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International Procurement

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This year the International Procurement Committee's contribution is divided into five sections exemplifying the diverse nature of international procurement issues during 2009. The first half of the article provides three different topics: (1) the annual update regarding reforms of the UNCITRAL Model Procurement Law; (2) a new local government bid protest procedure in Canada; and (3) recent developments in health care procurement in Germany. The second half of the article provides two surveys of domestic preference procurement laws in (1) Serbia and Bosnia & Herzegovina, and (2) Canada.

I. Reform of UNCITRAL Model Procurement Law

Efforts to revise the United Nations Commission on International Trade Law (UNCITRAL) model procurement law[1] continued into 2009,[2] delayed somewhat by new reform

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1. UNCITRAL, UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES WITH GUIDE TO ENACTMENT, U.N. Doc. A/CN.9/393 (1994), *available at* http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf.

2. The revised text of the model law, current as of the start of the December 2009 meeting of the UNCITRAL working group in Vienna, UNCITRAL, POSSIBLE REVISIONS TO THE UNCITRAL MODEL LAW ON

issues that emerged in the world procurement community. Thus, for example, while there was general agreement in the UNCITRAL working group to make defense procurement an integral part of the model law, there was disagreement over how much to modify the model law to accommodate the special demands of defense purchasing. That collateral (and disruptive) debate was driven, in part, by a new European defense procurement directive.[3] The delegations hope to refocus their discussions and to wrap up the revised model law by mid-2010. Besides accommodating defense procurement, the new law will reflect advances in procurement worldwide over the last decade,[4] and so will likely include, *inter alia*, provisions on electronic commerce, socioeconomic preferences,[5] reverse auctions, competitive dialogue, conflicts of interest,[6] bid protests (remedies),[7] and "framework" agreements.[8] Once the revised model law is complete, attention will likely shift to a revised guide to enactment.

II. Canada's Most Populous Province Launches New Procurement Framework: Local Governments to Set-up Bid Protest Procedure

Governments at all levels in Canada have not historically played an active role in providing guidance in procurement. With the exception of the Federal jurisdiction where the main trade agreements have the force of law,[9] procurement guidance in Canada has been largely left to the courts, which have toiled in the absence of any legislative or regulatory guidance.

The winds have been changing of late. In April 2009, the Ontario Ministry of Finance released its new provincial procurement framework, which applies to the so-called Broader Public Sector (BPS),[10] or local governments in Ontario.[11] The current version of

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PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES-A REVISED TEXT OF THE MODEL LAW, U.N. Doc. A/CN.9/WG.I §§ WP.71-71/add.8 (2009), *available at* http://www.uncitral.org/uncitral/en/commission/working_groups/1Procurement.html.

3. Council Directive 2009/81/, 2009 O.J. (L 216/76) (EC), *available at* http://ec.europa.eu/internal_market/publicprocurement/dpp_en.htm; *see, e.g.*, Baudouin Heuninckx, *Towards A Coherent European Defence Procurement Regime? European Defence Agency and European Commission Initiatives*, 2008 PUB. PROC. L. REV. 1 (2008); Wolfram Hertel, Falk Schning, & David W. Burgett, *New EU Legal Framework For The Defense Industry*, 5 INT'L GOV. CONTRACTOR, Oct. 2008, ¶ 80; Christopher R. Yukins, *Feature Comment—The European Defense Procurement Directive: An American Perspective*, 51 GOV'T CONTRACTOR, Nov. 4, 2009, ¶ 383.

4. *See, e.g.*, Alejandro L. Sarria, *The Future of Public Procurement Law in Cuba: Why the UNCITRAL Model Law Is Havana's Best Option*, 37 PUB. CONT. L.J. 89 (2007).

5. *See, e.g.*, Rolf H. Weber, *Development Promotion as a Secondary Policy in Public Procurement*, 4 PUB. PROC. L. REV. 184 (2009).

