

EU Canada Comprehensive Economic and Trade Agreement (CETA)
Update on state of play in key negotiating areas
June 5, 2013

(extraits / excerpts)

PROCUREMENT

Both sides have agreed on additional elements to be included in the procurement package, notably: (1) an improvement of Canada's offer on energy utilities; (2) a regional development clause; and (3) some elements to rebalance both sides' offers.

1) Improvement to Canada's offer on energy utilities

Canada has accepted to improve its offer on energy utilities to a satisfactory level suggesting that more than 70% of the sector is now covered, including also a sufficient coverage of goods and of those services of interest to EU.

The details of this improved offer are attached in Annex 1.

2) Regional Development Clause

Both sides also agreed on a regional development clause allowing Canada to reserve certain procurements for regional development purposes. However, it has been ensured that this clause is sufficiently narrow and limited in scope that it will not undermine the economic value of Canada's procurement offer.

QUÉBEC

"This Annex covers government enterprises and legal persons or other entities that are owned or controlled by one or several of these enterprises, which are not in competition with the private sector.

"Government enterprise" means a body set out in section 7 of the Act Respecting Contracting by

Public Bodies, ~~with the exception of:~~

~~Hydro-Québec~~

New note 4 to Annex X-04 (Goods)

"4. For the Province of Québec, the Annex does not include procurement of the following goods by Hydro- Québec (identified in accordance with the Harmonized

System Codes (HS)): HS 7308.20; HS 8406; HS 8410; HS 8426; HS 8504; HS 8535; HS 8536; HS 8537; HS 8544; HS 8705.10; HS 8705.20; HS 8705.90; HS 8707; HS 8708; HS 8716.39; HS 8716.40.”

New note 5 to Annex X-05 (Services)

“5. For the Province of Québec, this Annex does not include procurement of the following services by Hydro-Québec (identified in accordance with the United Nations Provisional Central Products Classification (CPC)): 7523 – Data and message transmission services 84 – Computer and related services 86725 – Engineering design services for industrial processes and production* 86729 – Other engineering services.”

*This exclusion is consistent with Hydro Québec’s policy whereby the participation of a firm in the conceptual phase of a project prevents it from participating in its implementation phase. In the event that such policy would be modified in a such a way as to allow participation in both phases of a project by the same firm, this reservation may not be used to undermine market access to civil engineering procurement contracts.

New note 2 to Annex X-06 (Construction Services)

“2. The Province of Québec reserves the right to adopt or maintain any measure favouring local outsourcing in the case of construction services contracts awarded by Hydro-Québec. For greater certainty, such measure would in no case be a condition for the participation or qualification of suppliers.”

Explanatory notes (Annex X-03)

For the Province of Québec:

Construction Services

For greater certainty, please note that the rights reserved in relation to Annex X-06 relate to existing business practices where suppliers are provided financial incentives when they decide to hire locally but such conditions do not form part of conditions for suppliers to participate in a procurement process, nor do such advantages to suppliers form in part of the tender evaluation process.

Services

With respect to the reservations for the four services categories, they are intended to exclude the following:

L'étude, l'analyse et la conception :

- d'un nouvel aménagement hydroélectrique et ses ouvrages connexes;
- de la réfection d'un aménagement hydroélectrique et de ses ouvrages connexes;
- des projets de maintenance des équipements de transport d'électricité;
- pour la construction, la réfection ou la maintenance des réseaux de distribution;
- pour le réseau de télécommunication d'HQ

These reservations do not prevent market access to civil engineering. Hydro-Québec's business model segregates procurements between the conceptual and the implementation phases of projects and prohibits any participation of companies involved in the conception to participate in its construction/implementation. The excluded engineering services exclusively relate to the conception phase of a project and as such maintain effective market access to all other civil engineering procurements. Attached is Hydro-Québec's policy relating to this and the relevant excerpt is here below (in the attached see section 3.1 "Personnes et sociétés non admissibles" p. 1:

« Les personnes physiques ou morales, les sociétés ou les entreprises ayant participé directement ou indirectement à la préparation des documents relatifs à l'appel de soumissions, incluant les études préliminaires et d'avant-projet, individuellement ou par le biais d'une filiale ou d'une société dans laquelle elles détiennent des intérêts, ne sont pas admises à soumissionner au présent appel de soumissions, ni à participer à la réalisation du contrat. »

Goods

Lastly, please find below a detailed list of the excluded goods in new note 4 to Annex X-04 procured by Hydro-Québec. Annual procurement value of the **goods covered in Hydro-Québec's offer amounts to 390 million out of 1.1 billion (total value of excluded goods: \$710M).**

Harmonized System Codes for Goods Excluded by Hydro-Québec

7308.20 -Towers and lattice masts

84.06 Steam turbines and other vapour turbines

84.10 Hydraulic turbines, water wheels, and regulators therefor.

84.26 Ships' derricks; cranes, including cable cranes; mobile lifting frames, straddle carriers and work trucks fitted with a crane. Overhead travelling cranes, transporter cranes, gantry cranes, bridge cranes, mobile lifting frames and straddle carriers.

