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Public Sector Procurement Law Newsletter May 2014

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Court deals with pre-determination of compliance with tender

In *Newfoundland and Labrador v. Marine Contractors Ltd.*, [2014] NLTD(G) 21, the Newfoundland and Labrador Supreme Court (Court) considered an application by the Crown for a declaration that a bid was compliant with the specifications of a tender, prior to awarding the contract. The tender call was issued in regards to a municipal sewage system upgrade, Marine Contractors Ltd. (Marine) had the lowest bid. The next lowest bidder, Cougar Engineering and Construction (Cougar), argued that Marine failed to meet the terms of the tender call since compliance meant following the tender specifications. Marine had submitted the form set out in the original tender documents, by mistake, rather than using the form set out in Addendum No. 1. If Marine's bid was compliant, it would be awarded the contract. However, if the bid was not compliant, then Cougar would be awarded the contract as the second lowest bidder.

The Court had to consider two issues: "First, was the bid responsive to the requirements of the

tender? Second, was an incorrect form actually used, and if so, does it lead to non-compliance?"

Cougar argued that strict compliance with the terms of the tender call was required by referring to clause 5 of the Instructions to Bidders which stated: "Tenders not submitted on the Tender Form provided will not be considered." The Court disagreed. The test for compliance in the tendering process is "substantial" rather than strict compliance.

The Court considered the law of tendering. A tender call raises the concept of two separate contracts: Contract A and Contract B. Contract A is formed when a bidder submits a bid in response to a call for tenders, which is compliant with the specifications. If the bid is not compliant, then Contract A is not formed in respect to that bidder and must be rejected. Contract B is the contract that is entered into with the successful bidder.

The Court held that Marine's bid was compliant and eligible for acceptance. The Court examined several authorities where bids that were found to be non-compliant had deficiencies in a substantive requirement of the tender. This was not the case with Marine's bid. The form in Addendum No. 1 was the same as the original tender form except for numbering changes. "[Changes were] made for the purposes of clarification, and not for changing the information to which bidders were required to respond." The Court applied the maxim of "de minimus". Since there were no substantive changes to the form, the Court found that Marine's submission was fully responsive to the tender. It was not appropriate to reject a tender for a mere technical error.

"The use of the form is important because it ensures fairness among all of the bidders when bids are evaluated...It is not to be disregarded. However, the form must serve the process. The process must not be a slave to the form." (emphasis added)

In determining that the bid was compliant, the Court considered whether the error gave an

advantage to Marine over other bidders. The Court stated that Marine had no bad faith or intent to gain an advantage and there was no prejudice to any party, including Cougar.

This decision affirms that bidders must comply with the form stipulated by the tender specifications. **However, an overly formalistic approach to compliance resulting in a rejection of a bid for technical errors would undermine the credibility and integrity of the tendering process.**

The process of the Crown obtaining a pre-determination is very interesting and may be followed by other public bodies to avoid claims for damages.

Public agency decision overturned for failure to follow its own contracting policies

Rapiscan Systems Inc. v. Canada (Attorney General), 2014 FC 68, involves an Application by Rapiscan Systems Inc. (Rapiscan) for judicial review of a procurement decision by the Canadian Air Transport Security Authority (CATSA). CATSA is a statutory body with a mandate that included screening airline passengers and their carry-on and checked baggage. CATSA was also responsible for authorizing contracting with screening companies and for procuring screening equipment. That process was conducted by the CATSA Board of Directors rather than under the Treasury Board contracting policy.

Since its creation in 2002, CATSA has purchased baggage screening equipment exclusively from Smiths Detection (Smiths). A procurement process was implemented after the Auditor General criticized these sole-sourcing contracting practices. In 2009, CATSA awarded Smiths a \$30 million contract for replacement of its previously

supplied screeners through a closed, non-competitive sole-source process despite the fact that Rapiscan's equipment was significantly cheaper. CATSA believed that Rapiscan's equipment achieved inferior detection performance. In 2010, an internal briefing note indicated that Rapiscan's equipment did not meet the minimum performance requirements, and eliminated Rapiscan from the procurement process.

