

**Public Procurement of Electric Vehicles, Recharging Infrastructures and
Related Products/Services in Canada: An Analysis Under the Rules of
International Trade**

Research Rapport Presented to Electric Mobility Canada

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Introduction

This research report is submitted to Electric Mobility Canada, at the request of its President and CEO, Mr. Daniel Breton. It was produced between November 11 and December 14, 2020.

The report is the result of research conducted since 2013 by researchers on inclusion of environmental criteria in calls for tenders in 30 countries. It is therefore inspired by best practices borrowed by foreign countries. This research also includes an analysis of the implications of international government procurement agreements, which includes free trade agreements to which Canada is a party.

A few caveats to note.

First, this report is not legal advice. It does not analyze a particular situation, but aims to provide a general understanding of the principles likely to be affected in the context of public procurements of Canadian electric vehicles and charging infrastructures.

Secondly, this report does not detail the rules applicable in each Canadian province. In fact, some international agreements concluded by the federal government apply, with the necessary modifications, to federal and provincial entities. However, some provinces also enter into agreements providing for the rules of public procurement that are exclusively applicable to them. This is indeed the case with the Trade and Cooperation Agreement between Quebec and Ontario and the Agreement on the Liberalization of Public Procurement for Quebec and New Brunswick. This report does not take into account all the agreements concluded at the provincial level.

Finally, the mandate did not seek to analyze the provisions specific to the various Canadian territories, whether federal, provincial or municipal.

Summary Report

In the majority of European countries and in several other countries of the world, public procurement has undergone an ecological transformation. Public buyers are called upon to demand more environmentally friendly products and services from suppliers. These buyers not only care about the final products and services, but increasingly pay attention to the processes and methods of production. In other words, the supply chain and the lifecycle of products and services are increasingly considered in tenders.

In Canada, public buyers can demand products and services that are environmentally friendly. The legislative framework does not prohibit this. From this perspective then, greater consideration of the environment in public procurement could benefit the transportation electrification industry.

Free Trade Agreements are often seen as hindering the ability to restrict trade for environmental reasons. The revised World Trade Organization Agreement on Government Procurement, to which Canada is a party, expressly allows states to include environmental requirements in tenders. No free trade agreement to which Canada is a party prohibits this.

In this context, public buyers should be encouraged to include environmental requirements. This would certainly favor the electric vehicle and charging station industry and any other business related to transportation electrification.

These environmental requirements must, however, respond to a need to achieve environmental protection objectives. In other words, they should not be pretexts to favor a domestic industry. The use of concrete national, provincial or municipal greenhouse gas reduction targets can certainly justify the use of environmental requirements in calls for tenders, since there is no doubt that the electrification of transport contributes to a reduction in greenhouse gases. The use of international standards or certification standards also provides a scientific and consensual basis for greener calls for tenders.

Public buyers benefit from a wide range of tools to help them achieve a more environmentally friendly public procurement. In terms of transport electrification, it seems that 1) the insertion of technical specifications, 2) the use of contractual performance clauses, and 3) the evaluation of quality according to certain attributing criteria, are the most important tools. A call for tenders can select the tool best suited to the target market, or combine two or three such tools. In all cases, public buyers should be bound by the principle of non-regression.

If public buyers were required to take into account the environmental impact of their purchases, or, if at the very least, governments strongly encouraged their entities to do so, it would certainly have the effect of benefiting the electrification of transport industry.

Analysis

The Context for ‘Greenifying’ Public Procurement in Canada

Traditionally, government procurement has been governed by the rule of the lowest bidder. If buyers were allowed to impose certain technical requirements, these had to adhere to the strict specifications of the product. However, since the end of the 2000s, certain considerations not necessarily linked to the intrinsic characteristics of products are becoming commonplace. This is the case for the criteria and requirements related to environmental protection which contribute to the phenomenon of ‘greenifying’ public procurement.

In concrete terms, when drafting calls for tenders, public buyers include environmental requirements. These can of course relate to the product or service to be purchased (therefore, its specific characteristics), but can also relate to the production chain, or even the entire life cycle of the product or service.

The legislative framework is the responsibility of each level of the federal, provincial and municipal governments. Regardless of individual differences, it is important to mention that none of them prevent procuring entities from including environmental criteria in tenders in Canada. Of course, it would be appropriate for these different legislative frameworks to be revised in order to explicitly authorize environmental criteria, but even more so and as is already done elsewhere¹, public buyers must be obliged to impose environmental criteria.

