

Combatting COVID-19 through Expedited Supply Contracts with Canada

The Canadian Government has issued a public call to all suppliers who can provide emergency goods or services needed to respond to COVID-19. A dedicated web page can be reviewed here: <https://buyandsell.gc.ca/calling-all-suppliers-help-canada-combat-covid-19> (Notice: This URL address is intermittently yielding an error message).

Given the importance of responding quickly to COVID-19, the Government's central purchaser, Public Services and Procurement Canada ("PSPC"), is issuing non-competitive contracts for a wide range of emergency goods and services.

The PSPC contracting process, even when undertaken on an urgent basis, is very complex. It is important for potential suppliers to fully understand their rights and obligations.

Suppliers contracting with PSPC should expect that those contracts include reference to the Standard Acquisition Clauses and Conditions ("SACC") Manual. The SACC Manual is a catalogue of terms and conditions that are regularly included in contracts by reference. It is highly recommended that suppliers review all SACC clauses referenced in the contract before contract execution.

It is expected that the Canadian Government will exercise a high degree of contracting flexibility to obtain emergency services and goods in a timely manner. That said, suppliers should be prepared to address a number of common terms and conditions, including but not limited to:

- Warranty provisions that may be longer than what is normally offered in the private marketplace;
- A requirement that all written material be provided in both English and French;
- A requirement that the bidder obtain industrial security clearance or controlled goods registration (particularly for contracts with the Department of National Defence);
- Unlimited liability owed by the supplier to the government of Canada;
- Third-party indemnity owed by the supplier to the government of Canada;
- Assignment of intellectual property rights to the government, or the granting of a perpetual license;
- Termination for convenience, at any time, by the Government of Canada;
- An obligation on the supplier to maintain records for six years after final payment under the contract, and to provide access for the government to conduct an audit and inspection; and

- Inclusion of a “most favoured nation” clause where the supplier guarantees the government the pricing offered to the supplier’s best client for similar quantity and quality of goods/services. This will normally be linked to audit rights.

Moreover, if the contract is subject to the *Defence Production Act*, then the government retains the ability to conduct cost audits and to determine, after the fact, whether the supplier received payment in excess of a “fair and reasonable profit”. Because what is “fair and reasonable” is not defined in the Act, it is highly discretionary. This applies to all forms of contracts, including fixed price contracts.

Depending upon the nature of the goods or services being provided, suppliers may also consider requesting that Canada agree to indemnify the supplier against third-party claims. As well, if the supplier is a manufacturer that has the ability to reconfigure operations and manufacture medical supplies, there may also be a need to obtain a waiver of the application of legislative requirements, including the need to obtain various permits or regulatory approvals.

Over the past few weeks, our team at Tereposky & DeRose has expeditiously advised government suppliers on the administration of government contracts in the COVID-19 environment. Given the urgency of Canada obtaining urgently needed goods and supplies, making sure that contracts are put in place as quickly as possible while protecting suppliers is a top priority.

Should you have any questions regarding these matters or any other government contracting issues, we are at your disposal. Although our procurement team is working remotely, we will respond immediately to all queries regarding COVID-19 related contracts.

Vince DeRose

613.237.8862

vderose@tradeisds.com

Jennifer Radford

613.237.9777

jradford@tradeisds.com

Stephanie Desjardins

613.237.8680

sdesjardins@tradeisds.com