6. *See, e.g.*, Caroline Nicholas, *The United Nations Convention Against Corruption And Its Impact On Procurement Regulation: The UNCITRAL Perspective*, 2 PUB. PROC. L. REV. NA64 (2008).

7. *See, e.g.*, Caroline Nicholas, *Remedies for Breach of Procurement Rules and the UNCITRAL Model Law on Procurement*, 4 PUB. PROC. L. REV. NA151 (2009).

8. *See, e.g.*, Christopher R. Yukins, *Are IDIQs Inefficient? Sharing Lessons with European Framework Contracting*, 37 PUB. CONT. L.J. 545 (2008).

9. These include the World Trade Agreement (WTO) Agreement on Government Procurement (GPA), the North American Free Trade Agreement (NAFTA), and the domestic Agreement on Internal Trade (AIT).

10. Currently, only BPS organizations that receive transfer payments from a Ministry of the Government of Ontario of $10 million or more are subject to the new framework.

11. Ontario has a population of thirteen million inhabitants (2009 figures).

the Ministry's Supply Chain Guideline[12] requires that local governments establish a Supply Chain Code of Ethics and certain Procurement Policies and Procedures. The latter offers much guidance on how local governments should conduct their procurement processes. Particularly noteworthy is the Guideline's requirement that each agency establish a bid protest procedure to "ensure that any dispute is handled in a reasonable and timely fashion."[13] Such a procedure must also comply with the bid protest procedure set out in the Agreement on Internal Trade, which mandates an inter-governmental dispute settlement system. It is widely recognized across Canada that an inter-governmental dispute settlement system has been wholly ineffectual.[14]

A. Basic Principles

If the AIT's bid protest model is inappropriate for local governments, what, then, is the right model? The Ontario Ministry of Finance is currently assessing some principles and approaches, starting with a review of some essential attributes, articulated in the 2007 Organization for Economic Co-Operation and Development (OECD) publication entitled *Integrity in Public Procurement: Good Practice from A to Z*, as follows: "There is a common recognition [among OECD countries] that effective recourse systems for challenging procurement decisions should provide timely access, independent review, efficient and timely resolution of complaints and adequate remedies."[15] While article spacing does not allow for a review of each attribute, the independence principle looms especially large as it closely relates to the perceived objectivity and integrity of the bid protest forum. The "independence" principle within the context of a bid protest procedure demands that the members of the reviewing body be sheltered from various types of potential external influences and that they not be biased in favor of either the complainant or the buying organization.

The trouble with the independence principle is that all but a few local government agencies in Ontario would be severely strained financially to put in place a fully independent bid protest forum. A more cost-efficient starting model for Ontario may be to engage the agencies in the solution, through the creation of an agency-level bid protest procedure, an approach that the Ministry of Finance is now considering.[16] An appeal body would also be established.

B. Agency-Level Bid Protest Model

An agency-level bid protest procedure—as opposed to one that is created for an entire sector or jurisdiction—is one where the review body is created by the local government

12. It is described as version 1.0; version 2.0 will be released in 2010. *See* Ontario Ministry of Finance, Supply Chain Guideline (2009), *available at* http://www.fin.gov.on.ca/en/ontariobuys/documents/scg.pdf.

13. *Id.* ch. 5, 5.3.13.

14. According to the Internal Trade Secretariat, which is responsible for administrating the AIT, no expert panel has been struck to resolve any procurement dispute since the AIT came into force in the mid-1990s.

15. A wealth of resources recognizes these basic principles. *See, e.g.*, Daniel I. Gordon, *Constructing a Bid Protest Process: The Choice That Every Procurement Challenge System Must Make*, 35 Pub. Cont. L.J. 427 (2006) (illustrating the many policy trade-offs that must be made in putting in place a bid protest forum).

16. As of October 19, 2009.

agency itself. Although such a model infringes the "independence" principle, it may still serve as a useful, if imperfect, starting point.

