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When Experts Construct a Blue Wall: Defending Police Against Code of Silence Claims



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Municipal Procurement Law in Canada: Everyone Sings Off the Same Song Sheet

By: RAHUL RANADE, *Lidstone & Company, Vancouver, British Columbia*



In 2018, a domestic trade tribunal in Ottawa famously put the kibosh on the Canadian government's procurement of design services for a new fleet of warships. One of the bidders had alleged that the process had violated a domestic trade agreement, and the tribunal ordered suspension of the purchase as an interlocutory remedy. While the purchase did ultimately proceed upon final disposition by the tribunal, municipal purchasers across the country keenly watched the story as it unfolded and took notes.

Why would a municipality be interested in a warship procurement saga, you ask? Because municipal procurement in Canada is subject to the same substantive law that binds procurement made by higher levels of government. Yes, the procurement of a humble snowplough for keeping municipal roads drivable must follow the same rules as the procurement of a $5 billion state-of-the-art warship. And a municipality in Nova Scotia on the Atlantic shore is bound, more or less, by the same procurement rules that bind a municipality in British Columbia on the Pacific shore.

A common legal framework

While a common body of law governs municipal procurement across Canada, surprisingly, none of it is owed to federal law-making; in fact, there is no federal statute on point. Rather, municipal procurement law arises out of voluntarily-entered trade agreements – primarily the Canadian Free Trade Agreement ('CFTA') - and the celebrated (and criticized in equal measure) decision of the Supreme Court of Canada in *The Queen (Ont.) v. Ron Engineering*, [1981] 1 SCR 111 and its progeny. At the risk of oversimplification, one could say that the two aforementioned pieces of writing - CFTA and *Ron Engineering* - together bind all municipal procurement in Canada to a common legal framework.

The CFTA is a domestic, multilateral trade agreement which all provinces, territories and the federal government have entered into. While the CFTA is not a statute, each of the signatory governments has adopted laws making a monetary award under the CFTA enforceable in courts of that jurisdiction. This makes the CFTA a formidable source of black-letter law related to procurement. Municipalities, while not direct signatories, are subject to the CFTA through commitments made by senior levels of government (with the exception of municipalities in Yukon).

But wait, CFTA is not the only trade agreement that municipalities must worry about; there are other supra-national and sub-national treaties that also apply. Internationally, there is the Canada-European Union Comprehensive Economic and Trade Agreement which applies to a majority of municipalities in Canada. Regionally, some provinces have entered into trade agreements with neighbouring provinces; for example, the Trade and Cooperation Agreement Between Ontario and Quebec provides rules that apply to municipal procurement in those provinces.

Fortunately for municipal purchasers, the trade agreements in the melange all impose obligations that are substantially similar. If a procurement complies with one of the agreements, then it is highly likely that it complies with all of them (subject to different

monetary thresholds, but more on that later). As a practical matter, the CFTA is often used as a stand-in for the entire set of applicable agreements by Canadian municipalities (and their lawyers).

The first of the trade agreements was executed in 1995 (when a predecessor to the CFTA was signed) but even before then, the Canadian procurer was no stranger to the idea of a nation-wide set of procurement principles. That concept had been around since 1981 when the *Ron Engineering* decision was issued by the Supreme Court of Canada ('SCC'). Indeed, no discussion of municipal procurement is complete without discussion of the 'Contract A/Contract B' framework propounded by the SCC in that decision. Delving into that concept is not necessary for purposes of this sweeping review and it will suffice to state the central message of *Ron Engineering*: there is a duty on a procuring entity inviting bids to treat each bidder equally and fairly. Further, the decision opened the door for courts to step in to generally preserve the integrity of the bidding process and specifically to remedy the alleged unfairness. Under *Ron Engineering*, a procuring entity's failure to meet the duty of fairness could – and does - result in monetary awards against procuring entities for bidders' lost profits and other damages. A line of cases from the SCC and lower courts following *Ron Engineering* have helped refine the law, prominent among these being *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 SCR 619.

A comparative view

The legal/institutional system that frames municipal procurement in Canada is unusual. For starters, the trade obligations that CFTA's domestic signatories have placed on each other are reminiscent of those found between sovereign nations. Indeed, there are provisions in the CFTA that are modeled after the General Agreement on Tariffs and Trade and the erstwhile North American Free Trade Agreement. This characteristic of the CFTA is owed to the dynamic (read, fractious) nature of relationships between Canadian provinces. The situation is not helped by the SCC's interpretation of federal powers that favours provincial autonomy over nationwide economic integration (compare this with the US, whose supreme court has tipped the balance in favour of economic integration by reading in the 'dormant commerce clause' in its constitution).

