

The Year in Review

Volume 53 *International Legal Developments*
Year in Review: 2018

Article 14

January 2019

International Procurement

Eric P. Roberson

Paul M. Lalonde

Larysa Workewych

Recommended Citation

Eric P. Roberson et al., *International Procurement*, 53 ABA/SIL YIR 201 (2019)

This Corporate is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in The Year in Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

International Procurement

ERIC P. ROBERSON, PAUL M. LALONDE, AND LARYSA WORKEWYCH*

This article reviews international law developments in the field of international procurement in 2018.

I. A Comparative Analysis of Recent Developments in EU/UK Procurement: Cost/Price Realism, E-Invoicing, and Supply Chain Development

Government contractors doing business in the European Union and the United Kingdom should take note of recent developments related to unrealistically low prices, new electronic invoicing requirements (e-invoicing), and Brexit. Notably, these developments reflect similar changes occurring in the United States, which signals a convergence in procurement policies and approaches on an international scale.

A. COST/PRICE REALISM

In *SRCL, Ltd. v. National Health Service Commissioning Board*, the High Court of Justice for England and Wales addressed the question of whether contracting authorities have an affirmative obligation to investigate “abnormally low tenders” (ALTs).¹ Companies doing business in the United States will find this concept similar to cost and price realism, which is addressed in Part 15 of the Federal Acquisition Regulation (FAR).² The Court, in *SRCL*, discussed ALTs in EU procurements, determining that, in

* The first section, “A Comparative Analysis of Recent Developments in EU/UK Procurement: Cost/Price Realism, E-Invoicing, and Supply Chain Development,” was drafted by Eric P. Roberson, an associate in the Washington, DC, office of DLA Piper LLP (US) where his practice covers a wide range of government contracting matters. The second section, “Government Procurement in North America and the Impact of the United States-Mexico-Canada Agreement,” was drafted by Paul Lalonde and Larysa Workewych. Mr. Lalonde is a partner in Dentons Canada LLP’s Toronto office, where he focuses on government contracting law, international trade, anti-corruption and international arbitration. Ms. Workewych is a Student-at-Law at Dentons Canada LLP, in Toronto. Samuel W. Jack, an Attorney Advisor for the U.S. Agency for International Development (USAID), served as the editor of the International Procurement Committee’s Year in Review for 2018. The views of the authors and editor are not attributable to their law firms or government agency. The article covers developments during 2018. For more information about the International Procurement Committee visit: <http://apps.americanbar.org/dch/committee.cfm?com=IC760000>.

1. *SRCL, Ltd. v. The Nat’l Health Serv. Commissioning Bd.* [2018] EWHC (QB) 1985 [16] (UK).

2. See Federal Acquisition Regulations System, 48 C.F.R. §§ 15.001–15.609 (2019).

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

202 THE YEAR IN REVIEW

[VOL. 53]

order for contract awards to be based on the “most economically advantageous bid,” contracting authorities should consider whether a submitted price is so low that there is a risk of non-performance, or a risk that the contractor is incapable of complying with certain national environmental, social, or labor laws (e.g., payment of minimum wages).³

Importantly, the Court recognized that contracting authorities generally have the discretion to reject an ALT but are only required to reject such bids when the abnormally low price occurred due to non-compliance with certain mandatory laws.⁴ The Court also noted that the bidders must be given the opportunity to explain why a bid price might appear to be abnormally low, recognizing that there could be legitimate business reasons to submit a low price, such as to allow the bidder to enter a new market, or develop an emerging line of business.⁵

Similarly, in United States-based procurements, FAR Part 15 describes the methodologies contracting officials may use when performing a price or cost realism analysis. It allows proposals to be rejected for unsupported costs or prices deemed too low.⁶ Additionally, the FAR describes the practice of “buying-in,” where a bidder may submit an abnormally low offer, even at a loss, to increase the likelihood of obtaining a contract with the lowest price.⁷ While “buying-in” is not inherently improper, and there may be legitimate business reasons for submitting a low offer, the FAR instructs contracting officials to guard against improper buying-in practices, such as when the bidder unnecessarily increases the contract price after award, or where the bidder intends to receive a follow-on contract at artificially high prices to recover losses incurred on the buy-in contract.⁸ While buying-in is distinct from cost/price realism, the two concepts may overlap in cases where a bidder submits an artificially low proposal as a buy-in attempt, and the proposal is then rejected following a realism analysis.