The UNCITRAL Model Procurement Law[17] incorporates the principle of an agency-level review mechanism, which serves as a model for the development of bid protest procedures in developing countries. Among other things, the Model Procurement Law requires that strict agency procedures be put in place and that the review be conducted by the head of the purchasing organization. The agency-level bid protest model appears to be widely used in the United States.[18] With efficiency as its primary objective, the agency-level protest model in the United States tends to emphasize informality, open communications, and speed.[19] While strict filing rules typically apply, the review is conducted by an official in the purchasing organization at "a level above the contracting officer"[20] and the remedies available range from suspension of the process during the complaint process, payment of loss profit, and payment of protest costs to the successful complainant, among others.

It is too early to know how the competing and conflicting values of efficiency and due process will eventually be settled under Ontario's new bid protest system. But in a jurisdiction where the supplier community has almost habitually and systematically failed to assert itself before the courts, local government agencies may be expected to value efficiency above all else and press hard for limiting disruptions caused by the protest process.

III. New Public Procurement Rules for German Health Care Sector

A. Introduction

Recent public procurement law developments on a national as well as on a European level have had a significant impact on the German healthcare market where they affect all kinds of contracts concluded by German public health insurance companies (so-called sickness funds), in particular supply contracts for generic but also for patented and biotechnological pharmaceuticals. This will result in more than forty billion Euros spent annually by sickness funds on pharmaceuticals through public procurement procedures. Therefore, familiarity with German public procurement law becomes inevitable for all market participants.

B. German Public Health Insurance Companies are Bound to Public Procurement Law

The question of whether sickness funds qualify as "public contracting authorities" pursuant to European and national procurement law was submitted to the European Court of

17. The Model Procurement Law is formally called the UNCITRAL Model Law on Procurement of Goods, Construction and Services, with Guide Enactment (1994).

18. For a short history of the agency-level bid protest mechanism in the United States, *see* Erik A. Troff, Agency-Level Bid Protest Reform: Time For a Little Less Efficiency? (U.S. Air Force, Report OMB 0704-0188) (2005).

19. The time provided for processing agency-level protests is about one third of the 100-day decision requirement set by the Government Accounting Office, with its more formal procedural trappings. *See id.* at 7-8.

20. Federal Acquisition Regulation, 48 C.F.R. § 33.103(d)(4) (2009).

Justice (ECJ) in 2007. But it took the ECJ until June 2009 to come to an affirmative conclusion.[21] The decision ends a discussion that has lasted several years and entailed many judicial disputes in Germany. Though in 2008 sickness funds started to apply public procurement law to some extent when concluding certain contracts,[22] this normally happened without accepting a respective statutory duty. Now the ECJ has made application of public procurement law obligatory for sickness funds. Additionally, any decision or action related to the procurement process may be reviewed by German public procurement review bodies, which have already started to consider sickness funds as public contracting authorities and apply procurement law on contracts awarded by them.[23] Public procurement law has set a complete new framework for the German healthcare market, which has especially been noticeable with regard to pharmaceuticals.

C. Recent Developments Regarding Pharmaceuticals

The German public healthcare system regarding pharmaceuticals is characterized by a system of reimbursement. Sickness funds do not conclude supply contracts for pharmaceuticals directly with pharmaceutical companies. Rather, pharmaceutical companies conclude supply contracts with drug stores or distributors. Sickness funds conclude reimbursement contracts, (so-called rebate contracts), which require the pharmaceutical company to refund some of the cost of the pharmaceuticals. This regulatory framework makes qualification of contracts concluded between pharmaceutical companies and sickness funds as public contracts difficult. Thus, barring the question whether sickness funds qualify as contracting authorities–application of public procurement law in those cases was the subject of innumerable court proceedings over the last few years.[24]

The award of rebate contracts regarding generic pharmaceuticals has been subject to judicial review since 2007. By now, the application of public procurement law on the award of such contracts is acknowledged.[25] Their award has to be conducted pursuant to public procurement law with the open tender procedure, as the rule for award and sickness funds have to comply with public procurement law throughout the award procedure. Judicial review is granted by the Procurement Review Chambers (Chambers). An immediate appeal from the Chambers' decision may be filed with the State Social Courts.

