



Harmonized Sales Taxes & Fixed Price Contracts: Transitional Issues October 2009

The Issue

Both the British Columbia and Ontario Provincial Governments have announced their intention to harmonize their existing Provincial Sales Tax (PST) with the 5% federal Goods and Services Tax (GST) to create a single, value-added Harmonized Sales Tax (HST) effective **July 1, 2010**. In the case of B.C., a 12% HST will replace the current 7% PST. In Ontario, a 13% HST will replace the current 8% PST.

It is expected that both the new B.C. and Ontario harmonized sales taxes will generally use the same rules and tax base as the current GST (see *Canada-B.C. Comprehensive Integrated Tax Co-ordination Agreement* at www.gov.bc.ca/hst/Documents/HST_MOA.pdf and *Canada-Ontario Comprehensive Integrated Tax Co-ordination Agreement* www.rev.gov.on.ca/english/agreements/moa_cita.html.)

As a result, in one aspect, the matter might simply be treated as an increase in the current GST in B.C. from 5% to 12% and in Ontario from 5% to 13% effective July 1, 2010. However, there is some concern that in the absence of clear statements as to the intended scope and operation of the new HST, and whether in fact the transition will proceed as announced, no assumptions can be made.

The Transitional Problem

How should bidders be instructed to bid fixed price construction contracts closing *prior* to the announced effective date but extending beyond that date? (i.e. a “transitional” project)

- a. How should the GST and HST be treated?
- b. What about the PST? How should it be treated by bidders?

The Canadian Construction Association (CCA) has been asked by its members and the major federal government contracting authorities to provide recommendations for dealing with these “transitional” projects. When the GST was first introduced in 1991, CCA was instrumental in bringing about the bidding practices for that transition.

Recommended Approach

DO NOT HAVE GST OR HST INCLUDED IN BID PRICES.

In all cases, bidders should be told to submit bid prices exclusive of any Value Added Taxes, (i.e. GST or HST), as is the current recommended industry practice; AND

DO NOT ASK BIDDERS TO IDENTIFY THE AMOUNT OF GST OR HST THAT APPLIES TO THEIR BID PRICE.

Some Bid Forms, including CCDC, ask bidders to indicate the amount of GST that applies to their bid price. For transitional projects this could lead to unnecessary confusion, especially given the different timing rules that apply to progress payments and holdbacks. For information on these rules see the GST/HST Memoranda Series, Section 19.1 Real Property and the GST/HST at: www.cra-arc.gc.ca/E/pub/gm/19-1/19-1-e.pdf (see pages 18–21); AND

HAVE CLEAR INSTRUCTIONS IN THE BID DOCUMENTS DIRECTING BIDDERS TO BID BASED UPON THE TRANSITION TO HST OCCURRING AS ANNOUNCED.

This eliminates the need to seek a credit since any cost savings arising from the move away from a PST to the HST will have been factored into the bid prices as part of the normal competitive bid process. Should the transition not occur, the Contractor would then be entitled under the CCDC contract language to recover the additional costs it incurred due to the transition to the harmonized HST and the elimination of the PST not occurring as announced. This option is preferred by CCA since it avoids having to deal with credits for the elimination of the PST and assumes the transition will occur.

This would also appear to be preferred by those that read the provisions in GC 10.1.1 in CCDC standard contracts as intending that tax changes announced or known to bidders prior to the time of bid closing are in fact taxes that are “in effect at the time of bid closing” even if not applicable until a future date.

ALTERNATE (LESS PREFERRED) OPTION: Direct bidders to bid assuming **no change in the current PST** for the life of the project and seek a credit for any cost savings due to the change in applicable taxes, (i.e. the elimination of the PST), should the transition to a new HST occur as announced. Owners should not ask for this credit to be identified at the time of bidding.

It is important to realize here that the credit the Owner is entitled to under the CCDC standard language is NOT the PST cost component that was included in the Contract /Bid Price but any savings in costs to the Contractor due to the elimination of the PST.

This option would appear to be preferred by those that have some doubt as to whether the actual transition to a harmonized HST will occur or that it will operate in the same manner and scope as the current GST and who view the Budget announcement simply as a proposal.

Some Basic Facts and Considerations

Here are some statements of fact that are important to understand before considering possible options:

1. For owners/construction purchasers who are also GST/HST registrants, the move to a 12% or 13% HST will NOT increase construction costs. Most purchasers of construction in the non-residential construction industry are GST registrants and as such are entitled to a full GST input tax credit on all GST paid on their taxable inputs. It is expected that this will continue with the new HST in both B.C. and Ontario. As a result, the move to a 12% and 13% HST in B.C. and Ontario will NOT increase construction costs for GST/HST registrants. The one notable exception is the MASH sector. Municipalities, Academic Institutions, Schools and Hospitals typically are not GST registrants but are entitled to partial or full rebates of the GST they pay on their inputs. Where such MASH owners are entitled to partial rebates only, (i.e. hospitals, schools and universities), the move to a 12% or 13% HST from a 5% GST may increase the cost of construction.

2. Under Construction Supply and Install Contracts, contractors must not, when calculating the GST applicable to their selling price, exclude any amount that represents the PST they paid on their inputs.

Contractors may include the PST they paid on their materials in their prices to their customers. CRA bulletins make it clear that for the purposes of calculating the GST, contractors are not to exclude any portion from their prices that represents PST paid by them. The GST is calculated on the full selling price regardless of the PST content of that selling price. (see: GST/HST Technical Information Bulletin B-053 *Construction Supply and Installation Contracts* at www.cra-arc.gc.ca/E/pub/gm/b-053/b-053-e.html).

3. How do standard industry fixed price contracts deal with post-bid changes in applicable taxes? General Condition 10.1 of CCDC2 2008 states as follows:

“GC 10.1 TAXES AND DUTIES

10.1.1 The *Contract Price* shall include all taxes and customs duties in effect at the time of the bid closing except for *Value Added Taxes* payable by the *Owner* to the *Contractor* as stipulated in Article A-4 of the Agreement – CONTRACT PRICE.

10.1.2 Any increase or decrease in costs to the *Contractor* due to changes in such included taxes and duties after the time of the bid closing shall increase or decrease the *Contract Price* accordingly.”

Note that GC 10.1.1 says that the Contract Price should include all taxes in effect at the time of the bid closing. If a new tax or tax change is announced prior to the bid closing time but is not applicable until after the bid closing time, is it a tax that is “in effect” at the time of bid closing? While arguments can perhaps be made either way, it is nonetheless important that this is clarified in the Bid Documents.

Note that the “extra” or credit” contemplated by GC 10.1.2 is the amount of any increase or decrease in costs to the Contractor due to post-bid changes in taxes and not the amount of PST content in the Contract Price.