In sum, the *SRCL* case offers a valuable reminder for companies doing business with governmental entities in the EU and the United States: that bidders should take proactive steps to justify their proposed pricing when bidders are explicitly warned that unjustified pricing may indicate a lack of understanding or demonstrate a risk of non-performance. Bidders who fail to heed such warnings risk their proposals being rejected.

B. E-INVOICING

In another recent development, Scotland has required the central government and other public sector bodies to implement electronic

3. *SRCL, Ltd. v. The Nat'l Health Serv. Commissioning Bd.* [2018] EWHC (QB) 1985 [183] (UK).

4. *Id.*

5. *Id.* at [163].

6. *See* 48 C.F.R. § 15.404-1.

7. 48 C.F.R. § 3.501-1.

8. *See id.*

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019]

PROCUREMENT 203

invoicing, recognizing the efficiencies that e-invoicing can provide.⁹ In a related move, England and Northern Ireland modified the applicable rules on public contract invoicing by (1) allowing companies to submit “unstructured” e-invoices, and (2) instructing contracting authorities to amend contracts that previously prohibited e-invoicing.¹⁰ These e-invoicing practices align with current practices in the United States, notably those outlined in the United States Office of Management and Budget Memo No. M-15-19 (July 17, 2015), which directed United States federal government agencies to transition to electronic invoicing for appropriate federal procurements by the end of the 2018 fiscal year.¹¹ The United States Department of Defense has implemented similar e-invoicing requirements through the Defense Finance and Accounting Service.¹² Indeed, contracting officials in both systems may benefit from exchanges and engagement with each other to identify best practices and lessons learned and in turn improve implementation and maximize efficiency of such payment systems.

C. SUPPLY CHAIN

Separately, the Public Accounts Commission of the U.K. Parliament recently released a report on strategic suppliers, which examines ways to incorporate small and medium sized enterprises (SMEs) into supply chains.¹³ The U.K. Government also issued proposed guidance to encourage new entrants in the public procurement marketplace, and proposed amendments to existing laws, which encourage charitable enterprises to bid on public contracts.¹⁴ These efforts are focused on reinvigorating the supply base to serve two fundamental goals: (1) driving innovation to improve services; and, (2) realizing taxpayer savings through competition.

Likewise, contracting officials in the United States have undertaken initiatives to improve the public contracting system and increase the defense supply base. For example, the United States Congress spurred the creation of the Section 809 Panel to improve the defense acquisition process, by identifying ways to reduce barriers to entry into the government

9. *Introduction of Electronic Invoicing in Public Procurement*, SCOTTISH GOV'T (Nov. 16, 2018), <https://consult.gov.scot/ecommerce/public-procurement/>.

10. *Procurement Policy Note- Acceptance of unstructured electronic invoices by central government authorities*, CROWN COM. SERV. (June 22, 2015), <https://www.gov.uk/government/publications/procurement-policy-note-1115-unstructured-electronic-invoices>.

11. Memorandum from the Office of Management and Budget on Improving Government Efficiency and Saving Taxpayer Dollars Through Electronic Invoicing, Memo No. M-15-19 (July 17, 2015).

12. See *Contractor and Vendor Payment Information Booklet*, DEF. FIN. AND ACCT. SERV. (April 4, 2018), <https://www.dfas.mil/dam/jcr:ba0ad550-be42-4c7f-9ee6-438b8dd5e4a6/ContractPayInformation-011110.pdf>.

13. COMMITTEE OF PUBLIC ACCOUNTS, STRATEGIC SUPPLIERS, 2017-19, HC 1031, ¶ 45-6 (UK).

14. U.K. Cabinet Office Press Release, Government announces major changes to rebuild trust after Carillion (June 25, 2018).

procurement marketplace.¹⁵ Specifically, the Section 809 Panel is charged with many of the same types of responsibilities to improve government procurement as is the U.K. Public Accounts Committee.¹⁶ Procurement officials from both systems may benefit from closer collaboration, sharing of best practices, and monitoring of each other's successes and failures to better reform and improve each country's procurement system.

