



The New West Trade Partnership Agreement

How the trade agreements define everyday procurement

IN CANADA, THE PUBLIC PROCUREMENT PROCESS is primarily governed by the express written rules of the particular bid call document. Public institutions in Canada are also subject to a broader body of written rules that have a significant impact on the relationship between public institutions and the suppliers competing for government contracts. Among these written rules are the internal trade treaty “rules,” often seen by many as playing something of a gatekeeper role in access to government contracts and to the range of remedies permitted aggrieved bidders. Such treaties also establish the fundamental principles that public institutions must comply with everyday as they issue bid call documents.

An organization’s specific bid call document (whether an RFP, tender or other document) are important (including its own procurement policies) but in the end, the entire lifecycle of the procurement process must be consistent with the applicable trade treaty rules. In one way or another, all public procurement in Canada flows from the internal trade treaty rules.

The main agreements

For foreign suppliers, the entry (and exit) points are well known: the WTO Agreement on Government Procurement (AGP) and the North American Free Trade Agreement (NAFTA). But for Canadian suppliers – from the provinces to broader public sector (BPS) organizations (municipalities, hospitals, universities and other) – the main entry point has until recently been the Agreement on Internal Trade (AIT). The AIT (effective as of July 1, 1995) is a domestic treaty signed by the federal, provincial and territorial governments in Canada. As with the international treaties, the AIT aims to implement the principles of open competition and reciprocal non-discrimination for the benefit of Canadian suppliers from all jurisdictions within Canada.

Since implementation, increasingly the AIT has been supplemented by a number of regional trade agreements, such as the Atlantic Procurement Agreement (APA), the Agreement on the Opening of Public Procurement for Ontario and Quebec (AOPPOQ) and the British Columbia-

Alberta Trade, Investment, and Labour Mobility Agreement (TILMA).

To this alphabet soup of agreements can be added the New West Trade Partnership Agreement (NWPTA). On April 30, 2010, the provinces of Saskatchewan, Alberta and British Columbia signed the NWPTA, committing the provinces to four initiatives including one on procurement, which came into limited force on July 1, 2010. Some provisions affecting the Province of Saskatchewan will not come into full force until July 1, 2012.

The NWPTA supersedes the TILMA in BC and Alberta, and is regarded – at least by representatives of the three member provinces – as a significant step that reduces barriers to interprovincial trade, investment and labour mobility.

The NWPTA does bring a new approach to issues of trade liberalization between the affected parties. However, in view of the overlapping provisions of the NWPTA with the AIT, significant questions arise regarding the practical application of the NWPTA for companies looking to supply goods and services into specific jurisdictions across the country.

The AIT and NWPTA compared

The AIT and the NWPTA have broadly similar goals with respect to procurement. The parties to these agreements are required to eliminate local price preferences, biased technical specifications, unfair registration requirements and other discriminatory practices.

Notwithstanding this, the NWPTA intensifies the participating provinces' internal trade commitments in the area of procurement beyond those of the AIT in at least three fundamental ways: (i) the scope of the government entities covered; (ii) the use of a positive list rather than a negative list to express the subject matter of party obligations; and (iii) monetary thresholds for all of the above.

(i) Scope of government entities covered

First, the NWPTA's breadth and depth of obligations are achieved by a broad definition of 'government entity.' The definition is such that ministries, departments, municipalities, Crown corporations and delegated authority organizations or other government-owned commercial enterprises, as well as BPS organizations all come within the scope of the agreement's obligations. In this respect, the NWPTA extends beyond the AIT's procurement commitments in terms of its application to government agencies and bodies.

By contrast, the AIT's procurement rules apply to the same types of entities as the NWPTA, but only to the extent that particular entities are positively listed as being subject to the procurement rules. Even though the procurement chapter of the AIT expands coverage beyond the default entities of other chapters, the AIT obligations apply to a narrower range of government actors.