¹ For example, California is forcing its public buyers to prioritize goods with less health and environmental impacts over competing products (Executive Order, B-18-12, April 25, 2012). The city of Berlin requires its public buyers to include environmental criteria, as well as an analysis of the cost of living (Decree on the Application of Regulation for Environmentally-Friendly Purchases and other Placements for Deliveries, Construction Work and Services, 2013). Spain has set time targets to force buyers to enforce the greening of public markets. For example, 50% of the paper purchased was to be recycled in 2010, while 90% of the paper was to be recycled in 2015. In Massachusetts, public buyers must consider the environmental impact of a purchase (Executive Order 515 Establishing an Environmental Purchasing Policy , Mass register n1143).

The Canadian industry on the electrification of transportation could certainly benefit from this ‘greening’ of public markets. In order for States, such as the State of California², to meet their target for reducing greenhouse gas emissions, governments could be tempted to speed up electrification of transportation, which would lead to an increase in purchases made in this sector. On the other hand, Canadian production in the field may offer comparative advantages that could allow the industry to position itself advantageously in the context of calls for tenders and to become even more competitive in international markets³, which could lead to an increase in Canadian purchases.

The Inclusion of Environmental Considerations: A Practice Already Well Established Abroad

For many years, several countries around the world have explicitly allowed or required their public buyers to consider impacts on the environment. Some even go so far as to support their public buyers by providing them with software detailing the type of environmental criteria that can be easily added to a call for tenders, depending on the targeted sector, product or service to be acquired. This is the case for European countries and several American states. Their calls for tenders must increasingly focus on considerations of sustainable development.

The following is a non-exhaustive summary of the principles being applied abroad:

- At the national level, some governments allow or explicitly impose to take into account the life cycle of products⁴; others impose environmental technical specifications⁵; some recognize the possibility of including environmental criteria⁶

² Since 2012, the state of California ordered its agencies to provide electric vehicle charging stations in employee parking lots of existing and new buildings (Executive Order, B-18-12, April 25, 2012).

³ The draft European regulation on batteries aims among other things to encourage local producers to become more competitive. Kate Abnett, « With green battery standards, EU seeks a competitive edge », The Telegram, December 10th 2020, online: https://www.thetelegram.com/business/reuters/with-green-battery-standards-eu-seeks-a-competitive-edge-529553/?mc_cid=32955fdac4&mc_eid=d90b0e714f.

⁴ In Chile, Article 6 of the Public Procurement Act, number 19886, stipulated that the award criteria must make it possible to establish the most advantageous combination between the goods or services purchased and their costs, past, present or future. In Japan, the texts specify that the goods and services selected in a call for tenders must be done so by considering their ability to respect the environment throughout their life cycle (Basic Policy for the Promotion of an Ecologically Responsible Public Purchase ", p. 4).

⁵ In Tunisia, Law 2003-72 of August 2, 2004 indicated that new public buildings are subject to "technical specifications aimed at saving energy consumption" (Art. 10).

⁶ Japan, *Basic Policy for Promoting Environmentally Responsible Public Purchasing*, p. 2.

- At the provincial level, some governments adopt public procurement policies aimed at protecting the environment, taking into account life-cycle⁷; encouraging the use of preferential margins in order to favor green purchases⁸; imposing the use of specifications on environmental techniques⁹;
- At the municipal level, some municipalities require that the environment be taken into account by their public buyers¹⁰ through environmental criteria¹¹ and a life-cycle analysis¹².

A recent initiative of the European Commission proposes to modernize the European legislative framework on batteries in order to impose sustainable production taking into account the whole life cycle¹³. The new regulation, applicable to all types of batteries marketed in Europe, would require the “use of responsibly sourced materials with restricted use of hazardous substances,

⁷ Massachusetts, *Section 2, Executive order 414*.

⁸ Several neighboring American states have already adopted this practice for many years. For example, we can mention that the Massachusetts Public Purchasing Guide (2014) allows preferential margins of between 5 and 10% to be allocated for green products and services. Connecticut also explicitly allows the public purchaser to allocate up to 10% preferential margin (Chap. 58: *Procedures Promoting the Procurement and Use of Recycled Products and Environmentally Preferable Products and Services by State Agencies*, para. 4a-67h, 2014). Vermont does the same (*Vermont Statutes, Title 29, para. 93*).