II. Government Procurement in North America and the Impact of the United States-Mexico-Canada Agreement

On November 30, 2018, the former North American Free Trade Agreement (NAFTA) parties – Canada, Mexico, and the United States – signed the text of a new trilateral agreement to replace NAFTA.¹⁷ The agreement is touted as a “modernized trade agreement for the Twenty-First Century.”¹⁸ Its name varies depending on which country is referring to it—the agreement is called the United States-Mexico-Canada Agreement (USMCA) in the United States, and the Canada-United States-Mexico Agreement (CUSMA) in Canada.

One of the points of discord during the negotiations was the text of NAFTA's chapter ten, on government procurement.¹⁹ This chapter regulated suppliers' access to domestic markets, with the aim of ensuring open, transparent and non-discriminatory treatment of suppliers and increasing competition in the market.²⁰ During those negotiations, Canada sought to create a freer market for government procurement by excluding

15. National Defense Authorization Act of 2016, Pub. L. No. 114-92, § 809, 129 Stat. 726, 889 (2015) [hereinafter “NDAA 2016”]; *see also* Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations, Vol. I-III, Section 809 Panel (Jan. 2019), <https://section809panel.org/>.

16. *Compare* COMMITTEE OF PUBLIC ACCOUNTS, *supra* note 14, ¶ 3 (“The PAC's role is to examine the efficiency, effectiveness and economy of Government spending.”), *with* NDAA 2016, 129 Stat. at 889 (“The panel shall . . . review the acquisition regulations applicable to the Department of Defense with a view toward streamlining and improving the efficiency and effectiveness of the defense acquisition process and maintaining defense technology advantage.”).

17. *See* United States-Mexico-Canada Agreement, Nov. 30, 2018, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [hereinafter “USMCA”].

18. Global Affairs Canada, *Joint Statement from United States Trade Representative Robert Lighthizer and Canadian Foreign Affairs Minister Chrystia Freeland*, GOV'T OF CAN. (Sept. 30, 2018), <https://www.canada.ca/en/global-affairs/news/2018/09/joint-statement-from-united-states-trade-representative-robert-lighthizer-and-canadian-foreign-affairs-minister-chrystia-freeland.html>.

19. *See* Mike Blanchfield, *U.S. procurement demand on Canada, Mexico fading from NAFTA: sources*, THE GLOBE AND MAIL (Sept. 19, 2018), <https://www.theglobeandmail.com/politics/article-us-backs-down-from-buy-american-demand-in-nafta-renegotiations/> (The contentious nature of the procurement demands can be observed through media coverage of the ongoing NAFTA negotiations).

20. *See* *Government Procurement*, GLOBAL AFF. CAN. (Feb. 20, 2018), <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/gp-mp/index.aspx?lang=eng>.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019]

PROCUREMENT 205

local-content provisions and expanding coverage to sub-central entities, as was similarly achieved in the Canada-EU Comprehensive Economic and Trade Agreement (CETA) negotiations.²¹ The United States, by contrast, sought to strengthen domestic policies designed to encourage local purchasing, such as “Buy America,” and to exclude sub-central government entities from coverage.²² The final version of the new chapter ultimately mirrors the government procurement chapter of the now-inoperative Trans-Pacific Partnership (TPP) agreement, from which the United States withdrew shortly after the election of President Trump.²³

Most notably, the USMCA procurement chapter excludes Canada as a party. As a result, the chapter applies only between Mexico and the United States.²⁴ Consequently, while Mexico-United States procurement will be governed by the USMCA, procurement between Canada and the other two former NAFTA parties will be regulated by the revised World Trade Organization Agreement on Government Procurement (WTO GPA).²⁵ Canada-Mexico procurement, on the other hand, will be governed by the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), when it comes into force.²⁶

The USMCA government procurement chapter offers the former NAFTA parties a much-needed revival of the twenty-five-year-old chapter that preceded it and provides greater harmony with government procurement chapters in other free trade agreements, such as the WTO GPA and the CPTPP.

