

CHAPTER FIVE: PROCUREMENT

Annex 502.4 ¹

Procurement - Provisions for municipalities, municipal organizations, school boards and publicly-funded academic, health and social service entities

A. Purpose

This Annex establishes the provisions required to extend coverage of Chapter Five (Procurement) to municipalities, municipal organizations, school boards and publicly-funded academic, health and social service entities.

B. Application of Chapter Five and Relationship to other Chapters

1. Chapter Five (Procurement) and the provisions of other Chapters of the Agreement on Internal Trade apply only as specified in this Annex.
2. The following provisions of the Agreement on Internal Trade apply to this Annex: Chapter One (Operating Principles); Chapter Three (Reaffirmation of Constitutional Powers and Responsibilities); Article 502(4) (Scope and Coverage); Article 512 (Contact Point); Article 602(2) (Scope and Coverage); Article 1600 (a), (b), and (d) (Committee on Internal Trade); Article 1603(4) (Secretariat); Article 1802 (Aboriginal Peoples); Article 1803 (Culture); Article 1805 (Taxation); Article 1809 (Relationship to International Agreements); Article 1811 (Accession and Withdrawal); Article 1812 (Language); and Article 1813 (Rules of Interpretation).

C. Scope and Coverage

1. This Annex covers all municipalities, municipal organizations, school boards and publicly-funded academic, health and social service entities, as well as any corporation or entity owned or controlled by one or more of the preceding.
2. At the time of its adherence to this Annex, each Province shall provide the Secretariat with a list of its legislation applicable to entities covered by this Annex. Those lists will be attached as Appendix “A” (Legislation applicable to entities covered by Annex 502.4) to this Annex. Thereafter, each province shall advise the Secretariat of any changes to its list and the Secretariat shall maintain an up to date list of all applicable legislation. Each province shall also maintain an up to date list of all its entities covered by this Annex.
3. This Annex applies to measures related to the procurement, within Canada, of goods, services and construction which are adopted or maintained by the entities covered by this Annex where the procurement value is

- (a) \$100,000 or greater, in the case of goods or services; or

¹ This annex was added to the Agreement on Internal Trade by the Third Protocol of Amendment, signed April 17, 1999.

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(b) \$250,000 or greater, in the case of construction.

4. For procurement below the thresholds in paragraph 3, entities covered by this Annex are encouraged to respect the spirit of this Annex.

D. Non-Discrimination

1. Provinces shall not adopt or maintain any measures that would operate to require the entities covered by this Annex to differentiate between suppliers, or goods or services on the basis of geographic location in Canada.

2. Entities covered by this Annex shall not adopt or maintain any forms of discrimination based on the province of origin of goods, services, construction materials or the suppliers of such goods, services or construction materials in their procurement practices.

3. Discriminatory procurement practices which are not allowed under this Annex include, but are not limited to, those listed in Appendix “B” (Discriminatory Practices).

4. Nothing in this Annex is intended to provide, nor shall be construed to provide, directly or indirectly, to any Province not subject to this Annex or to its goods, services, suppliers or entities any right, claim, benefit or remedy pursuant to any provision of this Annex.

E. Transparency

1. Each Province shall ensure that its legislation, regulations, procedures, guidelines and administrative rulings as they apply to matters covered by this Annex are made readily accessible.

2. Each entity covered by this Annex shall ensure that its legislation, regulations, procedures, guidelines and administrative rulings as they apply to matters covered by this Annex are made readily accessible.

3. Each entity covered by this Annex shall ensure that its notices of contract award are made readily accessible.

F. Legitimate Objectives

1. Where it is established that a measure is inconsistent with Section “D” (Non-Discrimination) of this Annex, that measure is still permissible under this Annex where it can be demonstrated that:

(a) the purpose of the measure is to achieve a legitimate objective;

(b) the measure does not operate to impair unduly the access of persons, goods, services or investments of a Province that meet that legitimate objective;

(c) the measure is not more trade restrictive than necessary to achieve that legitimate objective; and

(d) the measure does not create a disguised restriction on trade.

