

# going global

## open public procurement drives change in government business

by Paul Emanuelli



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The expansion of open public procurement in Canada is part of a broader international current that is driving unprecedented transformations in the way that governments do business worldwide. As discussed below, two interrelated trends are driving this development: (1) the expanded breadth and depth of public policy reforms aimed at opening up international public procurement practices and (2) the internationalization of suppliers providing goods and services to governments worldwide.

Looking first at the domestic context, in June 2007 the Internal Trade Secretariat identified the expansion of the *Agreement on Internal*

*Trade's* open procurement obligations as one of the organization's most significant accomplishments since the treaty came into effect in the mid-1990s. Ongoing negotiations have succeeded in expanding open procurement obligations beyond the senior levels of the federal, provincial and territorial governments and into (i) the crown corporation/agency sector and (ii) the broader public sector (municipal institutions, post-secondary academic institutions, primary and secondary school boards and the health and social services sectors). In practical terms, this means that the scope of the open public procurement standards established under the treaty has expanded exponentially over the last

decade to encompass thousands of public institutions across Canada.

Across the Atlantic, we can see a similar public policy trend in Europe. As Jean-Jacques Verdeaux observes in a *Public Contracting Law Journal* paper entitled “Public Procurement in the European Union and in the United States: A Comparative Study,” the European Union has developed directives that govern the procurement of goods, services and construction, and establish open public procurement across all levels of government in Europe:

The three directives define public contracting authorities to include state, regional and local Governments. The definition also includes all kinds of public bodies having legal personality that are created to satisfy a general interest and financed for the most part by these Governments. Then, from the Federal Government of Germany to the small village of Italy, they are all subject to the same set of rules for each of their procurements exceeding a specific threshold.

While remaining a work in progress, these reforms have made considerable headway in expanding open public procurement procedures within the European community.

Offering an Asian perspective, a *Temple International and Comparative Law Journal* report by Tong Xinchao entitled “Chinese Procurement Law: Current Legal Framework and a Transition to the World Trade

Organization’s Government Procurement Agreement” explains how the World Trade Organization’s efforts under the *Agreement on Government Procurement* have helped to bring about significant reforms within China aimed at opening that country’s public procurement procedures. As the author notes, when China signed the *Protocol on the Accession to the World Trade Organization* (WTO) in November 2001, it committed to ensuring that government entities would conduct their procurement in a transparent manner. Then, in June 2002, China promulgated the *Law of the Peoples’ Republic of China on Government Procurement*. That law came into effect in January 2003. As Xinchao notes, this reform has had a significant impact on opening government procurement in China:

The Ministry of Finance, the central authority responsible for government procurement, promulgated the Interim Regulations of Government Procurement (IRGP), which came into effect on April 17, 1999, and regulated national government procurement. Since then, the central government promoted the adoption of a regulated procurement policy in all parts of China. Presently, 27 provinces, four cities under the jurisdiction of central government, and three pioneer coastal “open cities” have established local procurement regulations or related rules in conformity with central government regulations.

The reforms flowing within China are reflective of a broader international current that is driving

open government procurement worldwide. As Anne Janet DeAses observes in a *Public Contracting Law Journal* study entitled “Developing Countries: Increasing Transparency and Other Methods of Eliminating Corruption in the Public Procurement Process,” the United Nations developed a convention against corruption that focuses on the need to establish appropriate procurement processes to better ensure the transparent management of public finances:

After seven negotiation sessions beginning in January 2002, the United Nations Convention Against Corruption (U.N. Convention) was adopted by the General Assembly on October 31, 2003, by Resolution 54/4. The U.N. Convention is the

most recent effort to combat corruption throughout the world. Article 9 of the Convention addresses public procurement and management of public finances. The U.N. Convention requires each party to:

take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption.

Furthermore, the procurement systems are required to address (a) the public distribution of procurement procedures and invitations to bid, (b) conditions for

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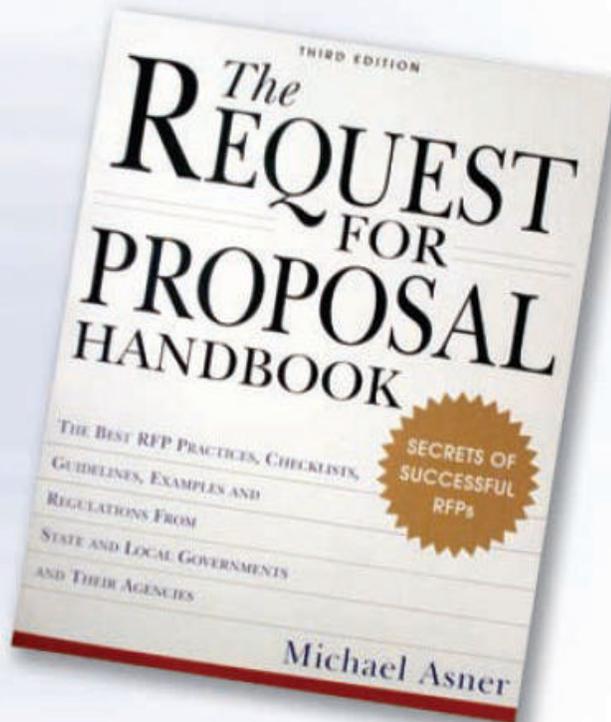
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*...relentless historical tides are driving the expansion of open public procurement within Canada and around the world.*

participation such as selection and award criteria, (c) the use of objective and predetermined criteria for the correct application of procurement procedures, (d) a domestic review system to ensure legal recourse and remedies, and (e) measures to regulate procurement personnel such as screening and training.