To continue the across-the-border comparison, there is nothing quite like the all-encompassing body of Canadian procurement law found in the United States. While federal procurement in the US is governed by federally mandated rules (e.g., the Federal Acquisition Regulation), municipal procurement must follow rules that are usually established by state legislatures. For example, in California, municipalities must publicly bid certain contracts as set out in the Public Contract Code. Further, there is no free-standing common law duty of fairness in the tendering process as engendered in Canada by *Ron Engineering*.

But to draw a contrast between municipal procurement law in Canada and its counterpart in the United States is to miss the point that even within the universe of laws that apply to Canadian municipalities, procurement law is highly unusual in having rules that apply nationwide. Except for broadly applicable legal principles (e.g., administrative law), is it not easy to find substantive law that is applicable to municipalities across provincial boundaries. This author, who practices in Alberta and British Columbia, may not have the foggiest idea as to what statutes govern council procedure or municipal rights-of-way in the neighbouring province of Saskatchewan, but will readily offer an opinion on a municipal procurement question from anywhere in the country, thanks to procurement law being unrestrained by provincial boundaries.

With that background, let us look at some broad principles that apply to municipal procurement in Canada.

Principles of law for municipal procurement in Canada

The substantive law that arises under the CFTA and *Ron Engineering* permeates each step of a typical municipal procurement exercise. Simplistically, a municipality's procurement obligations are manifested in four discrete aspects of the procurement process: deciding whether to use open procurement, dealing with non-compliant bids, applying selection criteria, and contracting with the lowest bidder.

Decision whether to open procure

When initiating a procurement, the first decision that municipalities face is whether the vendor or contractor must be selected by publicly inviting competitive bids ('open procurement') or through a closed procurement process. There is no common law requirement in Canada for municipalities to seek open procurement. While some provinces do impose open procurement requirements on municipalities by statute (such as Newfoundland and Labrador's Public Procurement Act), such statutes are the exception and not the norm.

The law requiring open procurement arises from the trade agreements. Article 502(1) of the CFTA requires municipalities to use open procurement when purchasing goods,

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Rahul Ranade is a lawyer at Lidstone & Company Barristers and Solicitors in Vancouver. He acts for municipalities in Alberta and British Columbia, primarily in the areas of construction, engineering, infrastructure and procurement. Rahul is licensed in Alberta, British Columbia and California.

service or construction over certain monetary thresholds. For example, for the year 2022, the CFTA requires that municipal procurement of goods and services above $121,200, and construction above $302,900, must be open procured. The monetary thresholds provided in different trade agreements vary, in descending order from the international agreements to those at the regional level. As a practical matter, municipal purchasers concern themselves only with the monetary thresholds for the regional agreement that their province is subject to, since this threshold is the quickest to be crossed.

Noncompliant bids

One of the specific rules of law that has arisen from the *Ron Engineering* line of cases is that when a procuring entity invites submissions from potential vendors, there is a legal obligation to only accept a submission that complies with mandatory requirements for submissions set out in the invitation. "An owner owes no contractual duty of fairness to a bidder who does not submit a compliant bid, and owes contractual duties to all compliant bidders" (*True Construction Ltd. v. Kamloops* (*City*), 2016 BCCA 173). In other words, noncompliant submissions must be rejected by the procuring entity. That said, the SCC has recognized that tendering would become unworkable if minor defects are not overlooked; needless to say, lot of judicial ink has been spilled upon finer questions about whether certain defects in submissions were minor or material.

The degree of noncompliance was *at issue in Maglio Installations Ltd. v. Castlegar* (City), 2018 BCCA 80, where the dispute arose out of the City's invitation to tender for the construction of a swimming facility. The plaintiff submitted a bid that was fully compliant with the invitation to tender, whereas the successful bidder did not include a construction schedule as required by the tender documents. The plaintiff sued. At trial, the City argued that while the successful bidder's tender was indeed missing a schedule, the omission was immaterial. The trial judge disagreed, and held that the noncompliance of the successful bidder was material and, accordingly, the City was obligated to reject the bid. Judgment was granted to the plaintiff for breach of contract, and the Court of Appeal agreed.

