The Procurement Office

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A Canadian Perspective on Sustainable Procurement

Transatlantic Workshop on Sustainable Public Procurement

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About the Author

Paul Emanuelli is the General Counsel and Managing Director of the Procurement Office. He was recognized by *Who's Who Legal* as one of the top ten public procurement lawyers in the world. His portfolio focuses on strategic governance in public purchasing and on negotiating high-profile major procurement projects. Paul has an extensive track record of public speaking, publishing and training. He is the author of *Government Procurement, The Laws of Precision Drafting*, *Accelerating the Tendering Cycle,* and *The Art of Tendering*. Paul hosts a monthly webinar series and has trained and presented to thousands of procurement professionals from hundreds of institutions across North America through the Procurement Office and in collaboration with leading industry organizations, including NIGP, SCMA, the University of the West Indies, and Osgoode Hall Law School.

A Canadian Perspective

Sustainable Public Procurement

This discussion offers a Canadian perspective on sustainable public procurement and covers the following topics:

- Structural Barriers to Policy Implementation
- An Institutional Success Story: The City of Mississauga

Structural Barriers to Implementation

Global Standards and Local Practices

Depending on the level of formal harmonization, between one-half and three-quarters of the rules that apply to a public procurement process within any jurisdiction flow from common core global standards. These global standards come in the form of international trade treaties, international model laws and procurement guidelines, and common law precedents and audit findings.

Structural Barriers to Implementation

Global Standards and Local Practices

These sources all play a role in influencing jurisdiction-level statutory standards, guidelines, and directives, and in informing local case law and audit standards. The remaining quarter of the rules and standards that apply to a procurement project flow out of the industry practices that apply to the specific goods, services, or construction contracts, many of which are also harmonized with global commercial practices.

Structural Barriers to Implementation

Global Standards and Local Practices

Navigating the specific challenges at the institutional and project levels requires a better understanding of the core global standards that drive the public procurement processes at the local level. Different jurisdictions enjoy a higher or lower degree of formal harmonization with these global standards.

Structural Barriers to Implementation

Global Standards and Local Practices

Some public institutions operate in highly regulated environments with international procurement treaties and directives formally enacted through national and sub-national statutory structures that are, in turn, further bolstered by formal bid protest enforcement mechanisms and the development of local case law precedents and public audit findings.

Structural Barriers to Implementation

Global Standards and Local Practices

Deeper jurisdictional integration tends to drive a higher degree of procurement process standardization across those jurisdictions, since global standards have already been formally implemented into local rules, leaving fewer grey zones open to institutional-level improvisation. This tends to support the creation of more consistent internal governance frameworks across institutions within harmonized jurisdictions.

Structural Barriers to Implementation

Global Standards and Local Practices

However, jurisdictions that are less formally harmonized with global standards tend to leave more of the governance work to each specific institution to implement its own internal operating system to comply with global standards. A lower degree of formal harmonization with global standards tends to expose institutions within those jurisdictions to greater litigation and audit uncertainty as the courts and public audit offices tend to fill the vacuum left by the lack of a formal regulatory spine with ad-hoc case law precedents and audit findings.

Structural Barriers to Implementation

Global Standards and Local Practices

Public procurement in Canada has largely evolved without a strong statutory spine. While Canada's federal procurement regime includes trade treaty enforcement mechanisms through the Canadian International Trade Tribunal that are similar to the UK system in recognizing both monetary and procedural remedies, and while Canada's federal system also includes, more generally, court-based commercial and administrative law remedies, the federal system does not include a statutory framework comparable to the EU Directive, the UK regulations, or the US *Federal Acquisition Regulation*.

Structural Barriers to Implementation

Global Standards and Local Practices

Furthermore, Canada's sub-federal systems, which operate at the provincial and territorial levels to govern provincial, territorial, and local institutions, including agencies, municipalities, universities, colleges, school boards, and the health sector, remain a work-in-progress. While Atlantic Canada recently underwent a round of statutory reforms that helped modernize those provincial operating systems and harmonize them with global standards, the statutory code in Quebec remains outdated, and the rest of Canada west and north of Quebec operates largely without any meaningful statutory regulation of government procurement.

Structural Barriers to Implementation

Global Standards and Local Practices

The paradoxical result sees US institutions at the federal, state, and local levels subject to far more statutory regulation than their Canadian counterparts, but at the same time subject to far less litigation since the Contract A lost profit remedy first recognized by the Canadian courts and later adopted by other Commonwealth jurisdictions is generally not recognized in the US, or, for that matter, in India or across Africa. The low level of formal harmonization with global standards, coupled with the commercial lost profit remedy and rise of judicial review remedies, increases uncertainty and risk within the Canadian context.

Structural Barriers to Implementation

Global Standards and Local Practices

Notwithstanding a highly challenging domestic operating system and relatively weak levels of formal harmonization with international standards, in recent years, public institutions across Canada have, in practice, been adopting those common global standards at an accelerating rate. This has resulted in the slow-but-steady decrease in overall government procurement litigation and has provided a series of turnaround stories in procurement governance that serve as leading case studies on how to successfully navigate global procurement standards and achieve strategic execution at the institutional and project level.

Canadian Case Study

Mississauga

As noted in Wikipedia, Mississauga has a population of 721,599 as of the 2016 census, which makes it the sixth-most populous municipality in Canada due to a population boom in latter half of the 20th century which “attracted a multicultural population and built up a thriving central business district”. As Wikipedia also notes, “Mississauga is the location of Toronto Pearson International Airport, Canada's busiest airport, as well as the headquarters of many Canadian and multinational corporations.”

Canadian Case Study

Mississauga

The City of Mississauga has set sustainable procurement targets for 2020 in the areas of Leadership, Integration, and Impact.

Leadership: The City is aiming to build a best practice sustainable procurement program and, to that end, has already trained 80% of contract managers in sustainable procurement and has confirmed that 60% of employees are aware of sustainable procurement. Mississauga ranks in the national top five municipalities in the Reeve Consulting Benchmarking Tool.

Canadian Case Study

Mississauga

Integration: The City is aiming to integrate sustainable procurement as a criterion in the majority of its procurements by 2020 by both overall number of procurements and dollar value. In January and February 2019, it met its interim target of 25% compliance with both benchmarks. The City funds a full-time sustainable procurement position so that procurement project teams have a specialized resource available to assist in the creation of sustainable procurement criteria specific to each tendering process.

Canadian Case Study
Mississauga

Impact: Through its sustainable procurement program, the City aims to achieve improved environmental performance and positive social impacts as a result of its procurement activities. Results to-date are as follows:

- Within its Ethical Purchasing category, 100% of contracts with high-risk suppliers now include Code of Conduct provisions.

- In the Jobs and Training category, 60% of suppliers scored 80% or higher on the local development benchmark.

Canadian Case Study
Mississauga

- In the Sustainable Expenditure category, 67% of surveyed suppliers scored 70% or higher on advanced sustainability practices.

- On the GHG Reduction Leadership category, 39% of suppliers scored 80% or higher on their GHG reduction plans.

- On the Waste Reduction Leadership category, the City exceeded its 60% interim compliance target and found that 80% of its surveyed suppliers had waste reduction plans.

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