



firm profile

McMillan is a modern and ambitious business law firm serving public, private and not-for-profit clients across key industries in Canada, the United States and internationally. With recognized expertise and acknowledged leadership in major business sectors, we provide solutions-oriented legal advice through our offices in Vancouver, Calgary, Toronto, Ottawa, Montréal and Hong Kong. Our firm values – respect, teamwork, commitment, client service and professional excellence – are at the heart of McMillan's commitment to serve our clients, our local communities and the legal profession. For more information, please visit our website at www.mcmillan.ca.

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government procurement

overview

Governments in Canada buy almost \$200 billion per year of goods and services from businesses in Canada and abroad. Companies interested in maximizing their access to this lucrative market need to deal with a challenging array of policies, international obligations and domestic laws relating to public procurement. Additional free trade agreements that are nearing implementation (like the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the 12 country Trans-Pacific Partnership (TPP)) will make the government procurement market even more competitive and complex. That's where our team can help.

We speak the language not just of tenders and requests for proposals (RFP), but also: requests for standing offers (RFSO) or supply arrangements (RFSA), requests for information (RFI) or quotations (RFQ), task authorizations (TAs) as well as the whole range of procurement vehicles and how these all work in practice.

Whether you are considering participating in a government bidding process or working on preparing that (hopefully) winning bid, you may have questions about your rights and obligations and how best to deliver a compliant and compelling bid submission. These rights and obligations can seriously affect your bid. Our team has significant experience in helping prepare high quality bids, advising on bidder eligibility and avoiding spending time on bids that are unlikely to be successful.

Your rights and obligations are very important when a procurement decision is made. If the decision is unfavourable, you may have the right to obtain a detailed explanation, and to challenge the decision. There is often an obligation on a dissatisfied supplier to act quickly (such as within 10 business days).

How to challenge a procurement decision varies widely depending on the public entity involved with the procurement. It might require a complaint to a dedicated procurement dispute body (like the Canadian International Trade Tribunal or a particular municipal committee) or a claim in the courts. Our team has considerable experience defending and prosecuting complaints before tribunals and the courts and can quickly identify the appropriate mechanism and work to raise your concerns in a timely manner.

We also have a diversified team of experts that includes former senior members of government who can assist with public policy advice and strategy.

In challenging an unfair decision to award a contract, or defending the award of a hard-won contracts, we have dealt with



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government procurement disputes relating to a variety of goods and services across many industries from military vehicles parts, to information technology, to financial consulting services, to public transit.

Government procurement obligations continue after the contract award. For example, governments sometimes improperly use an existing contract, which can mean other potential suppliers are unfairly excluded. Freedom of information, access to information, and privacy are often live issues during the course of the contract and afterwards. We help clients deal with these issues, which can sometimes turn into very significant concerns.

McMillan professionals help clients lead by:

- Obtaining contracts when their bids were unsuccessful because of an improper evaluation;
- Protecting contracts awarded to clients through competitive government procurement processes;
- Providing counsel for government entities on procurement processes and policies, dispute resolution and the formation of strategic alliances (including divestment/outourcing of business functions); and
- Advising companies on bid preparation and submission, compliance with solicitation documents, debriefing meetings, and ensuring government compliance throughout contract delivery.

representative transactions

Our team has significant experience in federal, provincial and municipal procurement matters. This experience includes procurement disputes, such as bringing and defending procurement complaints against the Federal Government at the CITT and Federal Court of Appeal and public procurement litigation (both for and against governments) in the provincial courts. Our team also advises clients on public procurement and bidding strategies to maximize chances of a smooth and successful public procurement processes.

The following are public examples the team's representative matters:

- Represented successful bidder in protecting contract award in complex set of three related procurement reviews at the CITT relating to contract for data centre services (CITT File Nos. PR-2014-006, PR-2014-015 and PR-2014-020), and in having the contract award to our client upheld in the subsequent judicial review at the Federal Court of Appeal



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(*CGI v. Canada Post Corporation and Wipro Technologies Canada Ltd*, 2015 FCA 272).

- Complaint to CITT on behalf of large accounting firm for unfair evaluation and rejection of bid relating to change management consulting services by Department of National Defence and subsequent settlement of claim (CITT File No. PR-2014-057).
- Complaint to CITT on behalf of potential supplier seeking compensation for wrongful exclusion from contract extensions relating to learning services awarded by Health Canada. Successfully established a violation of the government's procurement obligations and obtained compensation from the CITT for loss of profits at 45% gross margin, as well as extraordinary recovery of legal costs: (CITT File No. PR-2013-014).
- Federal Court challenge via judicial review of National Research Council's decision not to renew contract (*Chazey Partners Canada Inc. v. Attorney General Of Canada*, T-427-14)
- Complaint to CITT on behalf of potential supplier relating to unfair evaluation and improper application of Canadian preferences relating to supply of communication hardware for Department of National Defence (CITT File No. PR-2013-048).
- Complaint to CITT on behalf of large accounting firm for unfair evaluation of bid relating to financial auditing services by Department of Aboriginal Affairs and Northern Development, including intervening in related complaint brought by another potential supplier (CITT File Nos. PR-2013-005 and PR-2013-008).
- Complaint to CITT on behalf of potential supplier for unfair evaluation and failure to meet minimum requirements relating to informatics consulting services for Environment Canada (CITT File No. PR-2012-016).
- Representing municipality to successfully defend against allegations of improperly evaluating bids for public/private partnership of sports arena (*Kingston 2000 Developments Ltd. v. Kingston (City)*, ONSC Docket 06-CV-320008)
- Representing municipality in dispute regarding successful bidder in construction tender (*Russell (Township) v. Dalcon Enterprises Inc.*, 2009 CanLII 31597)).
- Representing municipality to successfully defend against claim by unsuccessful bidder for supply of vehicles, on basis that the RFP and procurement process involved evaluative criteria that did not ensure that the lowest price would be



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successful (*Leeds Transit Sales Ltd. v. Ottawa (City)*, 2004 CanLII 31377 (ONSC)).

- Representing Crown Corporation in successfully defending claim by unsuccessful bidder for supply of advertising services on the basis that the bid evaluation criteria and scoring processes for the RFP treated the bidder unfairly and that the process involved evaluative criteria that did not ensure that the lowest price would be successful.
- Represented Ontario university is successfully defending various bid challenges by unsuccessful bidders alleging unfairness or non-compliance in the procurement process.