(ii) Positive vs. negative lists of subject matter

Second, the NWPTA's obligations are expansive because the NWPTA avoids the positive list approach to commitments used in the AIT. This approach (established in article 400 of the AIT) means that its obligations apply only to matters outlined in the agreement. The AIT's listed trade in goods commitments (in agriculture and food, alcohol, natural resources processing, communications and transportation) cover much commercial activity, but do not cover every area of the economy. The parties are only bound where obligations in a particular area are declared in the agreement.

By contrast, the NWPTA extends to all economic sectors unless excluded, widely applying to all "measures of the Parties and their government entities that relate to trade, investment and labour mobility," which, in the scheme of the agreement, includes procurement. It is still not certain how these broadly-worded NWPTA obligations will interact with more narrowly drafted AIT obligations.

(iii) Monetary thresholds

The NWPTA also extends beyond the AIT's procurement commitments in terms of its application to government agencies and bodies and significantly decreases the applicable threshold levels beyond those set out in the AIT.

(a) Government entities

Under the NWPTA, government entities, including departments, ministries, agencies, boards, councils, committees, commissions and similar agencies are committed to providing open and non-discriminatory access to procurement at values of: (1) \$10,000 or greater for goods; (2) \$75,000 or greater for services; and, (3) \$100,000 or greater for construction.

This compares with threshold values for the listed government entities under the AIT's procurement chapter of (1) \$25,000 or greater for goods; (2) \$100,000 or greater for services; and, (3) \$100,000 or greater for construction. These AIT procurement commitments do not apply to government entities that are not accountable to the executive government and entities whose objective is national security.

(b) Government controlled commercial enterprises

Under the NWPTA, Crown corporations and government owned or controlled commercial enterprises have commitments at procurement threshold values of: (1) \$10,000 or greater for goods; (2) \$75,000 or greater for services; and, (3) \$100,000 or greater for construction. By comparison, the threshold values for procurement under the AIT for listed commercial and non-commercial Crown corporations are much higher, set at \$500,000 for goods or services and \$5,000,000 for construction services.

(c) BPS organizations

The NWPTA applies to procurement by "municipal government, school boards, publicly-funded academic, health and social service entities, as well as any corporation or entity

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owned or controlled by ... [such] entities” which have commitments at procurement values of: (1) \$10,000 or greater for goods; (2) \$75,000 or greater for services; and, (3) \$100,000 or greater for construction. The AIT commitments also apply to municipalities and other BPS entities, with threshold levels of \$100,000 for goods or services and \$250,000 for construction services.

Conclusion

While the procurement provisions of the NWPTA and the AIT appear fairly similar, as a whole the NWPTA’s procurement obligations are more expansive. The NWPTA clarifies and enlarges the scope of the signatories’ procurement commitments by lowering the procurement thresholds from those contained in the AIT and relying on an open-listing approach to entities and obligations.

The question remains whether the reduction of the procurement thresholds in the NWPTA will actually lead to tangible benefits for suppliers in Alberta, BC and Saskatchewan. This is both a legal and a practical question.

For example, significantly the AIT’s procurement chapter contains a conflicts provision, which holds that “[i]n the event of an inconsistency between a provision of this chapter and a provision of any comparable procurement liberalization agreement [...] the provision that is more conducive to trade liberalization prevails to the extent of the inconsistency.” Considering the differences in value thresholds in the two agreements, this

provision could be interpreted either as restricting the application of the lower procurement thresholds of the NPTWA to the three signatories (and suppliers based in those jurisdictions), or as expanding the application of those thresholds to other AIT members. Thus, if a BPS organization in BC already procures from suppliers from other Canadian provinces under the AIT, would it maintain differing thresholds based on the jurisdiction of the supplier, or would it simply comply with the more generous thresholds of the NWPTA in order to reduce administrative costs? How these issues are dealt with could effectively lead to the lowering of thresholds for all suppliers across Canada, informally, or by encouraging incorporation of subsidiaries of existing or potential extra-territorial suppliers within the NWPTA’s jurisdiction.

The practical responses to the differences between the procurement coverage of the two agreements remain to be seen. Considering the possible wide-ranging effects on public policy and legislative choices, the potential effect of such responses on suppliers are not likely academic. As noted earlier, all public procurement in Canada flows from the internal trade treaty rules. 

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