

Contracting for software: an overview of Canadian federal regulations

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The Canadian federal government is a large purchaser of software programs and applications. While these can be easily provided across borders, there are some key aspects to consider that differentiate Canadian government contracting in the North American context. We set out some of the key considerations below.

1. What laws and policies govern government contracting for software?

Canadian government procurement is governed by the *Financial Administration Act*¹ and the *Government Contracts Regulations*² (GCRs). This guidance is supplemented by the Supply Manual and Standard Acquisition Clauses and Conditions (SACC Manual),³ and the Contracting Policy issued by the Treasuring Board of Canada.⁴

2. What is the typical procurement process?

There are two governmental entities involved in the majority of software procurement by the Government of Canada: Public Services and Procurement Canada (PSPC) and Shared Services Canada (SSC). SSC is responsible for purchasing related to cyber and IT security, cloud services, accessibility, accommodation and adaptive computer technology (AACT), workplace technology, telecommunications, human resources pay, email, and data centres. PSPC is typically responsible for all software purchasing beyond the scope of the SSC.

The SACC Manual outlines the typical software procurement process. Generally, a Request for Supply Arrangement (RFSA) is used to establish a supply arrangement (**SA**), which is a non-binding agreement between the government and a pre-qualified supplier that allows the government to award contracts and solicit bids. If permitted under the terms of the SA, a pre-qualified supplier can subcontract services.

The SACC Manual identifies two sets of standard clauses that frequently apply to software procurement. The documents of solicitation will indicate which, if any, of these clauses are applicable:

1. Software Development or Modification Services, SACC 4002, 2010-08-16.
2. Licensed Software, SACC 4003, 2010-08-16.

There is a two-phased procurement process for purchasing licensed software under the Software Licensing Supply Arrangement (SLSA). First, suppliers qualify through the SLSA RFSA process, similar to the RFSA process above. Once qualified, the supplier lists their products and ceiling prices in the SLSA catalogue.⁵ The second phase involves the approved PSPC and client authorities competing their specific requirements via Request for Quotations (RFQ), simplified Bid Solicitations, or Sole Sourcing.

Occasionally, software is solicited through a more classic Request for Proposals, whereby a specific solution or license is purchased to satisfy a specific need.

3. What are the key legal requirements for government contracting?

GRCs Deemed Terms

Section 18 of the GCRs prescribes deemed terms in Government of Canada goods or services contracts.⁶ Through this provision suppliers and bidders are deemed to make several declarations relating to ethics, and integrity. For instance, a supplier is deemed to declare that they have not been convicted of an offence under subsection 750(3) of the *Criminal Code*, which prohibits government contracting if convicted for certain offences under the *Criminal Code*, or if they have, that a pardon has been granted. A supplier is also deemed to have consented to the public disclosure of basic information relating to the contract, with the exception of the information described in paragraph 20 of the *Access to Information Act*. A contractor who makes a false declaration or fails to comply with the deemed terms is considered to be in default under the contract.

Integrity Provisions

To sell to the Government of Canada, a supplier must be eligible. The *Ineligibility and Suspension Policy*⁷ sets out various circumstances where a supplier is automatically deemed ineligible (see section 6), as well as circumstances that *may* lead to a determination of ineligibility (section 7). Both of these sections are subject to section 8, which outlines pardons. For example, a supplier will automatically be deemed ineligible if they have been convicted of an offence that results in a loss of capacity to contract with the Government under s. 750(3) of the *Criminal Code*. A supplier *may* be deemed ineligible if they have breached any term or condition of an administrative agreement entered into with PWGSC pursuant to the Policy.

Alongside the Policy, Chapter 4 of the SACC Manual stipulates that every government procurement instrument must incorporate Integrity Provisions.⁸ The Integrity Provisions provide that by submitting a bid, the supplier certifies, among other things, the following:⁹

- It has read and understands the Policy;
- It understands that certain domestic and foreign criminal charges and convictions, and other circumstances described in the Policy, may result in a determination of ineligibility under the Policy;
- None of the domestic criminal offences, and other circumstances, described in the Policy that will or may result in a determination of ineligibility or suspension, apply to it, its affiliates, and its proposed first-tier subcontractors.

In accordance with the Integrity Provisions and the Policy, if a supplier is unable to provide any of the certifications required by the Integrity Provisions, such as those outlined above, it must submit a completed Integrity Declaration Form with its bid.¹⁰

Lobbying

Suppliers should also note that communications with Government of Canada public office holders is a regulated activity under the *Lobbying Act*.¹¹ If a supplier frequently communicates directly with public officials such that those communications become a “significant part of the duties” of the employee, this may trigger registration obligations under the *Lobbying Act*. Similarly, if a company engages a lobbying firm or individual to lobby on their behalf such

activities would be publicly disclosed, including the companies name. Questions vis-a-vis a specific procurement would not be considering lobbying.