Rapiscan sought an Order declaring CATSA's decision unlawful and unfair, and an Order directing it to refresh its procurement process in respect of the equipment for 2012 through 2015 in compliance with its statutory obligations and contracting procedures, so as to allow Rapiscan and other suppliers a fair and equal opportunity to supply the equipment.

The issues in this case pertaining to good governance arise from circumstances of CATSA's Board being misled by its management's advice. The Board was unaware that it had authorized an award of a contract that resulted from an unfair and non-competitive procurement process. Given its mandate and policies, it would seem unlikely that CATSA's Board would have authorized a contract had the proper information been presented.

The Court found that managers at CATSA "*misled*" the Board of Directors about key details of the bids, which in turn resulted in an unfair contract. The process was "*concocted*" and "*derogated drastically*" from CATSA's contracting procedures. Therefore the Board was unable to exercise its oversight function.

For example, the Board was wrongly informed that Rapiscan's equipment did not meet the requirements, so the Board therefore never saw that their equipment was priced much lower than Smiths'. The Court also explained that CATSA knowingly "*induced*" Rapiscan to participate in a process which it had no chance of even being considered so that "*the process had the appearance that all industry leaders had participated in a competitive procurement when*

management knew in advance that Rapiscan would be eliminated."

CATSA's decision did not meet the standards of legality, reasonableness and fairness required to achieve the overall objective of good governance, primarily due to a failure to consider relevant factors. In the Court's view, the Board's decision is procedurally illegal for its failure to consider relevant factors, whether intentional or not. On this basis, it was held that the procurement decision should be set aside or declared unlawful.

The Court condemned the entire process, writing, "*It is a matter of importance to the public if a governmental decision-making body is misled or misinformed by its staff on a significant factor of group of factors likely affecting the outcome in a procurement process.*" This case highlights the distinction between a procurement process that is fair and competitive and one with a mere surface illusion of legitimacy. Finally, it is very concerning to see a public agency behave in such a way, especially given that CATSA is responsible for spending hundreds of millions of dollars per year on screening services which are paid for by passenger fees.

Court confirms strict compliance with tender requirements

In *Pomerleau Inc. v. Newfoundland and Labrador*, 2014 NLTD(G) 19, the provincial government (the Government) issued a call for tender for the completion of a new police training campus in St. John's. The tender called for bids on a stipulated price contract to construct a police campus building and included a detailed specification for the elevator maintenance and servicing in the building. The specific details of the future monthly costs were to be included in Appendix D of the tender

package. The tender documents issued by the Government included requirements that: the tender form was to be “*completed in its entirety*” and stated that the Government reserved the right to reject “*incomplete tenders*”.

Pomerleau Inc. (Pomerleau) submitted the lowest bid for the overall construction including the future monthly elevator costs but failed to provide the detailed breakdown of the monthly elevator costs as required in “Appendix D”. Pomerleau’s bid was disqualified by the Government as being incomplete and thus non-compliant with the tender call.

The contract was ultimately awarded to another bidder, Olympic Construction Limited (Olympic), despite the fact that Olympic’s bid was higher than Pomerleau’s. Pomerleau sued the government for breach of contract and asserted that its inadvertent failure to complete the form was insufficient to justify the disqualification, as their omission of specific details had no effect on the “total tender amount” by which the contract was to be evaluated. Pomerleau had included a “present worth” figure as to the elevator contract, from which they stated the Government could have easily determined the monthly price through reverse calculation.

In addition, Pomerleau argued the omission, as related to a unit price for a small, subordinate part of the overall contract, was not a material part of the tender. Pomerleau therefore submitted that it had been substantially compliant with the tender call and that the Government was bound to award it the bid as the lowest bidder, and had not acted in good faith.

