CANADIAN GLOBAL AFFAIRS INSTITUTE
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by Marcia Mills

October 2019

POLICY PERSPECTIVE

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Prepared for the Canadian Global Affairs Institute
1800, 421 – 7th Avenue S.W., Calgary, AB T2P 4K9
www.cgai.ca

ISBN: 978-1-77397-092-9

On June 12, 2019, the Government of Canada introduced amendments to the Canadian International Trade Tribunal Procurement Inquiry Regulations. Described as a "clarification", the amendments were surprising, not only because of the absence of public notice or consultation, but also because of their apparent contradiction with recent, well-reasoned jurisprudence by a World Trade Organization (WTO) panel, and a body of well-developed decisions from the Canadian International Trade Tribunal (CITT). These new regulations could significantly change the procurement dispute process that federal government suppliers have had at their disposal for several decades. The elimination of CITT oversight for billions of dollars of goods and services acquisitions is problematic.

The CITT and the Benefits of Trade Agreements

With a history reaching back to the 1930s, the current CITT was constituted in 1988, as a result of the merger of the Tariff Board, the Canadian Import Tribunal, and the Textile and Clothing Board. In 1994, the Procurement Review Board was also merged into the CITT, extending its mandate to include inquiries into federal government procurements subject to Canada's trade agreements.

The CITT is empowered to investigate all complaints by potential suppliers that the federal government's procurement practices violated free trade agreement rules such as those found in the Canadian Free Trade Agreement (CFTA), World Trade Organization-Agreement on Government Procurement (WTO-AGP), the North American Free Trade Agreement (NAFTA)[1] and the Comprehensive Economic and Trade Agreement (CETA).

Trade agreements contain comprehensive procurement rules that significantly influence the structure and conduct of government procurements, ensuring that procurements are not only fair, but also provide open, transparent and non-discriminatory competitive opportunities. A procurement subject to and in compliance with trade agreements is structured the way it is not by happenstance, but by design. The procurement rules are proscriptive (positive obligations to be fulfilled) and prohibitive (procurement practices that are contrary to law).

For example, procurement entities must:

- Set out all evaluation criteria clearly, in writing, and in advance of bid submission;
- Provide the same information to all of the bidders;

[1] NAFTA will be replaced by the USMCA. Canada is not a signatory to the USMCA government procurement chapter. For more information, please see: https://www.fasken.com/en/knowledge/2018/12/ott-newsletter---the-usmca-is-the-glass-half-empty-or-is-the-glass-half-full

- Permit bidders to participate in pre-qualification processes on an annual basis if a pre-qualification process is used (for example with a standing offer);
- Permit bidders to correct unintentional errors in their bids.

Procurement entities are prohibited from:

- Favouring the goods or services of a particular supplier, or running a competition that is, in reality, a disguised sole source;
- Setting bidding time lines for goods and services delivery requirements that bidders cannot meet so as to eliminate bidders from the competition;
- Using pre-qualification requirements to operate as an obstruction to trade, such as requiring that a bidder have prior government contracts in order to qualify to bid;
- Applying technical requirements that are not bona fide operational requirements to eliminate potential bidders;
- Evaluating bids using undisclosed evaluation criteria.

In the absence of the procurement rules, the federal government procurement process is a creature of policies, directives and "indoor management rules", such as the Government Contracts Regulations issued under the *Federal Administration Act*. Trade agreements make the entire solicitation process – including the form and content of solicitation documents and evaluation criteria, the conduct of bid evaluations and the final contract award – a matter of law, providing bidders with legally enforceable rights.

The benefit for Canadian bidders is profound, particularly under the CFTA that applies to Canadian-based businesses.

All signatories to trade agreements are permitted to exclude specified goods, services and entities from their application. This typically occurs during the negotiation of the trade agreement, with the exclusions set out in a schedule or annex to the agreement. Modifications of these exclusions require, at a minimum, a formal notice to all signatories.

Trade agreements may also provide signatories with broader exception rights. As is discussed next, the interpretation and application of one of these broader rights has become the subject of disputes before the CITT and WTO.