A. GOVERNMENT PROCUREMENT UNDER THE USMCA: MEXICO-UNITED STATES PROCUREMENT

When the text of the USMCA government procurement chapter is adopted, Mexico-United States procurement will include specific requirements designed to ensure fairness, provide greater transparency, and create predictable procurement procedures.

The USMCA procurement chapter establishes a default open tendering procedure, which must be used unless specified circumstances allowing

21. Chrystia Freeland, Foreign Affairs Minister, Address on the modernization of the North American Free Trade Agreement (NAFTA) (Aug. 14, 2017).

22. *Summary of Objectives for the NAFTA Renegotiation*, OFF. OF THE U.S. TRADE REPRESENTATIVE (Nov. 2017), <https://ustr.gov/sites/default/files/files/Press/Releases/Nov%20Objectives%20Update.pdf>.

23. *Consolidated TPP Text -Chapter 15- Government Procurement*, GOV'T OF CAN. (Nov. 29, 2016), <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ppp-ptp/text-texte/15.aspx?lang=eng>.

24. USMCA, *supra* note 18, art. 13.2.3.

25. See WORLD TRADE ORG., REVISED AGREEMENT ON GOVERNMENT PROCUREMENT (Mar. 30, 2012), https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm.

26. The CPTPP is a revival of the TPP and includes all of the original TPP parties save for the United States.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

206 THE YEAR IN REVIEW

[VOL. 53

limited or qualified tendering procedures apply.²⁷ All parties must promptly publish procurement information,²⁸ as well as publish a notice of intended procurement that (1) contains the procuring entity's contact information, (2) identifies the nature and quantity of the goods or services being procured, (3) includes the time-frame for delivery and for tendering, and (4) indicates that the procurement is covered by the USMCA procurement chapter.²⁹ Procuring entities must also guarantee that tenders will be received, opened, and treated "under procedures that guarantee fairness and impartiality of the procurement process and the confidentiality of tenders."³⁰ To increase transparency in contract award decision-making, unsuccessful bidders can request an explanation of the reasons why their bid was not selected and the relative advantages of the successful bidder's tender.³¹ The procuring entity must provide this information upon request.³²

The USMCA government procurement chapter further requires parties to create measures and review mechanisms that promote integrity in procurement practices. Parties must ensure that "criminal, civil, or administrative measures exist that can address corruption, fraud, and other wrongful acts in its government procurement," and must put into place policies to address potential conflicts of interest.³³ Parties are further required to maintain, establish or designate an independent reviewing authority that can assess challenges and complaints in a "non-discriminatory, timely, transparent and effective" manner.³⁴

In line with the United States' objectives during the NAFTA negotiations, the USMCA does not cover sub-central government entities. Its coverage is, therefore, not as expansive as government procurement chapters in other free trade agreements. That being the case, and notwithstanding the impact of Canada's exclusion from the chapter, the USMCA chapter gives Mexico and the United States a modernized procurement chapter designed to ensure greater transparency and predictability.

B. CANADA-MEXICO PROCUREMENT POST-USMCA

Once the USMCA comes into effect, Canada-Mexico procurement will be governed by a separate free trade agreement to which both countries are parties. The CPTPP—which both Canada and Mexico have ratified, and which entered into force on December 30, 2018—affords favorable treatment under the agreement's government procurement chapter.

27. USMCA, *supra* note 18, art. 13.4.4.

28. *Id.* art. 13.5.1.

29. *Id.* art. 13.6.3.

30. *Id.* art. 13.14.1.

31. *Id.* art. 13.15.2.

32. *Id.*

33. USMCA, *supra* note 18, art. 13.17.1, 13.17.3.

34. *Id.* art. 13.18.1.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019]

PROCUREMENT 207

The CPTPP is similar to the USMCA in many respects, in large part because the USMCA's inspiration was the CPTPP's predecessor, the TPP. There are minor additions in the USMCA chapter aimed at increasing transparency and accountability, such as provisions relating to collection and reporting of statistics, and a more-detailed article on integrity in procurement practices.³⁵ For the most part, however, Canada-Mexico regulation under the CPTPP will be very similar to what the parties would have experienced under the USMCA.