2. In this Annex, legitimate objective means one of the following objectives:

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- (a) public security and safety;
- (b) public order;
- (c) protection of human, animal or plant life or health;
- (d) protection of the environment;
- (e) consumer protection;
- (f) protection of the health, safety and well-being of workers; or
- (g) affirmative action programs for disadvantaged groups;

considering, among other things, where appropriate, fundamental climatic or other geographical factors, technological or infrastructural factors, or scientific justification.

The protection of the production of a Province is not a legitimate objective.

G. Fair Acquisition Process

1. Procurements covered by this Annex shall be subject to a tendering process.
2. “Tendering Process” includes all methods of tendering such as requests for information, requests for quotations, requests for proposals, requests for qualification and calls for tenders.
3. Entities covered by this Annex may continue existing policies and procedures to the extent that they are compatible with the provisions of this Annex.
4. Purchasing practices which may depend on a long term arrangement between an entity covered by this Annex and a supplier are permitted provided that each such arrangement is undertaken in a manner consistent with this Annex.
5. Entities covered by this Annex shall ensure that their needs, within Canada, of goods, services and construction are met through a fair acquisition process that is based on the highest degree of competition, efficiency and effectiveness, and is consistent with Sections “D” (Non-Discrimination) and “E” (Transparency) of this Annex.
6. The Provinces recognize that the transparency and non-discrimination of fair acquisition processes necessary to ensure access for all Canadian suppliers to public procurement opportunities can best be promoted through the widespread adoption of an electronic tendering system or systems.
7. Accordingly, Provinces agree that an electronic tendering system or systems which are low cost, easy to use and readily accessible across Canada, shall be made available to the entities covered by this Annex no later than December 31, 1998. The electronic tendering system or systems shall be capable of transmitting notices of contract awards.
8. After the date of entry into force of this Annex, entities covered by this Annex shall be required to post tender notices on the electronic tendering system or systems, referred to in paragraph 7, for all covered procurement.

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Prior to the date of entry into force of this Annex, entities covered by this Annex are encouraged to use the electronic system or systems, for all covered procurement.

The dates above are subject to review under Section “P” (Review of Provisions and Future Negotiations) by the Committee on Internal Trade to ensure that the electronic tendering system or systems are operational and that an adequate period is provided for their adoption.

9. The information provided in the tender notice shall include at least the following:
 - (a) a brief description of the procurement contemplated;
 - (b) the place where a person may obtain information and tender documents;
 - (c) the conditions for obtaining the tender documents;
 - (d) the place where the tenders are to be sent;
 - (e) the date and time limit for submitting tenders;
 - (f) the time and place of the opening of the tenders in the event of a public opening; and
 - (g) a statement that the procurement is subject to this Annex.
10. Consistent with Section “E” (Transparency), entities covered by this Annex may, in evaluating bids, take into account the submitted price, quality, quantity, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria consistent with Section “D” (Non-Discrimination). The tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.
11. Subject to Section “D” (Non-Discrimination), an entity covered by this Annex may limit tenders to goods, services or suppliers qualified prior to the close of call for tenders.

H. Buying Groups

1. Entities covered by this Annex that participate in group purchasing activities through buying groups shall ensure that the activities of such buying groups are carried out in a manner consistent with this Annex.
2. No Province shall direct the procurement activities of buying groups in a manner inconsistent with this Annex.
3. Buying group means a group of two or more members which combines the purchasing requirements and activities of the members of the group into one joint procurement process. Buying groups include cooperative arrangements in which individual members administer the procurement function for specific contracts for the group, and more formal corporate arrangements in which the buying group administers procurement for group members. Buying groups may involve a variety of entities, including public sector, private sector and not-for-profit organizations.