Conflict of Interest

To protect the integrity of the procurement process, the Government of Canada can reject a bid where there is a conflict of interest, such as an unfair advantage.¹² There are a few documents that are of particular relevance in terms of procurement. First, the PSPC Code of Conduct, which applies to all PSPC employees, describes a conflict of interest as a situation where an individual has competing financial, professional or personal obligations or interests that interfere, could interfere, or be perceived to interfere, with their ability to adequately perform in a fair and objective manner. There is another code of conduct that is specific for procurement, the Code of Conduct for Procurement. The Procurement Code applies to all transactions entered into by PSPC either for their own procurement, or on behalf of a client department, and it reflects the conflict of interest measures outlined in the PSPC Code of Conduct. Where the Government of Canada intends to reject a bid due to a conflict of interest creating an unfair advantage, the bidder has an opportunity to make representations before there is a final decision.

Anti-Corruption

Canada's domestic anti-corruption legislation is contained in the *Criminal Code*¹⁶ and the *Conflict of Interest Act*.¹⁷ Section 121 of the *Criminal Code* makes it an offence to offer public officials any benefit as consideration for cooperation, assistance, or the exercise of influence in a government transaction. Further, the *Conflict of Interest Act* outlines obligations under which public officials cannot solicit or accept money or gifts; assist individuals in dealings with the government in a way that compromises their professional status; take advantage of information obtained by virtue of their position as insiders; or, after leaving public office, act so as to take improper advantage of having held that office. To the extent that a supplier engages with government officials or employees, they must not offer or provide any benefit for the purposes of securing a contract from the government.

Data Localization

Canada generally does not impose data localization requirements and various trade agreements do include a prohibition on data localization requirements in government contracts. However, some government contracts do include provisions in this area through various exceptions.¹⁸

4. Reseller vs. Direct Sales Model

Under a direct model, the software developer contracts directly with the Government, whereas under the reseller model, a developer has an exclusive or nonexclusive Canadian intermediary (distributor/reseller) that acts as prime contractor with the Government of Canada.

The reseller model can be beneficial to non-Canadian entities as local Canadian resellers are familiar with the Canadian government contracting process and can monitor procurement opportunities and liaise directly with Canadian officials. A supplier may engage directly with the Government of Canada first and note the reseller that will be involved in the process, as opposed to a model which just licenses a Canadian reseller. In the context of an SLSA, if a supplier engages directly with the government first and plans on using a reseller, the supplier must certify that any subcontractor is in good standing in the sense that there are no reasons of which the supplier is aware that prevent the reseller from performing. Additionally, the supplier must certify that both parties are aware of the terms of the arrangement between the supplier and Canada, and that the terms of the agreement between the reseller and the supplier do not conflict with the terms of the arrangement between the supplier and Canada.¹⁹ The deemed declarations under section 18 of the GRCs is limited to prime contractors or bidders, the Integrity Provisions are

applicable to both prime and subcontractors and both parties must be eligible to contract in compliance with these provisions.

5. What are the Canadian procurement implications of incentive programs for resellers?

There are no specific procurement implications in connection with incentive programs developed by foreign entities for resellers, and generally, there is nothing that prohibits such a program. Suppliers that opt to use incentive programs for resellers must comply with the standard obligations applicable to Government procurement, such as those relating to anti-corruption, lobbying, and conflict of interest provisions that have been outlined above. Specific programs offering government a discount on service should be reviewed on a case by case basis.

6. Does the Government accept shrink wrapped terms or “Vendor Paper”? If so, when?

In certain circumstances the Government of Canada may accept shrink wrapped terms. The Treasury Board Secretariat’s “Contracting Policy Notice 2008-2 for Low Dollar Value Purchases of Commercial Off-the-Shelf Shrink-Wrap Proprietary Software and Related Maintenance and Support” outlines that the Government may accept click-wrap terms in low-dollar value situations, typically where the software is a one-time purchase without additional licensing purchases.²⁰

For contracts outside of the low-dollar value range, to the extent that the Government accepts shrink wrap terms or a EULA, such terms must generally be in compliance with any terms in the contracting mechanism including the SACC Manual, to the extent that it is incorporated. This can include the SACC Manual terms for licensed software.