Regarding the award of contracts for patented and bio-technological pharmaceuticals, the application of public procurement law has not yet been recognized.[26] The qualifica-

21. Hans & Christophorus Oymanns GbR, Orthopädie Schuhtechnik v. AOK Rheinland/Hamburg, Judgement, 2009 O.J. C 180/ (Aug. 1, 2009).

22. *See Tender Procedure Regarding Pharmaceuticals Worth More than _ 4 Bn.*, No. 2008/S 154-207965, TENDERS ELEC. DAILY (2008), *available at* http://ted.europa.eu [hereinafter Tender Procedure].

23. *See, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice] July 15, 2008, X ZB 17/08 (F.R.G.); Bundessozialgericht [BSG][Supreme Social Insurance Court] Apr. 22, 2008, B 1 SF 1/08 R (F.R.G.); Landessozialgericht [LSG][Social Insurance Court of Appeals] Apr. 29, 2009, L 21 KR 41/09 SFB (F.R.G.); LSG, Feb. 17, 2009, L 11 WB 381/09.

24. *See, e.g.*, BGH [Federal Court of Justice], X ZB 17/08; BSG [Supreme Social Insurance Court], B 1 SF 1/08 R; LSG [Social Insurance Court of Appeals], L 21 KR 41/09 SFB; LSG, L 11 WB 381/09.

25. *See, e.g.*, BGH [Federal Court of Justice, X ZB 17/08; BSG [Supreme Social Insurance Court], B 1 SF 1/08 R; LSG [Social Insurance Court of Appeals], L 21 KR 41/09 SFB; LSG, L 11 WB 381/09.

26. VK Bund [Federal Procurement Review Chamber] Aug. 15, 2008, VK 3–107/08 (F.R.G.); VK Bund [Federal Procurement Review Chamber] Aug. 22, 2008, VK 2–73/08 (F.R.G.); Oberlandesgericht [OLG] [Trial Court for Selected Criminal Matters and Court of Appeals] Oct. 20, 2008, VII Verg 46/08 (F.R.G.);

tion of a rebate contract regarding such pharmaceuticals as a public contract as well as the ability to award the contract directly (i.e. without any competition) is a highly controversial subject in Germany. Recent decisions by the competent court of appeals, however, point in the direction of full application of public procurement law,[27] which means that direct awards are only allowed in specific circumstances. Indeed, case law has denied direct awards in spite of patent rights due to the possibility of re-imports by suppliers.

D. Domestic Preferences in Tender Procedures Regarding Pharmaceuticals

Recent procurement procedures of sickness funds show certain aspects that allow for domestic preferences. Although the statutory non-discrimination rule forbids domestic preferences under European public procurement law,[28] the scope of the specification seemed to give domestic suppliers of pharmaceuticals an advantage in the past. That is because past procurement procedures have been limited to pharmaceuticals that have–at the time of publication of the specifications–already been listed in a domestic pharmaceutical database,[29] the so-called *Lauer-Taxe*.[30] Pharmaceuticals which have not been listed in *Lauer-Taxe* were not admitted. Foreign suppliers were unable to meet the specifications unless their products have already been listed. A challenge of this kind of specification has been dismissed by reviewing bodies on the grounds that (i) *Lauer-Taxe* is not limited to domestic suppliers but open to every supplier of pharmaceuticals which are licensed for the German market, and (ii) the determination of what kind of pharmaceuticals are needed lies within the discretion of the contracting authority.[31] Recent tender procedures seem to defuse the problem somewhat because the deadline for listing has been chosen to be a date about four weeks after publication of the specifications[32] or if a prior information notice has been published in advance.[33]

The listing procedure may take several months, however, if the pharmaceutical has not been licensed for the German market. Against that background, licensing and subsequently listing their products in *Lauer-Taxe* becomes more important for foreign suppliers in order to participate in procurement procedures worth more than forty billion Euros a year.