⁹ Connecticut, *Chap. 58: Procedures Promoting the Procurement and Use of Recycled Products and Environmentally Preferable Products and Services by State Agencies*, para. 4a-67h, 2014: with respect to cleaning products. For its part, the Basque government has operated in stages. In 2016, it suggested the inclusion of technical specifications to its buyers. 50% of all calls for tenders in 10 categories of contracts had to include technical specifications in 2018, and in 2020, 20 categories of contracts had to include such specifications, *Green Public Procurement Program of the Basque Country 2020*, online: http://www.oneplanetnetwork.org/sites/default/files/gpp-programme-basque-country-2020_eng.pdf

¹⁰ In 2013, the city of Berlin, adopted the *Beschaffung und Umwelt* (the Public Procurement and the Environment) Program, online: :

<www.umweltbundesamt.de/en/topics/economics-consumption/green-procurement/incorporating-green-procurement-into-your>.

¹¹ City of Berlin, *Decree on the application of regulations for environmentally friendly purchases and order placements for deliveries, construction work and services* (2013). See also, the city of Pamplona Fisseha Tessema and Cecile Marsille (2009) Practical insights and illustrative examples on Sustainable Public Procurement, Case Studies from Europe, SuPP-Urb-China Paper No. 3, online: https://www.scpcentre.org/wpcontent/uploads/2016/05/32_Tessema_Marsille_2009__SPP_in_Urban_Administrations_in_China_en.pdf.

¹² City of Berlin, *Decree on the application of regulations for environmentally friendly purchases and order placements for deliveries, construction work and services*, 2013.

¹³ European Commission, Green Deal: Sustainable batteries for a circular and climate neutral economy, December 10th, 2020, online: : https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2312.

minimum content of recycled materials, carbon footprint, performance and durability and labelling”¹⁴.

International Legal Framework Governing the Action of Public Buyers

The international legal framework relating to public procurement is fragmented. Indeed, many treaties are likely to apply to a call for tenders. Among the most important is *The Revised Agreement on Government Procurement* of the World Trade Organization, but also all other free trade agreements that the government of Canada or the provinces enter into.

In order to determine whether an agreement is applicable, it is first and foremost necessary to verify whether the procuring entity is covered by the agreement and whether the amount of the invitation to tender meets the thresholds established by the agreement.

For example, Canada has agreed to be bound by the rules of the World Trade Organization’s *Revised Agreement on Government Procurement*. However, this Agreement only covers calls for tenders issued by the federal government, some of its entities and provincial governments. It therefore does not apply to calls for tenders launched by municipalities, schools or even urban transportation companies. In addition, calls for tenders are subject to international trade rules only if the thresholds are met. These differ depending on the target entity and whether the nature of the contract is one of goods, services or construction.

It is also possible that more than one agreement is applicable. In this case, the call for tenders must respect the terms of each of the international agreements. However, negotiators reproduce much the same rules from one agreement to another. When they apply, they provide for rules of openness, non-discrimination, fairness and transparency in the award of public contracts.

¹⁴ *Ibid.* With respect to recycling, the draft regulation states that “all collected batteries have to be recycled and high levels of recovery have to be achieved, in particular of valuable materials such as cobalt, lithium, nickel and lead”. In addition, the regulation wishes to facilitate « repurposing of batteries from electric vehicles so that they can have a second life, for example as stationary energy storage systems, or integration into electricity grids as energy resources”.

More specifically, as far as we are concerned, these agreements prohibit States from discriminating in favor of their products, their services or their national suppliers. In other words, when a call for tenders is launched and an international agreement is applicable, the public purchaser cannot write the call for tenders in such a way as to favor local products, services or suppliers. This rule may appear frustrating, but it has been the basis of the multilateral trading system for at least 70 years. There are some exceptions, but these are extremely narrow and only apply in very specific cases.

For example, the Canadian government typically excludes contracts for urban transit equipment and systems and highway projects from the scope of government procurement agreements. It can also relativize certain obligations, such as in the case of the obligation of non-discrimination, by providing that part of the contract can be given to national suppliers.

