriginal Supplier Registry with provincial and territorial registries, with an aim to consolidate business information, reduce administrative burden for suppliers and buyers alike and overall to increase the ease of identifying Aboriginal companies.

While these forums can be valuable to share information and experience and forge new relationships among Aboriginal suppliers; awareness can also be furthered through attendance at these events by government buyers (contracting authorities) and the

collators/responsibility-centre managers who initiate purchasing requirements (project authorities). Broad supplier awareness sessions¹⁵ and project-specific 'industry days' or bidder conferences, including participation by a variety of public sector personnel, not only support awareness within the public sector, but similarly can enhance understanding of client requirements and context among the supplier community – critical for small- to medium-sized enterprises and those new to working with public sector entities. These sessions can and do engage suppliers to enhance awareness of opportunities and encourage networking for multi-dimensional bid requirements; supporting PSAB's objectives of increased participation. 

Cathryn Kallwitz is the director of operations for Setaside Solutions (www.setasidesolutions.ca) and its joint venture partner, RFP Solutions Inc. (www.rfpsolutions.ca). Setaside Solutions is a Canadian Aboriginal business, which works exclusively with public sector organizations to support the design and implementation of procurement processes; with a focus on high-complexity goods, services and construction requirements. Setaside Solutions specializes in designing organizational and project-specific strategies aimed at enhancing compliance with and awareness of the requirements of Comprehensive Land Claims Agreements (CLCAs), the PSAB, and other government legislative and policy requirements.

5. A similar exclusion is identified pursuant to the World Trade Organization's Agreement on Government Procurement (WTO-AGP) signed in 1996.
6. ALT signed in 1995, with the exception of Nunavut.
7. For example, the Yukon Government (available online at: <http://www.hpw.gov.yk.ca/selling/policy.html>); the Government of the Northwest Territories (Business Incentive Policy, available online at: http://www.iti.gov.nt.ca/publications/2010/businesseconomicdevelopment/BIPRevPolicy63-02_20100930.pdf); and the Government of Nunavut (IIBA Contracting Policy (parks) and NNI Policy available online at: <http://www.gov.nu.ca/en/Policies.aspx>).
8. See "Aboriginal Set-aside Procurement Strategy Signed", Transportation and Infrastructure Renewal, 25 Sept. 2008, available online at: <http://www.gov.ns.ca/news/details.asp?id=20080925004>.
9. For example, British Columbia Hydro's Aboriginal Contract and Procurement Policy - http://www.bchydro.com/etc/medialib/internet/documents/community/aboriginal/aboriginal_contract_policy.Par.0001.File.aboriginal-contract-policy.pdf.
10. See WT/Let/672; Annex II for Canada, Notes, WTO-AGP, dated 19 March, 2010; available online at: http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm#can. The Annex has recently been accepted by both Canada and the U.S., and is open for negotiation between Canada and other nations under the WTO, subject to similar reciprocal agreements (Section 74; WTO-AGP; Report from the Director General on Trade-related Developments, June 2010).
11. Ref. section 35 of the Constitution Act, 1982.
12. Based on contract award data drawn from PSAB Performance Reports 2000 – 2005, available online under "Reports" at the DIAND PSAB website. Specific PSAB data 2006-onwards is not currently published in this form and thus is not included here.
13. Held in Ottawa, March, 2010.
14. Whitehorse, November, 2010. http://www.buildingonsuccess.ca/pdf/AFNYukon2010Conference_flyer.pdf
15. Provided federally both by DIAND PABPD and the Office of Small and Medium-Sized Enterprises (OSME) of the Department of Public Works and Government Services (PWGSC).

For More Information:

Contact your Shared Services Office or your Procurement, Contracting and Materiel Management personnel or, federally, your departmental PSAB Coordinator
<http://www.ainc-inac.gc.ca/ecd/ab/psa/ctu-eng.asp>.

Contact Procurement and Aboriginal Business Promotion Directorate at DIAND (psab-saea@ainc-inac.gc.ca).

Search the "Aboriginal Business Directory" for your jurisdiction to locate registered Aboriginal suppliers in your region and your commodity requirement area.

Treasury Board Secretariat CPN
 1996-2; 1996-6; 1996-10; 1997-6
 (accessible from <http://www.ainc-inac.gc.ca/ecd/ab/psa/lks-eng.asp>);