Under article two of the CPTPP, certain provisions will not be in force immediately.³⁶ The Annex to the CPTPP lists two articles from the procurement chapter that are excluded from immediate effect: article 15.8.5, which clarifies the ability of procuring entities to promote compliance with the labor laws of the producing country, and article 15.24.2, which relates to holding further negotiations for expanding coverage, and sub-central coverage, within three years after the date the CPTPP comes into force.³⁷ Suspending these articles from the CPTPP procurement chapter does not fundamentally impact the obligations of procuring entities under the CPTPP.

The CPTPP does include sub-central government coverage. Pursuant to Annex 15-A – Schedule of Canada,³⁸ sub-central government entities in all of Canada's provinces and territories undertook procurement commitments. Consequently, Canada-Mexico procurement under the CPTPP offers greater coverage than what both parties would have had under the USMCA, and Canada has gained from Mexico the expanded coverage it sought in the NAFTA negotiations.

C. CANADA-UNITED STATES PROCUREMENT POST-USMCA

The United States is not a party to the CPTPP. Once the USMCA takes effect, Canada-United States procurements will be governed by the WTO GPA. The WTO GPA is itself a modernized text, as it was updated in 2014 to clarify and expand on the original 1994 GPA.³⁹

Although the text of the WTO GPA and the text of the USMCA contain a number of similarities, the USMCA is more comprehensive than the WTO GPA. This is due to the former's reliance on the "ambitious,

35. USMCA, *supra* note 1, art. 13.15.5, 13.17.

36. See Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art. 2, Feb. 21, 2018, <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-tpf/text-texte/toc-tdm.aspx?lang=eng>.

37. *Id.* at annex.

38. See *Consolidated TPP Text -Chapter 15A- Government Procurement*, GOV'T OF CAN. (Dec. 05, 2016), <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-tpf/text-texte/15-a3.aspx?lang=eng>.

39. See WORLD TRADE ORG., AGREEMENT ON GOVERNMENT PROCUREMENT, (2019), https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm; see also WORLD TRADE ORG., REVISED AGREEMENT ON GOVERNMENT PROCUREMENT, (2019), https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

208 THE YEAR IN REVIEW

[VOL. 53

comprehensive and high-standard” text of the TPP agreement (which itself was an update of the WTO GPA).⁴⁰ While the WTO GPA offers Canada and the United States an improved chapter when compared to the text of NAFTA chapter ten, the USMCA would have offered both countries greater certainty and transparency due to the USMCA’s more detailed provisions.

In line with Canada’s interests, and unlike the USMCA, the WTO GPA secures procurement opportunities with sub-central government entities. Both Canada and the United States have identified sub-central government entities subject to the agreement in their respective WTO GPA Annexes: Canada identifies government entities in all province and territories of Canada with the exception of Nunavut, while the United States identifies government entities in thirty-seven of the country’s fifty states.⁴¹ Under the WTO GPA, procuring entities in Canada and the United States will have broader coverage than previously existed under NAFTA chapter ten. This expanded coverage offers Canada a form of the sub-central government coverage it attempted to achieve in the USMCA procurement chapter.

D. CONCLUSION

Canada’s exclusion from the USMCA procurement chapter means that government procurement in the three former-NAFTA parties will no longer be regulated under one agreement. While Mexico-United States procurement will be regulated under the USMCA, regulation of Canada-Mexico and Canada-United States procurement will need to rely on alternative free trade agreements, respectively the CPTPP and the WTO GPA. The similarities between the USMCA, CPTPP and WTO GPA may have a general harmonizing effect, and bring the USMCA in line with free trade agreements around the world. The disunity of coverage for the three former NAFTA parties, however, undermines one of the primary benefits of having a trilateral free trade agreement. Although the USMCA government procurement chapter offers a much-needed update to the twenty-five-year-old text of NAFTA chapter ten, its implementation will nevertheless create a disjointed procurement landscape in North America.

40. See *Joint Statement by TPP Ministers*, OFF. OF THE U.S. TRADE REPRESENTATIVE (July 31, 2015), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/july/joint-statement-tpp-ministers>.

41. See *Agreement on Government Procurement Coverage Schedules*, WORLD TRADE ORG. (2019), https://www.wto.org/english/tratop_c/gproc_c/gp_app_agree_e.htm#revisedGPA.