The U.N. Convention provides one of many examples of how international organizations are promoting the adoption of open government procurement standards worldwide. As Susan Arrowsmith notes in an *International and Comparative Law Quarterly* paper entitled “Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard,” developing countries often have standards imposed on them as a condition of securing funds for procurement projects:

For developing countries, in procurement as in other fields, aid donors such as the World Bank, regional banks, other organizations (such as the EU), and individual donor countries also represent an important source of procurement standards. First, donors generally require recipients to procure for funded projects using procedures established by the donor, to secure a donor’s objectives of value for money, integrity, etc....secondly, donors also influence procurement laws through their funding of procurement reform projects.

By way of example, the World Bank released guidelines in May 2004, which

were updated in October 2006, which prescribe detailed standards for procurements funded by loans, credits or grants from the International Bank for Reconstruction and Development (IBRD) or the International Development Association. The *Guidelines: Procurement Under IBRD Loans and IDA Credits* prescribe a number of detailed procurement procedures which address the acceptable procurement formats and procedures for the funded project.

The World Bank also conducts country procurement assessment reports, which assess the procurement practices of its borrower nations, providing recommendations for improving their open procurement practices. As Carla Herbert explains in a *Commonwealth Law Bulletin* report entitled “Public Procurement Law Reform: Some Design Issues for Small Island States – A perspective from Trinidad and Tobago,” the so called “developing nations” have strong incentives for complying with World Bank recommendations:

An examination of transactions involving public expenditure for goods and services confirms whether or not a government’s ruling philosophy and values promote the good governance principles of value for money, transparency and accountability. Where procurement practices manifest these principles, there is a positive impact upon a country’s credit rating thereby providing additional leverage when negotiating interest rates with the

multilateral lending institutions such as the World Bank, IMF and International-American Development Bank (IADB).

As this illustrates, adherence to World Bank recommendations helps to secure more favourable loan terms for government procurement projects, thereby providing strong economic incentives for the international expansion of open government procurement.

Turning back to the Canadian context, federal and provincial Auditor General reports also encourage open government procurement. Like World Bank reviews, these audits often drive the expansion of open procurement by focusing on the practices of a broad range of departments, ministries, Crown corporations, agencies and broader public sector institutions. The recommendations made in these reports tend to promote the expansion of open procurement across the public sector.

This general trend towards expanding open government procurement at all levels of government make Canada an international leader when it comes to the transparency of its public sector procurement. The corresponding evolution of a highly developed legal regime, which includes a robust body of case law, helps to protect the interest of suppliers competing for government contracts in Canada and serves as an example for other jurisdictions worldwide.

More and more, as open government procurement systems expand, suppliers are competing for government contracts on an

international scale. For example, World Bank reports reflect the large number of international suppliers that are benefiting from contract awards from World Bank financed projects. World Bank statistics for the 2004-2007 fiscal years indicate that \$183 million worth of contract awards went to Canadian suppliers, \$263 million went to Japanese suppliers, \$486 million went to suppliers from the United States, \$493 million went to suppliers from the United Kingdom, \$532 million went to Italian suppliers, \$874 million went to French suppliers and \$1.4 billion went to German suppliers.

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industrialized nations.” Suppliers from borrower nations also win a considerable number of contract awards. By way of example, during that same time period, \$25 million worth of contract awards went to Mongolian suppliers, \$70 million went to Armenian suppliers, \$72 million went to Peruvian suppliers, \$118 million went to Kenyan suppliers, \$123 million went to Azerbaijani suppliers, \$126 million went to suppliers from the Ukraine, \$3.3 billion

went to suppliers from India and \$5.2 billion went to suppliers from China. However, one notable distinction between these two groups is that the vast majority of contract awards to suppliers from borrower nations were awarded by their own governments, whereas the contract awards for suppliers from “advanced industrialized nations” were awarded by other governments, predominantly in the borrower nations.

That said, these numbers reflect a significant bottom line reality: there are billions of dollars worth of international government procurement contracts available to suppliers worldwide and

these opportunities are likely to increase as more countries open their government procurement practices to external suppliers. As this survey of international sources reflects, relentless historical tides are driving the expansion of open public procurement within Canada and around the world.

This represents an enormous challenge for governments worldwide as they seek to establish and enhance their open procurement systems. It also represents a tremendous opportunity for suppliers who are ready to ride the rising international currents of open competition. *MM*

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