The Newfoundland and Labrador Supreme Court (the Court) disagreed with Pomerleau and held that the government was not treating Pomerleau unfairly and was within its rights to reject the bid. **The tender documents had not included “a discretion clause” whereby the government was able to waive any irregularity or accept an incomplete tender.**

As such, the Court determined that the applicable standard was strict compliance, not substantial compliance. The elevator maintenance and service contract was part of the tender, and the monthly price required to be set out in Appendix “D” had a purpose. Government practice allowed for the extension of a unit price if a simple mathematical error was made. However, without the information required by Appendix “D”, it would not have been able to do a reverse calculation of the extended present worth price to determine a unit price. Furthermore, it was accepted that it was not the practice of the Government to do such reverse calculations.

There was no implied contract term requiring or permitting such a reverse calculation, and to do so would have been a breach of their duty of fairness to the other bidders. **The absence of the Appendix “D” information prevented the evaluation of the Total Tender Amount, constituted an incomplete and non-compliant tender, and was not a simple omission.**

This case emphasizes the importance of filling out a tender package in full, and in accordance with the instructions. Developers and contractors who are submitting bids in response to a call for tenders must establish whether a package requires strict compliance and what aspects of the package are material, important aspects of a contract not to be missed.

Court rejects non-compliant tender

In *Derek Penney Electrical Ltd. v. Newfoundland and Labrador, 2013 NLTD(G) 177*, the Supreme Court of Newfoundland and Labrador, Trial Division (the Court) considered an Application by Derek Penney Electrical Ltd. (Penney) for a declaration that its tender was compliant and improperly disqualified by the Respondent (the Government). The Government issued a tender

call for a lighting project. Penney, along with seven other contractors, submitted tenders.

Initially, all the bids were considered compliant and Penny's tender was the lowest price. However, on secondary review, it was discovered that six contractors, including Penney, had not enclosed certain material set out in the specifications, so they were found non-compliant, subsequently disqualified and the contract was awarded to the lowest compliant bidder.

Penny objected to the disqualification of its bid on a number of grounds. It argued that the proper test was substantial completion of the documents rather than strict compliance and its failure to include the material was a mere irregularity. Penny explained it failed to enclose the material because there were no spaces provided on the tender form, which stated that additional clauses or qualifications would cause rejection. In addition, the tender envelopes did not remind bidders to include the material, and the tender stated bidders could be asked to submit similar material within seven days. The Government argued the material was mandatory and there was no excuse not to include it.

In finding for the Government, the Judge found Penney's arguments "unconvincing" and dismissed the Application. Penney's explanations for failing to enclose the material indicated it was aware of the requirement to include the information, but chose not to based on its mistaken impression the Government was obliged to include space for it and a reminder.

The specification was clear and unambiguous that the material was to be included and the instructions stated incomplete tenders would be rejected. A review of the tender documents indicated additional space was not necessary. The Government set mandatory requirements for the completion of the tender call and entered into Contract A with the compliant bidders. **The Government was entitled to rely on bidders to read documents thoroughly and to comply with instructions, and also gave them the right to request similar information later.**

It would have been in breach of its duty of fairness to the other compliant bidders to accept a non-compliant bid such as that submitted by Penney. The Government was justified, and indeed required, pursuant to its duty of fairness to all bidders to disqualify Penney's bid as it was non-compliant. There was no Contract A formed with Penney giving rise to the duty of fairness in the public tendering process.

This case reinforces the principle of strict compliance with the tender requirements.

Court confirms damages for breach of duty of good faith

Marine Atlantic Inc. (MAI) is a Federal Crown Corporation which provides cargo and passenger service between the island of Newfoundland and parts of the coast of Labrador. The Labrador services were provided by MAI through the hire of vessels under time charter party agreements (Charters) with various owners of such vessels.

Topsail Shipping Co. Ltd. v. Marine Atlantic Inc., 2013 NLTD(G) 163, dealt with an application by the defendant, MAI, by way of summary trial for an order dismissing the plaintiff, Topsail Shipping Co. Ltd.'s (Topsail) action. MAI had negotiated with various shipping companies to provide ferry service between Newfoundland and Labrador. All of the applicants, including Topsail, were either currently providing the service or had provided the service in the past.