OLG [Trial Court for Selected Criminal Matters and Court of Appeals] Oct. 22, 2008, I-27 U2/08 (F.R.G.); LSG [Social Insurance Court of Appeals] Oct. 28, 2008, L 11 KR 481/08 ER-B (F.R.G.).

27. LSG [Social Insurance Court of Appeals] Sept. 10, 2009, L 21 KR 53/09 SFB (F.R.G.).

28. *See* Case C-234/03, Contse SA v. Instituto Nacional de Gestión Sanitaria, 2005 OJ C 86/1.

29. *See* Tender Procedure, *supra* note 22.

30. *Public Procurement Law*, 2002, *Official Gazette* of the Republic of Serbia, No. 39/02, 43/03, 55/04 and 101/05 (2002) (Serb.), *available at* http://www.lauer-fischer.de/LF/Seiten/Produkte/Lauer-Taxe+online/Lauer-Taxe+online-EN.aspx.

31. LSG [Social Insurance Court of Appeals] Apr. 29, 2009, L 21 KR 41/09 SFB (F.R.G.); LSG [Social Insurance Court of Appeals] Feb. 4, 2009, L 11 WB 381/09 (F.R.G.).

32. *See* Tender Procedure Pub. No. 2009/S 177-254988 (2009), Tenders Electronic Daily, *available at* http://ted.europa.eu.

33. *See* Notice Published Publication No. 2009/ S 118-170797 (2009), Tenders Electronic Daily, *available at* http://ted.europa.eu.

IV. Domestic Preferences in Serbia and Bosnia & Herzegovina

Domestic preferences in public procurement procedures are rare in Europe, but the Republic of Serbia and Bosnia & Herzegovina are exceptions. In Serbia, from May 21, 2004, until early 2009, the old law on local preferences in public procurement[34] and its promulgating regulations[35] preferred local over foreign-bidders. But because foreign bidders rarely competed in the procurement process, the old law's preference for local bidders had little, if any, impact on procurement. A new Law on Public Procurements in Serbia became effective on January 6, 2009.[36] The new law treats (1) the procurement of products or goods differently from (2) the procurement of works (such as the construction of buildings, roads, and factories) or services (such as garbage collection).[37]

First, with regard to products or goods, the new law gives preference to local products. The contracting authority must give preference to the bidder offering the local product without any regard for the status of the bidder.[38] It no longer matters whether the bidder is local or foreign. If the bidder offering the product of foreign origin is first-place in ranking, based on the procurement criteria, and the bidder offering goods of local origin is second-place in ranking, and the difference in the total number of weighing factors between the two bidders is less than or equal to twenty points (out of a possible 100 points), then the contracting authority shall award the contract to the bidder with local products.[39] Regulations define "local" and "foreign" and discuss the type of evidence that is suitable to prove origin.[40]

Second, with regard to the procurement of works or services, the local or foreign status of the bidder does matter. The new law gives bidders enlisted with the Serbian Business Registers Agency[41] an advantage over bidders that are not so registered. Although foreign bidders can legally register with the Serbian Business Registers Agency and be considered as local bidders, in practice they rarely do so. When the first-place ranking in a competition for a contract is occupied by a bidder that is not enlisted in the registry, and the second-place bidder is enlisted in the registry, and the difference in the total number of weighing factors between the two bidders is less than or equal to twenty points (out of a possible total of 100), then the contracting authority shall award the contract to the bidder enlisted in the registry.[42] When evaluating bids by the lowest price criterion, the relation of prices between the first-place bidder (i.e., offering the lowest price) and the second-place bidder (i.e., offering the second-lowest price) is observed. If the difference between their prices is less than or equal to twenty percent, then the contract shall be awarded to the second-place bidder, as long as he is enlisted in the registry.[43]

34. *Public Procurement Law*, 2002, *Official Gazette* of the Republic of Serbia, No. 39/02, 43/03, 55/04 and 101/05 (2002) (Serb.).

