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Court finds no obligation to investigate bids prior to the award of Contract B

In *Penney v. Eastern Region Integrated Health Authority,* (2016 N.J. No. 270) the court determined that unless there is an express commitment to do so in a tender, procurement entities are not required to investigate or ensure that bidders are actually able to comply with what is set out in a bid in order to award Contract B.

The Eastern Region Integrated Health Authority, (Eastern) issued an invitation to tender regarding a contract for the provision of courier, freight and linen transportation services. Parties submitting bids were required to provide their own vehicles, which were required to meet the specifications set out in the tender. After the tender was closed, Eastern conducted an evaluation of the bids which had been submitted and determined that all bids were compliant. When Eastern evaluated the bids no

investigation was done into the accuracy of what was bid. The evaluation consisted of an examination of the bid documents only.

Eastern decided to award the tender to R.M.S. Pope Inc. (R.M.S Pope). However, when work began on the contract it was brought to the plaintiffs' attention that R.M.S Pope was not using the proper vehicles that had been required by the tender. The plaintiffs informed Eastern which investigated and agreed that the vehicles did not meet the required specifications. Rather than cancel the contract Eastern decided to notify R.M.S Pope of the problem and told it to get the proper vehicles. R.M.S Pope eventually did change the vehicles to those which met the specifications required by the tender.

The plaintiffs were unhappy with this result and launched a court challenge. The plaintiffs' argument stemmed from the well-known Contract A/Contract B analysis developed by the Supreme Court of Canada in *Ontario v. Ron Engineering & Construction (Eastern) Ltd*., (1981 1 S.C.R. 111) where the Supreme Court held that an invitation to tender constitutes an offer to potential bidders and that Contract A is established when a bidder submits a compliant tender in response to that offer. Submission of a compliant tender amounts to acceptance of the offer. Contract B is the actual contract for the work to be done and is entered into once a potential supplier's bid has been chosen as the winner. The plaintiffs argued that R.M.S Pope should not have been awarded Contract B because R.M.S Pope had submitted a non-compliant bid and as a result there had never been a valid Contract A. The plaintiffs argued that the point was clearly proven by the undisputed fact that R.M.S Pope did not actually use the correct vehicles. The plaintiffs also argued that there was a duty on Eastern to investigate and determine whether the proposed vehicles met the specifications, which was not done. The plaintiffs' argument was essentially that a subsequent discovery of information, after the bid evaluation was completed and Contract B was awarded, would retroactively make the bid of R.M.S. Pope non-compliant.

The court noted that R.M.S Pope's bid was compliant on its face and that there was no way Eastern could have known that the bid was non-compliant based on a review of the documents. The court held that the nature of a bid represents a commitment to comply with what was bid and once R.M.S. Pope's bid was accepted and the parties entered into Contract B, R.M.S. Pope was obliged to provide vehicles which met the specifications in the tender and Eastern was entitled to insist on the use of such vehicles. The court also held that this was what happened in this case. Once Eastern became aware of the deficiencies in R.M.S. Pope's vehicles it insisted on compliance and R.M.S. Pope conformed by providing the correct vehicles.

The court held that when it is alleged that a bidder did not comply with the bid it submitted a court should conduct a review regarding compliance with Contract A, on the basis of the information reviewed or which ought to have been reviewed during the bid evaluation process. Information subsequently discovered and not known at the time of the bid evaluation is not relevant in determining if the bid was compliant.

The court felt that this case established that in the absence of an express commitment to do so clearly set forth in a tender, there is no obligation on an owner to investigate bids prior to the award of Contract B. In this case there was no such express commitment and as such, there was no obligation on Eastern to investigate R.M.S. Pope's vehicles as part of the bid evaluation process prior to acceptance of its bid and the award of Contract B. Any obligation Eastern owed to the plaintiffs as a result of submitting a compliant bid and entering into Contract A did not survive the creation of Contract B.

The court concluded that the bid of R.M.S. Pope was compliant with the mandatory requirements of the tender. The bid represented a commitment to provide vehicles meeting the specifications set forth in the tender and constituted a valid Contract A between R.M.S. Pope and Eastern. Further, the terms and conditions of the tender did not impose an obligation on Eastern to verify any of

the contents of the bid of any bidder and did not impose an obligation on Eastern to inspect the vehicles intended to be used by any bidder, as part of the bid evaluation process.

This case stands for the principle that unless it is stated in the tender, there is no obligation on a bid evaluator to investigate the underlying ability of the bidder to meet the bid they put forth. However, a bidder will be bound to meet the bid they proposed, if they are chosen. ■

Court finds breach of confidence in province's use of confidential information in RFP

In *TDC Broadband Inc. v. Nova Scotia (Attorney General)*, (2016 N.S.J. No. 316), the court held that the Province of Nova Scotia had breached its obligation to maintain confidentiality over the information provided to it by TDC Broadband Inc. (TDC). The province misused the information by including it in its Request for Proposal (RFP) which was distributed to TDC's competitors. The court awarded $125,000 in damages to TDC as a result.

Ted, Dennis and Carter Cockerill are three brothers who developed a high-speed internet delivery system which functioned well in rural Nova Scotia. They demonstrated this system to members of the municipal government in the Region of Queens. The demonstration was successful and led to the participation of Ted, Dennis and Carter Cockerill in a government initiative known as the Caledonia project. In order to participate, the Cockerills incorporated TDC which received government funding to provide internet service in Caledonia that was comparable to urban delivery systems. TDC was a technical success in that its delivery system worked; however, it did not generate a significant income stream and fell into a perilous situation financially.

