

Canadian Law Certificate

Strathcona County
June 16-19, 2020

Day 1: Treaty Compliance

The Treaty Compliance bundle covers the recent trade treaty developments flowing out of the new Canadian Free Trade Agreement and Canada-Europe Comprehensive Economic and Trade Agreement.

Open and Fair Competition

Drawing on the general protocols contained in the new trade treaties, this module covers: (i) open, fair, and transparent competition duties; (ii) contract value thresholds; (iii) tender call posting, disclosure, and amendment rules; (iv) tender evaluation, award, and debriefing duties; (v) bidder prequalification and debarment protocols; and (vi) the use of buying groups, negotiated RFPs, and electronic auctions.

Anti-Avoidance Rules and Exemptions

Distilling the main anti-avoidance protocols contained in the Canadian Free Trade Agreement, this module covers: (i) valuation and contract splitting; (ii) local preference and Canadian content; (iii) prohibited practices, including biased specifications, unfair requirements, restrictive criteria and conflict of interest; and (iv) standard exemptions, including confidentiality, security, and urgency.

Debriefing Duties and Confidentiality

With a specific focus on the newly expanded trade treaty debriefing duties, this module covers the duty to ensure transparency in the tendering process, while protecting confidential bidder information, and explains how public institutions will need to enhance their debriefing practices to comply with the new trade treaty rules.

Bid Disputes and the CITT

Detailing the formal bid dispute enforcement rules contained in the new trade treaties, this module covers the following topics: (i) the due process rules contained in the new trade treaty enforcement regime, including document disclosure discovery rules, the right to representation, and the requirement of live public hearings; and (ii) the scope of the Canadian International Trade Tribunal's jurisdiction, its procedural remedy powers, including re-draft, re-evaluation, and contract termination orders, and its financial remedy powers, including bidding costs, complaint costs, and lost profits awards.

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Day 2: Legal Foundations

The Legal Foundations bundle covers the main administrative and commercial law duties and remedies that apply to the government procurement process in court-based tendering disputes.

Administrative Law and Judicial Review

Covering the rise of judicial review, this module explains how administrative law fair process duties are applied to government procurement and surveys the range of potential judicial review remedies, including injunctions, re-evaluation rulings, and contract termination orders.

Commercial Law and Contract A

Summarizing the Contract A tendering law analysis and remedies, this module provides an overview of: (i) the creation of Contract A and the duty of fairness; (ii) the key indicators of Contract A; and (iii) the Contract A remedies of bidder lost profits and forfeited bid security.

Negligence in the Tendering Cycle

Highlighting the key factors that trigger project delays and extra cost claims, this module explains how the tort-based laws of negligent omission and misrepresentation apply to the bidding process.

Critical Legal Trends

Synthesizing recent federal, provincial, and broader public sector case law developments across Canada, this module covers the critical legal trends impacting public procurement across Canada and places those legal developments within an international context.

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Day 3: Fair Competition

The Fair Competition bundle focuses on the core due diligence duties that apply to project teams as they navigate the government tendering process.

Disclosing Evaluation Criteria

Covering the key transparency duties that require public institutions to disclose their evaluation criteria and process rules, this module focuses on the importance of establishing and following clear and defensible evaluation and award procedures.

Tender Compliance

Summarizing the duty to reject non-compliant tenders, this module covers leading cases dealing with topics including: (i) strict vs. substantial compliance; (ii) formal, contractual, procedural, and technical compliance; (iii) rectifications, clarifications, and bid repair; and (iv) distinguishing tender compliance criteria from contract performance requirements.

Incumbent Advantage and Biased Specifications

Covering the main unfair advantage pitfalls that impact the government tendering process, this module explains the case law rules surrounding incumbent advantage, transition costs, and biased specifications.

The Duty to Award

Surveying the leading cases dealing with the duty to award to the best bid, this module covers the recurring risk areas relating to: (i) reserved rights and privileges, low-bid bypass, and unfair process claims; and (ii) over-budget bids, cancellations, re-tendering, and bid-shopping claims.

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Day 4: Practical Considerations

The Practical Considerations bundle focuses on the core due diligence measures required to achieve legal compliance at the institutional and project level.

Institutional Governance

Surveying institutional winning conditions, this module explains how organizations can achieve compliance with current legal requirements through the implementation of institutional policies and procedures and the adoption of advanced document drafting and bid evaluation protocols, systems, and tools.

Project Governance, Conflict of Interest, and Bias

Covering the main due diligence duties that apply to project teams, this module addresses the importance of (i) defining project roles and responsibilities and creating clear project plans; and (ii) avoiding conflict of interest, unfair advantage, and bias.

The Procurement Playbook

Surveying the main tendering formats used in competitive bidding both internationally and within Canada, this module compares and contrasts the Request for Quotation, Invitation to Tender, RFP, and Negotiated RFP formats, while also explaining how and when to use a Prequalification or Request for Information process.

Critical Project Details

Focusing on the core content categories contained in a properly structured bid solicitation document, this module offers insights on how to create and structure critical transactional details including: (i) the description of deliverables; (ii) mandatory and rated evaluation criteria; (iii) tendering process rules; and (v) legal terms and conditions.