The "Essential Security Interest" Exception

The trade agreements do not preclude their signatories (i.e., governments) from taking actions considered necessary to protect essential security interests, even if those actions run counter to

trade agreement rules that apply to procurement. Historically, in Canada, the federal government adopted a practice of invoking, on a procurement-by-procurement basis, what it referred to as the "national security exception" (NSE) to exclude all of its obligations under all trade agreements. The solicitation documents did not explain why, in the conduct of the procurement, all of the trade agreement rules needed to be excluded to protect an essential security interest. Bidders were merely informed the NSE had been invoked, and trade agreements no longer applied.

In 2012, this case-by-case approach dramatically changed. The government took a blanket approach to this issue, providing notice that it was planning to significantly expand the application of the NSE – including its application to all procurements conducted by Shared Services Canada (SSC), the department responsible for acquiring the vast majority of the government's information technology and related services.

The practice of invoking the NSE has been extensively argued before the CITT in recent years and a robust body of CITT case law quickly developed, providing rules on when and how the government should invoke the NSE.

In its decisions, the CITT cautioned that resorting to omnibus NSEs to forestall review of government action undermines public confidence in the integrity of the procurement process. It urged government to not only "limit the NSE only to the extent *necessary* to protect the national security interest" but also to "exclude only specific provisions of the trade agreements that cannot be upheld without compromising national security".

In a 2017 complaint by Hewlett Packard (Canada) Co. against Shared Services Canada, the CITT reviewed and rejected the government's invocation of the blanket 2012 NSE. It held that a government institution wanting to invoke a NSE had a duty to "articulate in a concrete manner, a national security issue that is rationally connected to the exclusion of a trade discipline". In other words, to properly exclude the CITT from examining whether a federal procurement complied with the trade obligations targeted by the NSE, the government had to identify which trade agreement rules it was excluding from a procurement and why it was necessary to do so for national security reasons.

The government consistently declined to follow any of the CITT recommendations provided in its decisions.

So, What Happened?

In June 2019, the government released the amended Canadian International Trade Tribunal Procurement Inquiry Regulations. The amendments are intended to remove the CITT's discretion and oust its jurisdiction to investigate suppliers' procurement complaints; the CITT is required to dismiss any complaint where a NSE has been "properly invoked" for a procurement.

Contrary to the CITT's past decisions, the new regulations require no rational connection between the NSE invocation and the trade disciplines to determine whether the invocation is proper. A NSE is deemed to have been properly invoked when an assistant deputy minister (or a person of equivalent rank) of the department responsible for awarding the contract has signed a letter approving the NSE's invocation, prior to the date of contract award. Invoking a NSE is now considered proper if the paperwork pre-dates the contract award.[2]

The government, having brought the CITT into its present-day structure over a quarter-century ago, seems to have changed its mind as to how much authority it wants the CITT to wield.

Not surprisingly, these amendments stand in stark contrast not only to clear and consistent CITT jurisprudence but also to recent WTO jurisprudence and Canada's position when litigating this issue before the WTO.

The WTO Decision

On April 5, 2019, the WTO issued a landmark ruling in Russia – Measures Concerning Traffic in Transit, regarding Russia's decision to invoke the "essential security interests" exception found in the General Agreement on Tariffs and Trade (GATT) (the very same exception that applies to procurement rules under the various trade agreements Canada has signed) to prevent Ukraine from trading with neighbouring states. Russia claimed that sovereign states had the sole discretion to "self-judge" what actions they considered necessary for the protection of their essential security interests and that this decision was immune from WTO scrutiny. The United States supported this position, but Canada opposed it. In its opposition, Canada claimed that while governments should be given a high level of deference regarding national security matters, they must provide reasons why they believed that valid security interests existed, necessitating the overruling of trade agreements for the measures taken to protect these essential interests.

The WTO ruled that countries seeking to invoke a NSE had a duty to demonstrate that valid security concerns existed which warranted invocation and that the measures taken were necessary to protect these essential or national security interests. The NSE did not grant an unfettered license to ignore the obligations under the trade agreements, or enable countries to shield themselves from WTO scrutiny. Importantly, the WTO said that if governments attempted to escape their trade obligations by re-labelling trade interests as "essential security interests", this would be "entirely contrary to the security and predictability of the multilateral trading system". This WTO ruling aligns to the CITT case law.