The Applicants believed that price was the only relevant consideration as all the applicant vessels had been approved to provide the service. The contract was offered to another company although Topsail's price was the lowest. Topsail argued that the parties were involved in a tendering process and that MAI breached its duty of fairness by permitting another applicant to amend its application after the close of bidding and by engaging in a vessel comparison.

Topsail sought damages for the loss of the contract and for losses that resulted from delaying the sale of its vessel so that it could be available if it was awarded the contract. MAI argued that the process was merely a Request for Proposals and there was no genuine issue for trial concerning liability.

MAI's Application for an Order dismissing Topsail's Action was dismissed. It was clear to the Newfoundland and Labrador Supreme Court (the Court) that the parties had intended that a contract would be entered into with the successful applicant so long as MAI continued to operate the ferry service at issue. It was also clear that the contract terms would be comparable to the terms set out in previous agreements between MAI and the applicants.

The parties were involved in a contract A/B scenario. MAI therefore owed a duty of fairness to the Topsail. This duty was breached when MAI permitted a competing applicant to amend its application after bidding closed and by engaging in a vessel comparison without telling the plaintiff that non-price factors would be considered.

The Court therefore concluded that Topsail was entitled to damages for the loss of the contract. However, Topsail was not entitled to both damages for the loss of the contract and for the loss of the sale of the vessel. Had the plaintiff been awarded the contract, the vessel would not have been available for sale.

Duty of good faith in the bidding process upheld

Olympic Construction Ltd. v. Eastern Regional Integrated Health Authority, 2014 NLCA 20, deals with an appeal by Eastern Regional Integrated Health Authority (Eastern) from a trial judgment finding it liable to Olympic Construction Ltd. (Olympic) for breaching their tender contract for the construction of an extension to a hospital, and from the amount of damages awarded.

In 2009 Eastern issued a call for tenders for an extension project where bidders were instructed to attend a mandatory site assessment meeting. They were notified that tenders would not be accepted from contractors who failed to attend the site assessment. When only one contractor, Redwood Construction Limited (Redwood), attended the scheduled site meeting, Eastern became concerned that it had not assured a competitive bid process. Eastern contacted two other contractors, including Olympic, and suggested they submit a bid on the project. Before Olympic submitted a bid, it requested assurances from Eastern that an extension to the tender would be granted and that they would qualify as a bidder. In order to accommodate the interest of the two new bidders, Eastern extended the closing date and scheduled another site meeting. The second site meeting was conducted in the same manner and covered substantially the same issues as the first meeting did.

Following this meeting, only Olympic and Redwood submitted bids. Olympic's bid was \$20,000 lower than Redwood's. Redwood wrote to Eastern five days after bidding closed, taking the position Olympic's bid should be disqualified because it did not attend the first mandatory site meeting. Eastern subsequently advised Olympic that its tender was disqualified and that the tender had been awarded to Redwood, the second lowest bidder.

As a result of the disqualification, Olympic launched the present action. The Court found that because Eastern had approached Olympic after the first site meeting, suggesting that Olympic bid on the project, Eastern had intended the second site meeting to be equivalent to the first site meeting in terms of giving contractors the right to bid on the project. There was no other reason for Eastern to have conducted the second site meeting.

The Court found Olympic would not have made its bid had it not known it was a compliant bidder. Eastern would have awarded the contract to Olympic but for Redwood's complaint. The Court awarded Olympic damages for lost profits and prejudgment interest. The

Court based the damage award on the profit margin Olympic expected of 13% and on its readily-available staff and familiarity with the project, having built the hospital to which the extension would be added.