I. Exceptions

1. An entity covered by this Annex may exclude a procurement from the application of this Annex in the circumstances listed in Appendix “C” (Exceptions - Circumstances for Exclusions) provided that it does not do so for the purposes of avoiding competition between suppliers or in order to discriminate against suppliers of any other Province.
2. Where only one supplier is able to meet the requirements of a procurement, an entity covered by this Annex may exclude a procurement from the application of this Annex in the circumstances listed in Appendix “D” (Exceptions - Circumstances for Sole Supplier Procurement), provided it does not do so for the purpose of avoiding competition or in order to discriminate against suppliers of any other Province.

J. Canadian Content

1. Entities covered by this Annex may accord a preference for Canadian value-added, provided that the preference is no greater than 10 percent.
2. An entity covered by this Annex may limit its tendering to Canadian goods or suppliers, provided the procuring entity is satisfied that there is sufficient competition among Canadian suppliers and the requirement for Canadian content is no greater than necessary to qualify the procured good as a Canadian good.

K. Regional Economic Development

A Province may, under exceptional circumstances, exclude a procurement of an entity covered by this Annex from the application of this Annex for economic development purposes provided that all such exclusions are reported, prior to the commencement of any procedure leading to the award of a contract, to the other Provinces with an explanation of the reasons justifying the decision. A Province invoking this provision will seek to minimize the discriminatory effects of the exclusion on the suppliers of the other Provinces.

L. Non-Application

This Annex does not apply to:

- (a) procurement of goods intended for resale to the public;
- (b) contracts with a public body or a non-profit organization;
- (c) procurement of goods, services or construction purchased on behalf of an entity not covered by this Annex;
- (d) procurement from philanthropic institutions, prison labour or persons with disabilities;
- (e) procurement of any goods the interprovincial movement of which is restricted by laws not inconsistent with the Agreement on Internal Trade;
- (f) procurement of goods, services and construction that is financed primarily from donations that are subject to conditions that are inconsistent with this Annex;

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- (g) procurement of goods and services related to cultural or artistic fields and computer software for educational purposes;
- (h) procurement of services that in the province of the entity issuing the tender may, by legislation or regulation, be provided only by any of the following licensed professionals: medical doctors, dentists, nurses, pharmacists, veterinarians, engineers, land surveyors, architects, accountants, lawyers and notaries;
- (i) procurement of services of financial analysts or the management of investments by organizations who have such functions as a primary purpose;
- (j) procurement of financial services respecting the management of financial assets and liabilities (i.e. treasury operations), including ancillary advisory and information services, whether or not delivered by a financial institution;
- (k) procurement of goods and services for use outside Canada as well as construction work done outside Canada; and
- (l) health services and social services.

M. Dispute Resolution

1. Entities covered by this Annex shall document their non-judicial complaint process and provide this information to suppliers or Provinces upon request.
2. Entities covered by this Annex shall provide suppliers from other Provinces the opportunity and process to challenge contract decisions that are equal to those available to local suppliers.
3. If a supplier, after completing the non-judicial complaint process of the entity, continues to believe that the entity has not adhered to the provisions of this Annex, the supplier may register a complaint with the designated contact point in the Province where the supplier is located.
4. If a Province has received recurring complaints about a specific entity, or if a Province agrees that an individual supplier's complaint has merit, that Province may inform the Province of the entity. Both Provinces shall make every effort to work with the affected suppliers and entities to resolve the complaints in a satisfactory manner.
5. Where the Provinces fail to resolve a complaint, one of them may require that the complaint be considered by an expert panel. A panel shall usually consist of three members or any other composition acceptable to both Provinces. The panel's report shall be made public and shall be provided to both Provinces. The Provinces shall consult each other in order to reach a mutually acceptable settlement based on the panel's report.
6. Each Province shall be responsible for costs incurred by itself and any entity within its jurisdiction involved in a dispute referred to a panel. Both Provinces shall share the fees and expenses of any panel equally.
7. The dispute resolution process shall not cause delay in the awarding of a contract by an entity covered by this Annex.