[2] Government practice prior to the new regulations was to provide notice of the NSE invocation within the procurement documents. The regulations have not included this requirement as part of a proper invocation. It remains to be seen whether the government will continue to identify the application of the NSE in procurement documents at the outset.

What Does All of This Mean?

The impact of the regulatory change may be far reaching but it is not yet fully understood.

The Canadian government wields massive purchasing power, spending billions of dollars annually on procurements for goods, services, construction and infrastructure. Ensuring that it remains accountable under the processes, policies and laws it has itself invoked is essential to ensuring that procurements are open, fair and transparent.

The 2012 invocation of the blanket NSE for SSC, in combination with the CITT act regulations amendment, means that the acquisition of all information technology and related services for the government of Canada is potentially shielded from oversight by the tribunal which the government specifically constituted for that purpose.

It is not clear how removing the CITT review authority protects Canada's essential security interests. The trade agreements have never prohibited Canada from taking measures to protect its essential security interests. Programs such as the Industrial Security Program, the Supply Chain Integrity Program, the Controlled Goods Program, and the Integrity and Suspension Policy, to name a few, provide the essential tools and processes to assure integrity of not only government suppliers, but also the goods and services they supply.

The CITT provided a cost-efficient and expedited review process, mandated by law to take no more than 135 days to decide a complaint. The complaint and inquiry process is, for the most part, paper-based, and bidders can access the entire process online from anywhere.

NSE-covered procurements must now be contested in the courts – a process that will require the bidder and the government to expend significant time, resources and money. It should not be lost on the reader that Canadian taxpayers ultimately bear the burden of this regulatory change – they, and they alone, pay the costs of litigation. The NSE invocation takes no notice of the value of the procurement or the size of the bidder – a small five-person business must now seek its remedies against the Canadian government in the courts.

If Canada intended to eliminate entire departments, goods and services from trade agreement coverage, one would have thought the more appropriate approach would have been to follow the processes already agreed to within the trade agreements and negotiate such changes with the other signatories (particularly with respect to the more recently concluded agreements such as the CFTA and CETA). Canada has already negotiated a list of those entities established by Parliament from the application of the trade agreements.

And It May Not End There …

Whether this regulatory amendment will have the impact the government intends remains to be seen.

Subject to certain express exclusions and delegations, Public Services and Procurement Canada (PSPC) holds the exclusive jurisdiction for all goods procurements, including all defence supplies, for the Canadian government. Should PSPC and its client department and agencies seek to invoke a blanket NSE, this could, in combination with the current SSC invocation, potentially remove the CITT's oversight from billions of dollars' worth of procurements annually.

Unknown at this point is whether the government, having amended the regulations, will now begin to ignore trade agreement procurement rules in its procurement processes.

A recent SSC Invitation to Qualify (ITQ) may be a harbinger of things to come. The ITQ sought to pre-qualify mobile device suppliers for a future supply arrangement. The ITQ included at least two pre-qualification criteria that violated trade agreement procurement rules. First, bidders were required to provide proof of existing contracts in Canada. Second, bidders who did not pre-qualify for the initial supply arrangement might only be permitted to requalify in the future if a demand for "new computer technology" arose. Most troubling, the ITQ set a limited number of suppliers that could be awarded a future standing offer and also indicated that SSC intended to award standing offers having no expiry date. This particular ITQ process could, in effect, close out any future sales opportunities to suppliers who did not qualify at first instance. If the standing offer is extended to provincial/territorial and municipal governments under the Canadian Collaborative Procurement Initiative (CCPI), suppliers who were eliminated from the competition may find themselves locked out of sales opportunities not only to the federal government but also to all government levels across Canada.

About the Author

Marcia Mills *is counsel with Fasken and has over 20 years of private and public sector experience, most recently as counsel to Public Services and Procurement Canada, the central purchasing agent for federal departments and agencies and the exclusive acquisition authority for the Department of National Defence, the largest end user of defence supplies and services in Canada.*

Marcia has provided advice and strategic support to the Government of Canada for multiple Major Crown Projects for defence. Her experience in defence acquisition provides her with an in-depth understanding of the considerations and requirements surrounding security, particularly cybersecurity, as well as national security exceptions, import and export controls for defence-related goods and services, including controlled goods and the International Traffic in Arms Regulations.

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