35. Rulebook on evidence by which it can be determined whether goods are manufactured in the country or have domestic origin, *Official Gazette* of the Republic of Serbia, No. 82/04 (Serb.).

36. *Public Procurement Law*, 2002, *Official Gazette* of the Republic of Serbia, No. 116/08 (2002) (Serb.).

37. *Id.*

38. *Id.* art. 52.

39. *Id.*

40. Rulebook on documents that confirm fulfillment of conditions for preferential treatment of local bidders in public procurement procedures, *Official Gazette* of the Republic of Serbia, No. 50/09 (July 6, 2009).

41. European Commerce Registers' Forum, http://www.ecrforum.org (last visited Jan. 30, 2010).

42. Public Procurement, No. 116/08, art. 52.

43. *Id.*

The European Union (E.U.) asked Serbia to limit the application of these preferences as Serbia seeks to become a candidate for E.U. membership. In 2008, Serbia agreed to phase out domestic preferences within five years from the date of entering into force of the Stabilization and Association Agreement, which was signed on April 29, 2008, but has not yet entered into force.[44]

Regarding Bosnia & Herzegovina, local preferences have been applied since 2005 to all sectors except for the procurement of electric power.[45] The Bosnian contracting authorities are required by law to decrease the preferential prices of "domestic offers" or "local offers" by ten percent when comparing the price of "domestic offers" with the price of non-domestic offers. This technique gives "local offers" an obvious but artificial (and fictitious) price advantage. Because Bosnia & Herzegovina is heading towards becoming a candidate for membership in the European Union, it passed a resolution in 2009 to cancel preferences at the beginning of 2012.[46] In addition, Bosnia & Herzegovina will cancel preferences related to countries mentioned in Annex I of the Agreement on Modification and Joining Mid-European Agreement on Free Trade in May 2010.

V. Domestic Preferences in Canada

A. Introduction

Canada is known for having one of the most open government procurement environments in the world.[47] At the international level, Canada is a signatory to a number of agreements that aim to reduce trade barriers in government contracts. The most notable of these agreements are the North American Free Trade Agreement (NAFTA)[48] and the World Trade Organization Agreement on Government Procurement (WTO-AGP).[49] At the national level, the federal, provincial, and territorial governments of Canada are parties to the Agreement on Internal Trade (AIT),[50] which establishes a framework to ensure equal access to procurement for all Canadian suppliers.[51]

Certain barriers, however, do remain. The agreements do not apply to all government purchases but only to purchases by those government entities and enterprises listed in each applicable agreement. Moreover, governments are permitted to exclude certain con-

44. *See generally* Serbian Government: The EU Integration Office, Text of the SAA Agreement, http://www.seio.gov.rs/code/navigate.asp?Id=20 (last visited Jan. 30, 2010). The arrest of Ratko Mladic is the prerequisite for the enforcement of the Agreement.

45. Decision on Obligatory Application of Domestic Preferences in Public Procurement Procedure by the Council of Ministers of Bosnia & Herzegovina, *Official Gazette* of the BiH, No. 50/05, July 26, 2005.

46. Decision on Obligatory Application of Domestic Preferences in Public Procurement Procedure by the Council of Ministers of Bosnia & Herzegovina, *Official Gazette* of the BiH, No. 29/09, Dec. 2005.

47. Kathleen Macmillan & Patrick Grady, *Interprovincial Barriers to Internal Trade in Goods Services and Flows of Capital: Policy, Knowledge Gaps and Research Issues* 5 (Industry Canada, Working Paper 2007-11), *available at* http://global-economics.ca/report_internal_trade.pdf (last visited Nov. 25, 2009).

48. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (in force in Canada on Jan. 1, 1994) [hereinafter NAFTA].