Eastern appealed, and the Newfoundland and Labrador Court of Appeal (Court of Appeal) allowed the appeal in part, finding that because Eastern was liable to Olympic for breaching its contract, the damage award was proper, but it reduced the interest. The Court of Appeal upheld the Trial Judge's Decision and found that because of the changes Eastern made to the tender call during the process, which involved scheduling a second site meeting, and because of the ambiguity these changes created, the Trial Judge was entitled to look to extrinsic evidence respecting the genesis of the transaction, the factual matrix surrounding the agreement, and the purpose and commercial context that surrounded Olympic's tender. Had the tender call not been changed, Olympic would not have bid on the contract, knowing it could not be a compliant bidder after it missed the first site meeting. Eastern breached its implied duty of fairness to Olympic by inducing it to bid, accepting its bid, then rejecting it at the behest of Redwood despite the fact Olympic's was the lowest bid.

This case confirms that the current state of the law permits Courts in certain situations to receive evidence from outside of the contract documents in order to assist in the interpretation of a contract or written document. Because the tender documents in this case were amended and were somewhat ambiguous, the Trial Judge was justified in considering evidence respecting the "*genesis of the transaction*", the "*evidence of the factual matrix surrounding the making of the agreement*" and the "*purpose and commercial context*" which surrounded Olympic's contract with Eastern, in addition to the tender documents themselves.

Court orders disclosure of financial information

In *Inzola Group Ltd. v. Brampton (City)*, 2014 ONSC 1301, the Ontario Superior Court of Justice (the Court) emphasized the importance of the public interest in openness and transparency with regards to public development projects. The Court ordered the City of Brampton to release documents relating to an alleged unfair winning bid.

In this case, the City of Brampton (the City) issued a Request for Proposals (RFP) for the construction of key public buildings, including new municipal offices and a public library in connection with the \$500 million renewal of Brampton's downtown core. Three parties, including Inzola Group Ltd. (Inzola) and Dominus Capital Corporation (Dominus) delivered submissions in response to the RFP in February of 2010. Dominus was the successful bidder and its Proposal was accepted by the City. Inzola alleges serious misconduct on the part of the City in dealing with these submissions.

Inzola alleges the bidding process was fixed and that Dominus was targeted to be selected regardless of what proposal Inzola submitted. Inzola alleges political interference in the selection, and that City staff did not follow basic principles of fairness and openness in considering the proposals. Inzola's submitted cost for the first phase was \$105 million (\$64 million for construction and \$42 million for financing), compared with Dominus's winning bid of \$205 million (\$94 million for construction and \$111 for financing). Inzola's position was that its Proposal was superior to and less expensive than the other Proposals and had they been assessed properly its proposal would have been selected. Inzola therefore claimed \$27.5 million in damages and \$1 million in punitive damages from the City of Brampton.

As part of the requirements of the RFP, the City required the execution of a confidentiality agreement by each bidder. Inzola refused to sign this confidentiality agreement, and Inzola alleges that this was the City's pretext for declining to give effect to Inzola's bid. Inzola's position is that the confidentiality agreement itself was improper as the bidding process should have been open and transparent. The confidentiality agreement would have permitted the City to keep all of the discussions and submissions from each bidder secret, which is contrary to the public interest.

Dominus sought an Order protecting the confidentiality of its financial information and relevant documents and an order limiting the disclosure of that material to Inzola's counsel as well as sealing the court file in relation to the material. Inzola's position was that this request for a protective Order should be denied in its entirety. In making its decision to release the documents, the Court stated that the documents relating to Dominus' financial position are not particularly sensitive and do not appear to be overly confidential among competitors in the construction industry. In the Court's view, the public had a strong interest in ensuring that the conduct of this case was open and transparent, and given there are allegations of serious impropriety, favouritism and political influence it is important that the public ultimately have access to all of the evidence that may bear on the matters in dispute. No hearing date has been scheduled for Inzola's lawsuit.

The decision underscores the issue of open and transparent bidding.

Court restricts disclosure of significant documentary evidence

In *1117322 Ontario Inc. (c.o.b. TELECORE) v. Canada (Attorney General) et al.*, [2014] ONSC 407, the Ontario Superior Court of Justice (the Court) considered 1117322 Ontario Inc.'s (Telecore) request for disclosure and leave to amend the Amended Statement of Claim for an action regarding governmental contracts. The action arose out of a tendering process for a contract to supply the Department of National Defence (DND) with antennae components.