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8. If a Province considers, as a result of a panel's report and subsequent consultations, the other Province is not complying with the terms of this Annex, the Province may temporarily suspend the application of equivalent benefits under this Annex to the non-complying Province and its resident suppliers, until such time as a mutually satisfactory solution is reached.

N. Language

Entities covered by this Annex shall specify the language requirements for their respective procurement procedures.

O. Confidentiality

Nothing in this Annex requires an entity covered by this Annex to breach confidentiality obligations imposed by law or to compromise security or commercially sensitive or proprietary information identified by a supplier in its tender documents.

P. Review of Provisions and Future Negotiations

1. The Secretariat shall prepare a progress report on the development of the electronic tendering system or systems referred to in Section "G" (Fair Acquisition Process) by the entry into force of this Annex. The progress report shall assess the provisions of this Annex in light of progress in the implementation of the electronic tendering system or systems and make appropriate recommendations, if necessary, to the Committee on Internal Trade.

2. Entities covered by this Annex may report to their respective Province any concerns or problems they encounter in the implementation of this Annex.

3. The Secretariat shall prepare a report for the Committee on Internal Trade based on any concerns or problems with the implementation of this Annex reported by the Provinces.

4. This Annex may be reviewed, as required, by the Ministers as part of the annual meetings of the Committee on Internal Trade. Opportunities for progress related to public procurement not covered by this Annex, or excluded from this Annex by virtue of paragraph L (h), shall be part of that review.

5. Each Province shall establish a process and guidelines leading to the harmonization of standard terms and conditions in the tender documents and to standardized procedures for complaint processes used by their entities covered by this Annex. The Provinces shall establish a Working Group to review the work of the Provinces with the perspective of harmonization. The Working Group shall report regularly through the Secretariat and shall report progress to the Committee on Internal Trade by July 1, 2000.

6. The Provinces shall review the application of Section "J" (Canadian Content) and of Section "K" (Regional Economic Development) and shall conclude such a review within two years of the entry into force of this Annex. If, as a result of that review, the Provinces agree that there is no justification for those Sections or for one of them, then the Section or Sections shall no longer apply to the procurement of entities covered by this Annex.

7. The Provinces shall review the operation of Section "M" (Dispute Resolution) following the review of standardized procedures for complaint processes noted in paragraph 5 and shall

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conclude the review within one year. In particular, the Provinces shall review whether Section “M” (Dispute Resolution) provides adequate access for private parties to the dispute resolution process.

Q. Relationship to Other Agreements

1. Provinces may continue or enter into additional agreements covering procurement by entities covered by this Annex. In the event of an inconsistency between such an agreement and this Annex, the agreement more conducive to trade liberalization prevails to the extent of the inconsistency.
2. Other Provinces will be provided the opportunity to gain access to any such agreement referred to in paragraph 1 within a reasonable time if they are prepared to accept the terms of the agreement.

R. Implementation

1. This Annex enters into force July 1, 1999.
2. This Annex does not apply to contracts entered into before July 1, 1999 or to calls for tenders or other procurement procedures initiated before such date.
3. Each Province shall not establish new trade barriers or increase the non-conformity of existing non-conforming measures in the areas to be covered by this Annex between the date it adheres to this Annex and the entry into force of this Annex.
4. Each Province is responsible for compliance with this Annex by its entities covered by this Annex.

S. Definitions

1. The definitions in Article 200 (Definitions of General Application) and in Article 518 (Definitions) of the Agreement on Internal Trade apply to this Annex insofar as any of the terms in those Articles are used in this Annex, except for the definition of “legitimate objective” in paragraph F2.

APPENDIX “A”

Legislation Applicable to Entities Covered by Annex 502.4

Note: A current list can be found by returning to the “MASH sector” menu and clicking on “Legislation applicable to covered entities”.