49. World Trade Organization Agreement on Government Procurement (WTO-AGP), Jan. 1, 1996.

50. Agreement on Internal Trade, R.S.C, ch. 17 (1996) (signed on July 18, 1994) [hereinafter AIT].

51. *Id.* art. 501. Certain provinces have also entered into additional agreements that provide for procurement-related commitments. For example, British Columbia and Alberta entered in the Trade Investment and Labour Mobility Agreement that provides market access guarantees that exceed those in the AIT.

tracts from coverage. This, inevitably, has led to the persistence of certain domestic preferences at the federal, provincial, and sub-provincial levels.

B. Domestic Preferences under NAFTA and WTO-AGP

Under NAFTA Chapter 10, Canada must accord national treatment to potential suppliers from the United States and Mexico when assessing bids for government contracts that meet certain value thresholds[52] and involve specific classes of goods, services, and construction services.[53] Similarly, under the WTO-AGP, Canada is obligated to extend national and most-favored-nation (MFN) treatment to other signatories in respect of government contracts that meet applicable value thresholds[54] and involve specified classes of goods and services.[55]

Both agreements list the government entities and enterprises to which the national treatment and MFN provisions apply.[56] There are seventy-eight government entities and ten government enterprises listed under the NAFTA, and eighty-two government entities and nine government enterprises listed under the WTO-AGP.

Canada has made a number of reservations under the NAFTA and the WTO-AGP exempting certain goods and services. These reservations apply, *inter alia*, to procurements for:[57]

- National security purposes;
- Ship building and repair;
- Urban rail and transportation components, materials, iron, steel and equipment;
- Transportation services that are part of, or incidental to, a procurement contract; and
- Set-asides for small and minority businesses.

The following services are also excluded from Canada's obligations under the NAFTA and/or WTO-AGP:[58]

- Research and development;
- Health and social services;
- Financial and related services;
- Utilities; and
- Communications, photographic, mapping, printing, and publications services.

These reservations and exclusions allow the federal government to favor Canadian suppliers when procuring contracts in respect of these matters.

Further, the procurement provisions in NAFTA do not apply to any form of financial assistance from the federal government to provinces and sub-provincial entities.[59] Arguably, when a federal government provides funding to a province in respect of a particular project, the federal government may attach a condition to the funding requiring the recip-

52. NAFTA, *supra* note 48, art. 1001.

53. *Id.* art. 1003.

54. WTO-AGP, *supra* note 49, annex 1.

55. *Id.* art. III.

56. *See* NAFTA, *supra* note 48, annex 1001.1a-1 and 1001.1a-2; WTO-AGP, *supra* note 49, annex 1, 3.

57. *See* NAFTA, *supra* note 48, annex 1001.2b; WTO-AGP, *supra* note 49, annex 5 (for a full listing of reservations and exclusions).

58. *See* Government of Canada, http://www.contractscanada.gc.ca/en/trade-e.htm#30 (last visited Nov. 25, 2009).

59. NAFTA, *supra* note 48, art. 1001, ¶ 5(a).

ient government to adopt certain domestic preferential policies in its procurement practices.[60]

NAFTA and WTO-AGP provisions presently apply only to federal government procurements.[61]

C. Domestic Preferences Under the AIT

The AIT governs the flow of goods and services within Canada. It is the only agreement binding on all provincial governments that contains non-discrimination rules relating to government procurement. Under Chapter 5 of the AIT, provinces and most sub-provincial entities are obligated to conduct their procurement process in a non-discriminatory manner, vis-à-vis suppliers from other provinces for contracts above certain value thresholds.[62] Chapter 5 of the AIT also prohibits the federal government from favoring the suppliers of goods and services of one province or region of Canada.[63] Only Canadian suppliers have standing to bring procurement complaints against the federal government based on the AIT before the Canadian International Trade Tribunal (CITT).[64] Potential suppliers who wish to benefit from the protections of the AIT are well advised to bid through a Canadian entity.

The CITT has no jurisdiction to hear complaints relating to provincial or sub-provincial entities. In fact, the AIT provides suppliers with no effective remedy in the event a solicitation is carried out by a provincial entity in a manner that is inconsistent with the AIT.

