

INTERPRETIVE NOTE ON THE TREATMENT OF PUBLIC PRIVATE PARTNERSHIPS UNDER CHAPTER FIVE OF THE AGREEMENT ON INTERNAL TRADE

Objective

1. The objective of this Interpretive Note is to provide guidance to the Parties and to their entities covered by Annexes 502.1A, 502.3 or 502.4 concerning the application of the procurement provisions of the Agreement on Internal Trade (AIT) to the establishment of a public-private partnership (P3) arrangement and to its subsequent operation.

Background

2. A P3 arrangement represents a cooperative venture between the public and private sectors based on a long-term relationship and a sharing of resources, risks and rewards. With rare exception, P3s in the Canadian context are established on the basis of a long-term contract and do not involve the public and private partners jointly forming a new P3 entity. The type of P3 arrangement (e.g. design/build/operate) will vary depending on the purpose for which the arrangement is entered into and the allocation of risk between the public and the private partners.

Establishment of a P3 Arrangement

3. Article 518 defines “procurement” as “the acquisition by any means, including by purchase, rental, lease or conditional sale, of goods, services or construction, but does not include:

- (a) any form of government assistance such as grants, loans, equity infusion, guarantees or fiscal incentives; or
- (b) government provision of goods and services to persons or other government organizations;”.

The term “by any means” acts to ensure that the scope of acquisition activities that would fall within the definition of procurement is very broad. The word “including” further indicates that the subsequent enumeration of procurement activities is descriptive, rather than definitive. On this basis, the selection of a P3 private partner should, in most cases, fall within the definition of procurement. However, in view of the variability of possible P3 arrangements, each should be assessed individually by the Party concerned to determine whether, in fact, the definition applies.

4. The AIT procurement provisions (“procurement rules”) apply only to procurement undertaken by entities covered by Annexes 502.1A, 502.3 or 502.4 where the procurement

value meets or exceeds specified threshold levels. Certain types of procurements are expressly excluded from these provisions. Therefore, with respect to the establishment of a P3 arrangement, the AIT procurement rules do NOT apply where:

- (a) the public entity seeking to enter into the arrangement is not covered by Annex 502.1A, 502.3 or 502.4;
- (b) the procurement value as defined in Article 518 is less than the threshold levels applicable to the public entity; or
- (c) the procurement is excluded under the AIT provisions governing the public entity.

5. In summary, the process of selecting a P3 private partner should, in most cases, constitute a procurement. In such case and where none of the circumstances outlined in paragraph 4 are present, the AIT procurement rules to which the public entity is subject apply to the process of establishing the P3 arrangement.

Operation of a P3 Arrangement

6. The vast majority of P3 arrangements in Canada are based on a long-term contract between the public and private partners (hereafter referred to as “contractual P3”). The public partner of a contractual P3 arrangement continues to be subject to all applicable AIT procurement rules with respect to its own procurement within the P3 arrangement.

7. The provisions of Chapter Five and its annexes do not apply to private entities nor do they require public entities in the course of their normal procurement to obligate a contractor, as a condition of receiving a contract, to follow the AIT procurement rules to which that public entity is subject. Therefore, there is no reason to place this requirement on the private partner of a P3 arrangement.

8. Although not common in Canada, there may be instances where the public and private partners jointly form a new P3 entity. The applicability of the relevant AIT procurement rules to the ongoing operations of this new P3 entity should be assessed individually by the Party concerned according to the particular merits of the case.

In such an assessment, Parties are reminded that Annex 502.4, paragraph C (1) indicates that where a public entity covered by Annex 502.4 owns or controls a body, the ongoing operations of that body are subject to the provisions of that Annex.

9. In summary, the provisions of the AIT do not extend to the ongoing operations of the private partner of a contractual P3. Where a jointly owned entity is created, the applicability of AIT provisions to this entity should be assessed on an individual basis by the Party concerned.

Conclusions

10. The provisions of Chapter Five (Procurement) or of Annex 502.3 or Annex 502.4, as applicable, apply to the selection of a P3 private partner on a contractual basis where:

- (a) the proposed P3 arrangement is determined to be a “procurement” according to Article 518;
- (b) it is being entered into by a public entity that is covered under Annex 502.1A, 502.3 or 502.4;
- (c) the procurement value attached to the acquisition meets or exceeds applicable threshold levels; and
- (d) the procurement is one that is not excluded from the provisions of the AIT.

The AIT procurement rules do not apply to the private partner of a contractual P3.

Other forms of P3 as may exist in Canada, because of their rarity, should be assessed on a case by case basis by the Party concerned.