Protection of the Environment in Calls for Tenders: an authorization by international agreements

International agreements do not prevent buyers from including technical requirements of an environmental nature in a tender. The World Trade Organization's *Revised Agreement on Government Procurement* explicitly mentions that states may "prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment." (Art. X: 6) . Some free trade agreements have adopted the language of this provision¹⁵, or, at the very least, have provided that a country can derogate from the principles of free trade for environmental reasons.¹⁶

This permission should not be aimed at discriminating in favor of local products or creating unnecessary obstacles to trade. As a general rule, therefore, a technical specification cannot mention the origin of the product to be purchased or require that the product come from a particular territory.¹⁷ Writing the technical requirements obviously requires special know-how and

¹⁵ For example, the *Comprehensive Economic and Trade Agreement*, article 19.9, par. 6 and the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, article 15.12, par. 6.

¹⁶ *Comprehensive Economic and Trade Agreement*, article 19.3, par. 2 and the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, article 19.3, par. 2.

¹⁷ Subject to some exceptions, for example, a call for tenders aimed at purchasing products covered by designations of origin or geographical indications, such as Champagne, Marseille soap or Laguiole knives, which directly refers to the origin of the product.

knowledge of the target market, but must also demonstrate real sincerity. In other words, the inclusion of a requirement aimed solely for the purpose of discriminating Canadian products over foreign ones would not pass the tests of international trade law. The protection of the environment must remain the objective pursued by the inclusion of a requirement. The fact remains that such a requirement may have the effect of discriminating in favor of national or local products. In such a situation, which is called *de facto* discrimination, the buyer's sincerity may be called into question. Legal tests have been developed by the dispute settlement bodies to determine the underlying motivations that led to the inclusion of the technical criteria.¹⁸

The use of international technical standards, such as those issued by ISO or other standardization organizations, can provide a solid basis for justifying an environmental requirement. The more the requirements are based on established scientific standards, the easier they will be to justify. For example, the ISO 26000 standard on social responsibility can easily be used as a guide or inspiration when drafting calls for tenders. This standard does not give rise to certification, but rather provides guidelines aimed, among other things, at contributing to sustainable development and provides information on best practices of companies throughout the life cycle.

Certification standards can also be taken into account in the development of calls for tenders in order to justify the use of environmental requirements. The public purchaser may either refer to the standard as such, which contains a series of requirements, or they may select the environmental criteria that best suits the contract to be awarded and, above all, the status of the bid in a given market.¹⁹

¹⁸ Legal tests have not been developed with regard to the inclusion of environmental requirements in calls for tenders, but rather within the framework of environmental law which has an impact on international trade. The idea remains the same: when an environmental requirement is imposed which has the effect of limiting access to the national market and which, in fact, disadvantages local products or suppliers, the environmental requirement must be rationally founded. In this matter, case law tends to resort to international standards based on scientific consensus or, failing that, on a scientific basis justifying the need to adopt such a requirement to protect the environment.

¹⁹ This clarification is important since calls for tenders must take into account the market offer. In other words, an overly demanding tender could simply be unsuccessful if no product or supplier meets the criteria. In addition, a public purchaser cannot add criteria for the sole reason that he wishes to restrict the market to less than three suppliers, or even to a single supplier.

Tools Allowing Buyers to ‘Greenify’ Public Procurement

Several tools are available to public buyers to ‘greenify’ public markets. These can be used as desired or be combined within a single call for tenders. It all depends on the product or service being purchased, and the state of the market. Every public buyer needs to know the market, the level of competition, and the ability of suppliers to meet the requirements. A public purchaser could therefore decide to impose very few environmental requirements in response to the fact that certain suppliers are not ready for such measures. A buyer could also assess that a call for tenders is likely to encourage, in the short term, suppliers to change their actions.

In this context, public purchasers may become a driver for social change insofar as the requirements that they choose to add in a call for tenders reasonably obliges suppliers to evolve and to offer more sustainable products or services. If the first call for tenders includes one or two environmental requirements, the next call for tenders could raise the level of requirement, again encouraging the industry to expect a higher level of environmental protection. Ultimately, the industry acquires an enviable specificity not only at the national or local level, but at the international level. It becomes more respectful toward the environment, but also becomes more competitive in international markets.

Here is a non-exhaustive list of the tools available to public buyers which allow them to include environmental requirements. These can be used to directly encourage the purchase of electric vehicles or charging stations and could have the effect of indirectly encouraging the purchase of domestically produced products.