Undisclosed criteria

Both the CFTA (article 515(5)) and common law require the procuring entity to select successful bidders in accordance with, and solely based upon, the criteria specified in the tender documents. In other words, a bid may not be evaluated on the basis of extraneous criteria that is not disclosed in the invitation to bid (Chinook *Aggregates Ltd. v. Abbotsford* (*District*), 1989 CanLII 241 (BCCA)).

In *Tarmac Canada Inc. v. Regional Municipality of Hamilton-Wentworth*, 1999 CanLII 2692 (ONCA), the lowest compliant bidder on a road project was not awarded the contract. Instead, the municipality awarded the contract to the bidder with the second-lowest price because this bidder represented to the municipality that it paid taxes in the region and employed local workers, many of whom were laid off (the lowest bidder was not a local entity). There were no criteria in the invitation to bid allowing the municipality to give a preference to local bidders. The lowest bidder challenged the decision and the trial court found in its favour. The Court of Appeal agreed that by relying on criteria extraneous to those identified in the tender documents, the municipality had breached its duty of fairness. (Note: The CFTA in its present form prohibits a local preference regardless of whether it is disclosed or note.)

Duty to contract with "lowest bidder"

Prior to *Ron Engineering*, a procuring entity had no legally enforceable duty to accept only the lowest tender. Since that decision, there is no doubt now that a procuring entity must enter into a contract with the lowest bidder. This obligation is tempered by the procuring entity's ability to cancel the process at any time for bona fide reasons (e.g., budgetary limitations). A corollary to the duty discussed above is that once a lowest bidder is identified, the procuring entity may not solicit other vendors in order to find a better deal; i.e., "bid shopping". The practice of bid shopping was expressly proscribed by the SCC in *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58.

The duty to contract with the lowest bidder and the prohibition against bid shopping were both at issue in *Halifax (Regional Municipality) v. Amber Contracting Ltd.*, 2009 NSCA 103. In this case, the municipality invited bids for a storm sewer project and after opening the bids publicly, cancelled the tender. It then retendered substantially the same scope of work. Another party bid a price lower than the original lowest bidder's price and was awarded the contract. Upon challenge by the original lowest bidder, the Court found that the municipality, by retendering a project for which the original bids were publicly known, had failed its duty to contract with the lowest bidder and that the municipality's conduct was "classic bid shopping". The plaintiff was awarded its lost profits.

But what about RFPs?

Ron Engineering was issued in an age when most municipal procurement was carried out through traditional bidding processes where price was the exclusive criteria of evaluation. In the intervening decades, municipalities

have also introduced the qualifications-based model in their procurement. In the latter model, procurement is often carried out by issuing requests for proposals ('RFP') and selection is based on multiple criteria.

Courts seem to have seamlessly adapted the *Ron Engineering* principles to this new reality. In the RFP context, the term 'lowest bidder' is understood by courts to mean the party who best meets the selection criteria. Further, instead of relying on whether a procurement document is called an invitation to tender or RFP, courts look to whether the language of the RFP contemplates the creation of a binding contractual obligation. If there is no such language, then there is no duty for the procuring entity to enter into the contract with the lowest bidder. Finally, courts have held that regardless of whether or not the process is intended to result in a binding contractual obligation, the principles of fairness require that the procurer abide by the process that it has defined for itself in the procurement document.

Conclusion

Municipalities across Canada are bound by the same body of substantive law when it comes to procurement. This unitary, all-encompassing legal framework for procurement is unusual not only when viewed from the outside (i.e., when compared with procurement law in the United States), but it is also unusual within the universe of laws that otherwise apply to municipalities in Canada. It is uncommon to find substantive municipal law that applies across provincial boundaries.

Canada's procurement law arises primarily out of two sources – trade agreements and *Ron Engineering* and its progeny. The CFTA is the most prominent trade agreement as it binds each province, territory, and the federal government, but other international and regional trade agreements also apply. *Ron Engineering* held, in essence, that the procuring entity owes a duty of fairness to bidders.

Whether based on CFTA or *Ron Engineering*, procurement obligations that apply to municipalities can broadly be divided in four aspects: deciding whether to use open procurement, dealing with non-compliant bids, applying selection criteria, and contracting with the lowest bidder. While the procurement obligations were initially developed in the price-based bidding context, the principles have been adapted by courts for qualification-based selections that are increasingly in use now. ML