The AIT lists the government entities to which the non-discriminatory provisions apply[65] and also those that are excluded[66] from coverage. Among those excluded are, at the federal level, the Bank of Canada, and at the provincial level, gaming corporations, liquor authorities, and electrical utilities.[67] The excluded government entities are permitted to adopt procurement policies that best meet their needs regardless of whether or not the practice is discriminatory. For example, Hydro-Québec, a government entity expressly excluded from the procurement provisions of the AIT, recently entered into a procurement agreement with the State of New York. As an excluded entity, Hydro-Québec is under no obligation to provide access to its procurement opportunities to suppliers from other provinces of Canada.[68]

60. This is the argument being made by advocates of Buy Canadian policies. *See* Letter from Steven Shrybman, to Ken Lewenza, President, CAW–Canada re: Buy Canadian–Build Communities Resolution (Oct. 22, 2008), http://caw.ca/assets/pdf/LegalOpinion.pdf.

61. Foreign Affairs and International Trade Canada, Further Opportunities, http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/gp-faqs.aspx?lang=en#4 (last visited Nov. 25, 2009).

62. AIT, *supra* note 50, arts. 502, 504 (for the threshold values and for the discriminatory practices that are prohibited, respectively).

63. *Id.* ch. 5.

64. Northrop Grumman Overseas Corp. v. Canada Atty. Gen., [2009] SCC 50 (Can.).

65. AIT, *supra* note 50, annex 502.1A.

66. *Id.* annex 502.2A.

67. *Id.*

68. Macmillian & Grady, *supra* note 47, at 7.

A number of services are also expressly exempt from the provisions of the AIT. They include:[69]

- Services by licensed professionals (including doctors, dentists, nurses, pharmacists, veterinarians, engineers, land surveyors, architects, chartered accountants, lawyers, and notaries);
- Hauling aggregate on highway construction projects;
- Services of financial analysts or the management of investments;
- Management of government financial assets and liabilities;
- Health and social services; and
- Advertising and public relations services.

The exemption for financial services is particularly significant "given the size of government treasury bill operations requiring financial management."[70]

Domestic preferences are also permitted under a provision[71] in the AIT relating to Canadian value-added.[72] The provision allows parties to the agreement to accord a preference for Canadian value-added goods and services subject to certain conditions. For example, a party may grant a higher score in the rated evaluation criteria for bids offering Canadian value-added. The federal government may only accord preferences under this provision where the NAFTA and WTO-AGP would not apply. A related provision also permits parties to limit tendering to Canadian goods or suppliers subject to certain conditions.[73]

Finally, in exceptional circumstances, Article 508.1 of the AIT also permits discriminatory procurement practices for regional and economic development purposes.[74] What constitutes "exceptional circumstances" is not clearly defined but could arguably include a severe economic downturn.

Overall, procurement in Canada is generally open to foreign bidders. Certain sensitive areas, however, continue to be insulated from foreign (and even interprovincial) competi-

69. AIT, *supra* note 50, annex 502.1B.

70. Macmillian & Grady, *supra* note 47, at 7.

71. AIT, *supra* note 50, art. 504, ¶ 5.

72. *Id.* art. 518 defines "Canadian value-added" as follows:

> (a) in relation to services, the proportion of the service contract performed by residents of Canada; and
>
> (b) in relation to goods, the difference between the dutiable value of imported goods and the selling price, taking into account any value added by manufacturers and distributors, and including any costs incurred in Canada related to:
>
> (i) research and development;
>
> (ii) sales and marketing;
>
> (iii) communications and manuals;
>
> (iv) customization and modifications;
>
> (v) installation and support;
>
> (vi) warehousing and distribution;
>
> (vii) training; and
>
> (viii) after-sales service.

73. AIT, *supra* note 50, art. 504, ¶ 6.

74. *Id.* art. 508.1.

tion; provincial procurement is not subject to the disciplines of the NAFTA or the WTO AGP; and there are no adequate remedies for foreign firms who are excluded from bidding on provincial opportunities.