APPENDIX “B”

Discriminatory Practices

For the purposes of D3, discriminatory procurement practices which are not allowed under this Annex include, but are not limited to:

- (a) registration requirements and restrictions on calls for bids based upon the location of a supplier and its subcontractors, or the place where the goods or services are produced and, generally, qualification procedures that discriminate between suppliers by province of origin;
- (b) the biasing of specifications in favour of, or against, a particular good or service for the purpose of circumventing this Annex;
- (c) the timing of bid opening and closing dates so as to prevent qualified suppliers from submitting bids;
- (d) the specification of quantities and delivery schedules of a scale and frequency that may reasonably be judged as deliberately designed to prevent qualified suppliers from meeting the requirements of the procurement;
- (e) the division of required quantities or the diversion of budgetary funds to subsidiary agencies in a manner designed to circumvent this Annex;
- (f) the consideration, in evaluating bids, of provincial content or economic benefits that favour a supplier or good of one of the participating Provinces;
- (g) the giving of preference to selected bids after bids have been submitted and without any mention of the intended preference in the tender documents;
- (h) the use of price discounts or preferential margins to favour suppliers of one Province;
- (I) the unjustifiable exclusion of a qualified supplier from bidding;
- (j) the requirement that a construction contractor or subcontractor use workers, materials or suppliers of materials originating from the Province where the work is being carried out.

APPENDIX “C”

Exceptions - Circumstances for Exclusions

The following are the exceptions for the purposes of paragraph I(1):

- (a) where an unforeseeable situation of urgency exists and the goods, services or construction cannot be obtained in time by means of open procurement procedures;
- (b) where goods or consulting services regarding matters of a confidential or privileged nature are to be purchased and the disclosure of those matters through an open tendering process could reasonably be expected to compromise government confidentiality, cause economic disruption or otherwise be contrary to the public interest;
- (c) where a contract is to be awarded under a cooperation agreement that is financed, in whole or in part, by an international cooperation organization, only to the extent that the agreement between the entity and the organization includes rules for awarding contracts that differ from the obligations set out in this Annex;
- (d) where construction materials are to be purchased and it can be demonstrated that transportation costs or technical considerations impose geographic limits on the available supply base, specifically in the case of sand, stone, gravel, asphalt, compound and pre-mixed concrete for use in the construction or repair of roads;
- (e) where compliance with the open tendering provisions set out in this Annex would interfere with the entities' ability to maintain security or order or to protect human, animal or plant life or health; and
- (f) in the absence of a receipt of any bids in response to a call for tenders made in accordance with this Annex.

APPENDIX “D”

Exceptions - Circumstances for Sole Supplier Procurement

The following are the exceptions for the purposes of paragraph I(2):

- (a) to ensure compatibility with existing products, to recognize exclusive rights, such as exclusive licences, copyright and patent rights, or to maintain specialized products that must be maintained by the manufacturer or its representative;
- (b) where there is an absence of competition for technical reasons and the goods or services can be supplied only by a particular supplier and no alternative or substitute exists;
- (c) for the procurement of goods or services the supply of which is controlled by a supplier that is a statutory monopoly;
- (d) for the purchase of goods on a commodity market;
- (e) for work to be performed on or about a leased building or portions thereof that may be performed only by the lessor;
- (f) for work to be performed on property by a contractor according to provisions of a warranty or guarantee held in respect of the property or the original work;
- (g) for a contract to be awarded to the winner of a design contest;
- (h) for the procurement of a prototype of a first good or service to be developed in the course of and for a particular contract for research, experiment, study or original development, but not for any subsequent purchases;
- (i) for the purchase of goods under exceptionally advantageous circumstances such as bankruptcy or receivership, but not for routine purchases;
- (j) for the procurement of original works of art;
- (k) for the procurement of subscriptions to newspapers, magazines or other periodicals;
and
- (l) for the procurement of real property.