85.04 Electrical transformers, static converters (for example, rectifiers) and inductors.

85.35 Electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, fuses, lightning arresters, voltage limiters, surge suppressors, plugs and other connectors, junction boxes), for a voltage exceeding 1,000 volts.

85.36 Electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, relays, fuses, surge suppressors, plugs, sockets, lampholders and other connectors, junction boxes), for a voltage not exceeding 1,000 volts; connectors for optical fibres, optical fibre bundles or cables.

85.37 Boards, panels, consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading 85.35 or 85.36, for electric control or the distribution of electricity, including those incorporating instruments or apparatus of Chapter 90, and numerical control apparatus, other than switching apparatus of heading 85.17.

85.44 Insulated (including enamelled or anodized) wire, cable (including co-axial cable) and other insulated electric conductors, whether or not fitted with connectors; optical fibre cables, made up of individually sheathed fibres, whether or not assembled with electric conductors or fitted with connectors.

8705.10 Crane lorries (mobile cranes)

8705.20 Mobile drilling derricks

8705.90 Other [Special purpose motor vehicles, other than those principally designed for the transport of persons or goods (for example, breakdown lorries (wreckers), crane lorries (mobile cranes), fire fighting vehicles, concrete mixer lorries (concrete-mixers), road sweeper lorries (road sweepers), spraying lorries (spraying vehicles), mobile workshops, mobile radiological units).]

87.07 Bodies (including cabs), for the motor vehicles of headings 87.01 to 87.05.

87.08 Parts and accessories of the motor vehicles of headings 87.01 to 87.05.

8716.39 Other [Tanker trailers and tanker semi-trailers]

8716.40 -Other trailers and semi-trailers

EU-Canada CETA: Summary of the main elements agreed in key negotiating areas

State Trading Enterprises

*The text on state enterprises and enterprises granted special or exclusive rights or privileges has been agreed confirming the overall objective to ensure that the disciplines of CETA are not circumvented and market access effectively denied when public authorities act through private entities.

*This includes agreement on the horizontal applicability of the non-discrimination clause to covered entities (monopolies, enterprises granted special rights or privileges and state enterprises). Covered entities - with the exception of monopolies - are deemed to act according to the non-discrimination principle if they act according to commercial considerations.

*Given the fact the CAN and the EU started from very divergent positions, the outcome is very satisfactory and sets a good precedent for our future negotiations.

*In this context - to be reminded - the EU has obtained good results on the main Canadian monopolies, i.e. the Liquor Boards, in the W&S chapter.

Investment Protection (including ISDS)

*Substantive progress has been made and the key provisions of the text are largely agreed.

*The text ensures a high level of protection, in line with Member States' best practices, while providing clear and precise guidance to the arbitrators to avoid unwarranted interpretations of the agreement.

*In particular, both sides have now agreed on the parameters for some of the last remaining key issues, notably fair and equitable treatment, indirect expropriation and the application of national treatment reservations to established investors.

*It is agreed that ISDS will not apply to pre-establishment.

*A way forward has also been found on the outstanding issues with respect to the ISDS (including the issues of standing, parallel claims, repeal and binding interpretations).

→Details and exact wording on some of these issues still need to be agreed.

→Agreement on investment protection in the financial services sector is also still open.

→ The inclusion of the Umbrella Clause also remains open.

Procurement package (including rules and market access)

*The CAN market access offer (received in July 2011) is the most ambitious and comprehensive they have ever made, including in comparison to what has been offered to the US.

*On coverage the outcome regarding the inclusion of regional and local government entities is very satisfactory (better than what CAN offered in the GPA and to the US).

*As far as the "rules" part is concerned, the text is finalized on the basis of provisions derived from the GPA (except detailed wording on single electronic procurement website).

*An understanding has now also been reached on two key issues which proved particularly difficult, notably:

1. Coverage of energy utilities: In its offer of 2011, CAN had excluded major energy utilities, notably in Ontario and Quebec. CAN has now improved its offer to a satisfactory coverage of entities as well as sufficient coverage of goods and of those services of interest to EU.
2. Regional Development Clause: Agreement has been reached on a clause that carves out a limited proportion of sub-federal procurement in 8 Provinces and Territories for regional development purposes; the solution is sufficiently precise and limited in scope that it will not harm EU economic interests (at a maximum 10mn CAN\$ per Province/Territory per year).

In addition, even though the CAN offer is the best CAN has ever made, the EU's offer (which reflects the de facto openness) is still more ambitious, and both sides have therefore agreed to re-balance their offers.

Extent of obligation

*Ambitious outcome, whereby Canada takes full responsibility for provincial measures and agrees to take "all necessary measures" to ensure respect of CETA.