On March 6, 2007, Public Works and Government Services Canada (PWGSC) issued the first Request for Proposal (RFP1) for the delivery of three items in various quantities to the DND. Telecore submitted a bid to supply the antennae components. However, a contract for one item was awarded to another bidder, which had submitted the lowest bid for that item. A second Request for Proposals (RFP2) was issued for the remaining items and Telecore was awarded the contract. The contract with Telecore was eventually terminated by DND on or about July 25, 2008.

Two more related Proposals were later issued by DND and PWGSC. On August 7, 2008, a Notice of Proposed Procurement ("RFP3") was issued by Defence Construction Canada (DCC), a Crown corporation, for the supply of materials and equipment necessary for the installation of a GPS system. The Court noted that Telecore had not added DCC as a Defendant, and any claim against the current Defendants relating to RFP3 was untenable since they did not play a role in the proposed additional cause of action.

On July 21, 2011, PWGSC issued a request for proposals (RFP4) for the delivery of various quantities of intrinsically safe NiMH batteries

for use in portable radios to the Canada Border Services Agency (CBSA). Telecore sought to amend its claim with regards to RFP4 by arguing that the Defendants improperly determined that its bid was non-compliant with the requirements of the tender. The Defendants claimed that this was an unrelated cause of action. Moreover, RFP4 involved a contract for the CBSA, not the DND. However, the Court decided to allow the amendments relating to RFP4.

Telecore's Amended Statement of Claim asserted that the Defendants were in breach of contract, had been unfair in the contract-award bidding process, made negligent misrepresentations with respect to the technical documentation relating to the contract, and violated sections 1, 7, 24(1), 32(1)(a) and 52 of its rights under the *Canadian Charter of Rights and Freedoms* (*Charter*). The Court had reservations about the validity of the *Charter* claims, however, it decided not to review whether they should have been allowed when the Statement of Claim was first amended.

In determining whether disclosure should be granted to Telecore, the Court considered the relevancy test: whether the requested disclosure is "*relevant to any matter in issue in an action.*" It found that most of the documents requested by Telecore did not meet this requirement. Telecore sought disclosure of "*[a]ll bid details and communications to and from the bidders with respect to RFP1, RFP2, RFP3 and RFP4, including phone records and emails.*" The Court stated that the "*...details of the other bids, communications with other bidders, and contact information for other bidders have no relevance to any matter at issue in this action.*" Moreover, "*...the requests [were] overly broad and contrary to the principles of proportionality.*"

Furthermore, Telecore had requested an order directing Primus Canada (Primus) and Rogers

Communications (Rogers) to issue time and date stamps for all calls to and from three phone numbers associated with Telecore. The Court found that the information requested would give Telecore an evidentiary basis to quantify some of its damages with respect to RFP1 and RFP2, for the time wasted in dealing with the contract awarded to Telecore which was ultimately terminated. Heads of damages include: breach of contract, *quantum meruit*, unjust enrichment, punitive damages, and damages in negligence and negligent misrepresentation for providing incomplete technical documentation. The Court ordered Primus and Rogers to provide time and date stamps.

Telecore also requested reasons for cancellation of the contract. The Court ordered such documents to be disclosed by the Defendants, subject to any claim of privilege. The Defendants must also serve all documents relating to the re-issuance of RFP2 subsequent to the cancellation of the contract with Telecore, and (if applicable) a copy of the winning bid(s) for any of the items covered by the terminated contract.

Finally, the Court ordered disclosure of documents relating to RFP4, subject to any claim of privilege, by the Defendants.

The Court found these requests to be "*narrow and proportional*", as well as relevant to the issues of liability and damages.

This Decision demonstrates the complexity of tender litigation, and also reinforces the requirements for disclosure in claims of this nature.

— KC LLP —

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