1. Include technical specifications for sustainable development in calls for tenders, whether or not based on recognized certifications.²⁰ As such, as part of a call for tenders for the replacement of vehicles, a public purchaser could require that these vehicles be electric. The invitation to tender could also specify a more environmentally friendly type of material in the design of vehicles, batteries, terminals, etc. The technical specification may relate to

²⁰ Although the public purchaser cannot require a supplier to obtain a specific certification, they may refer to a certification in order to clarify the technical specifications that are required. They can also be inspired by it and select the technical specifications that best illustrate the state of the current offer.

the production chain and provide for the use of renewable energy for certain percentage of inputs or of certain products in particular. The technical specification can also cover the entire life cycle of the product, for example, by including requirements for recycling end-of-life products. The specification may also require that the products be subject to a carbon market. Given the highly technical nature of these specifications, governments should develop an accounting system that allows for the proper evaluation of long-term costs.²¹

2. Require that contracts contain performance clauses that reduce the impact on the environmental. This tool is one of the most interesting in terms of the electrification of transportation as it can target all sectors, and thereby encourage the sector of electric vehicles and charging stations. For example, a public purchaser could require that the contract be performed by deliveries made by means of electric vehicles. For example, to win a contract for food supplies to schools, hospitals, daycares or government departments, the supplier would have to be able to demonstrate that the delivery will be made using electric vehicles. Public buyers could, follow the example of other European countries, and provide for the addition of bonuses in the event of compliance with these requirements and of penalties in the event of failure to comply with a contractual clause.
3. Evaluating the quality of bids through award criteria related to sustainable development, while allowing to pay 10% more in order to achieve this result. When a public purchaser considers that the state of the market does not allow the imposition of detailed technical specifications, as this would risk reducing competition and producing an unsuccessful call for tenders, he can resort to a common tool for public procurement: quality assessment. By adding award criteria relating to environmental protection, the public purchaser indicates to industries that they do not have to meet environmental standards but that those that do achieve them may be given preference. The public purchaser may even pay up to 10% more to favor industries that are more environmentally friendly.

²¹ This is often a major obstacle to green purchasing for public buyers: F. Testa, E Annunziata and M Frey, "Drawbacks and opportunity of green public procurement: An effective tool for sustainable production" (2016) 112 *Journal of Cleaner Production* 1893-900. Vidal Rosario and Nuria Pantoja have developed a method for evaluating projects according to requirements (technical specifications, award criteria, etc.) and the cost related to the product life cycle: "Method bases on life cycle assessment and TOPSIS to integrate environmental award criteria into green public procurement "(2018) 44 *Journal of sustainable cities and society* 464-474.

4. Public buyers can impose a principle of non-regression, so that if a call for tenders includes sustainable development criteria, the next call cannot be less demanding.

Public buyers have several tools at their disposal for green public procurement. These tools can be used individually, at the choice of the public purchaser, or they can also be combined in the context of a call for tenders. For example, it would be possible for a market requiring glass to offer a preferential margin of up to 10% for suppliers able to demonstrate the use of a wastewater treatment system. It would also be possible for the same market to additionally require, as a technical specification, that glass be produced from recyclable energy. In the latter case, only glass suppliers using recyclable energy will be selected and a preferential margin will be granted to suppliers treating their wastewater.

The Impact on the Electrification of transportation in Canada when Taking Better Consideration of the Environment

If public buyers were required to take into account the environmental impact of their purchases, or if at the very least, governments strongly encouraged their entities to do so, it would certainly have the effect of benefiting the manufacturing of the electrification of transportation industry.

For example, public buyers could be required, where possible, to renew the vehicle fleet with electric cars, trucks or buses. Such a measure would have the effect of increasing the demand for electric vehicles and charging stations.

With a view to preserving the environment and natural resources, public buyers of electric vehicles and charging stations should be encouraged to take into account the complete life cycle of a product, taking into account, for example, the impacts of the production of inputs into the finished product (and most importantly, the extraction of minerals). In doing so, companies manufacturing environmentally friendly products, using renewable energy or following strict specifications for the treatment of waste and wastewater, could be favored. Clearly, companies using renewable energy would be one step ahead. Measures targeting sectors not necessarily linked to the production of electric vehicles or charging stations could nevertheless also benefit the transport

electrification sector. For example, public buyers could demand that the delivery of tender products be made by electric vehicles, or that the supplier using this type of transport be given priority in the quality assessment.

These measures would obviously respond to the urgent need for action to ensure that Canada meets its greenhouse gas reduction targets, but would also, very likely, have the effect of benefiting businesses in the sector in a number of areas. That of the electrification of transportation is certainly no exception.