7. What information is subject to Freedom of information and how to protect it?

At the federal level, the *Access to Information Act*²¹ (AIA) applies to government procurement and to information provided to the Government by bidders. That said, under section 20 of the AIA, sensitive commercial, scientific, financial and competitive information is not subject to public disclosure. Bidders, and subcontractors should, therefore, clearly mark as confidential all information and documents provided to government officials in the procurement process (including bids and related correspondence). As noted above, under subsection 18(1)(d) of the GCRs, contractors are deemed to have consented to the public disclosure of basic information about contracts, except for information that relates to the exceptions identified in section 20 of the AIA.

8. Key Differences Between US and Canadian Software Procurement - the Federal Acquisition Regulation & End User License Agreements

Canadian regulations for government contracting do not contain a Federal Acquisition Regulation (FAR) equivalent. In

the context of a contract that involves software development or customization, the SACC Manual provisions that relate to IP will frequently apply. In certain respects these can be more demanding than those in the FAR. There are two SACC provisions that are relevant in this regard: (1) Contractor to Own IP Right in Foreground Information and (2) Canada to Own IP Rights in Foreground Information. One of those provisions would generally apply in the context of a contract that involves software development or customization (work product that is referred to as Foreground Information in the SACC).

For US suppliers, End User License Agreements (EULA) can be accepted. However, the EULA will generally have to be consistent with the terms of the contract/ bid documents. Notably, the SACC Manual provisions can include a provision on the Right to Modify and no Reverse Engineer, which states that if the source code is provided under the contract, any modifications that the Government of Canada makes, it will own, but it will take no ownership in the licensed software. The SACC Manual also includes a provision on liability, which prescribes that no limitation of liability provision will apply to the contract with the Government of Canada unless specifically incorporated in the full text of the Articles of Agreement. To address this issue, suppliers can adjust the language of their EULA on a case-specific basis.

The Dentons Procurement team keeps abreast of leading global developments. If you have any questions, please feel free to reach out to Paul Lalonde or Sean Stephenson with any inquiries.

¹ *Financial Administration Act*, R.S.C., 1985, c. F-11.

² *Government Contracts Regulations*, SOR/87-402.

³ Public Works and Government Services Canada, Standard Acquisition Clauses and Conditions, available at: <https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/section/4/10/25>.

⁴ Government of Canada, Contracting Policy, available at: <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14494>.

⁵ SLSA categories of software, available at: <https://www.tpsgc-pwgsc.gc.ca/app-acq/cral-sarc/lgcl-ctgr-eng.html>.

⁶ GCRs section 18, available at: <https://laws-lois.justice.gc.ca/eng/regulations/sor-87-402/page-2.html#h-905917>.

⁷ Government of Canada, *Ineligibility and Suspension Policy*, available at: <https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html>.

⁸ Supply Manual, Chapter 4, Section 4.21, available at: <https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/section/4#section-4.21>.

⁹ See <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/1/2004/15#integrity-provisions>.

¹⁰ See subsection 5, available at: <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/1/2004/15#integrity-provisions>.

¹¹ *Lobbying Act* (R.S.C., 1985, c. 44 (4th Supp.)). ¹² SACC Manual, 18 (2012-03-02) Conflict of interest – unfair advantage, para 1 available at: <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/1/2003/25#conflict-of-interest>. ¹³ Public Services and Procurement Canada Code of Conduct, available at: https://www.tpsgc-pwgsc.gc.ca/apropos-about/code-cond-eng.html#ch_3. See also Directive on Conflict of Interest, available at: <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32627>.

¹⁴ Code of Conduct for Procurement, available at: <https://www.tpsgc-pwgsc.gc.ca/app-acq/cndt-cndct/contexte-context-eng.html>.

¹⁵ SACC Manual, 18 (2012-03-02) Conflict of interest – unfair advantage, para 3.

¹⁶ *Criminal Code*, RSC 1985, c C-46.

¹⁷ *Conflict of Interest Act*, S.C. 2006, c. 9, s. 2.

¹⁸ Guidance on Cloud Security Assessment and Authorization (ITSP.50.105), available at: <https://cyber.gc.ca/en/guidance/guidance-cloud-security-assessment-and-authorization-itsp50105>,

¹⁹ See Annex H – List of Approved Resellers, available at: <https://www.tpsgc-pwgsc.gc.ca/app-acq/cral-sarc/annx-h-eng.html>.

²⁰Contracting Policy Notice, available at: <https://www.canada.ca/en/treasury-board-secretariat/services/policy-notice/2008-2.html>.

²¹*Access to Information Act*, R.S.C., 1985, c. A-1.

²²See: <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/4/4006/3>. and <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/4/4007/3>.

²³Available at: <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/4/4006/3>.

²⁴Available at: <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/4/4007/3>.

²⁵See 4003 17 (2008-05-12), available at: <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/4/4003/4>.

²⁶See 2010C 16 (2008-05-12), available at: <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/3/2010C/18#liability>.

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