In May of 2006 the province put out an RFP to participate in a pilot project designed to provide high speed internet in the rural area of Cumberland County, Nova Scotia. An important component of the RFP was the sustainability of the bidders. This posed a problem for TDC because at that time it was unable to pay its bills. As a result, its bid was not well received despite the fact that it had the only proven model to provide internet in rural areas out of all the bidders. Seaside Communications was awarded the contract and the exclusive right to provide internet service in the pilot area. Without provincial funding TDC was forced to allow a trustee in bankruptcy to take over its affairs.

The dispute at issue in this case arose from the RFP for the pilot project provided by the province in 2006. TDC claimed that the RFP included significant confidential information taken from TDC's business proposals and technical specifications which it had confidentially provided to the province. TDC alleged that the province breached its obligation to keep TDC's information confidential and misused the information by providing it to TDC's competitors which caused TDC to go out of business.

The court held that the test for whether the province had breached its duty of confidence required an inquiry into three separate elements. Those elements included whether the information supplied had a quality of confidence about it, whether the information was communicated in confidence and in circumstances that imparted an obligation of confidence, and whether the province misused the information or used the information in an unauthorized manner.

The province argued that TDC's information did not have a quality of confidence about it because TDC used off the shelf technology which meant that there was nothing confidential about TDC's internet delivery system. However, the court held that just because the hardware was publically available did not protect the province if there was an intellectual component involved, such as where the inventor used their intellect to create the product. The court concluded that Dennis Cockerill had used his specific skills and knowledge to create the delivery system and thus the information was unique and had a quality of confidentiality about it.

Regarding whether the information was communicated in confidence, the court held

that despite the fact that at times TDC was required to provide information to people employed by the province, TDC always sought to ensure that its business and technical information remained confidential. The information was only disclosed when it was necessary for business reasons. One of the employees of the province who had received technical information from TDC was Mr. Backman who testified that he felt that TDC was a client of the province and its information was confidential. He also testified that he had resisted attempts by senior members of the province to solicit TDC's information. However, Norman Cook who was in charge of vetting applications for licences to make use of tower facilities which distribute wireless signals did pass on detailed technical information he had received from TDC when he vetted its application for a licence. While he passed the information along, Mr. Cook was careful to state that the information was confidential and proprietary. The court held that the information provided had at all times been communicated in confidence and in circumstances that imparted an obligation of confidence.

TDC argued that its information was improperly used in the RFP based on several similarities between the technical information TDC had provided to the province and the technical aspects of the province's RFP. The court agreed, holding that TDC's technical and business information was used by members of the province when preparing the RFP. The court also held that senior members of the provincial government who had access to TDC's information were aware that the information was confidential and that TDC had not granted permission for its use in the RFP. The court found that the province had breached its duty of confidence owed to TDC.

The court held that a mitigating factor regarding damages was that the province had not used the most valuable part of TDC's delivery system in the RFP, which was the way Dennis Cockerill assembled off the shelf parts and configured them to make them work. Also, the court held that the evidence showed that while the province had breached its duty of confidence, the information had not been used by the bid winner, Seaside Communications, or by other bidders. However, the court did feel that TDC's information had value and that it had something special which had been misused by the province. The court described the method of evaluating the economic loss suffered by TDC as the value a willing seller and a willing buyer would agree to for the cost of the information together with the right for the province to use the information in the RFP. The court held this amount was $125,000. The court also found that the conduct of the province was not causally connected to the bankruptcy of TDC which in the court's opinion would have happened regardless because TDC was unable to find new capital through investors or develop an income stream to maintain its operations.

This case upheld the duty placed on procurement entities to keep confidential information provided to them in strict confidence. ■

Bids containing errors may still be accepted if test of substantial compliance is met

In *R.J.G. Construction Ltd. v. Newfoundland and Labrador (Transportation and Works)*, (2016 N.J. No. 85) the Newfoundland and Labrador Supreme Court held that an acknowledgment of addendums by email did not amount to a material error and, as such, the tender had not been awarded improperly.

In November of 2013, the Government of Newfoundland and Labrador issued an invitation to tender for the construction of a new wharf. A number of companies responded to the tender call, including the plaintiff, R.J.G. Construction Limited (R.J.G.). The contract was eventually awarded to another bidder, B. & R. Enterprises Ltd. (B. & R.). However, R.J.G. claimed that B. & R. had not submitted a compliant bid and that the contract should have been awarded to R.J.G. as the lowest compliant bidder.

R.J.G.'s argument was based on a clause in the tender which stated that a failure to acknowledge receipt of addendums in the tender form would be considered an

incomplete tender. Five addendums were issued by the province revising various sections of the invitation to tender. Some simply extended the closing date of the tender while others added more substantive changes, including addendums which created additional costs for bidders and forced them to revise their bid price.

On December 9, 2013 the province received a tender from B. & R. which included an acknowledgment that it had received the first three addendums the province had made to the invitation to tender. B. & R. also sent an email on that same day to acknowledge a fourth addendum which had been issued that morning. On January 7, 2014 B. & R. sent another email which confirmed receipt of the fifth addendum the province had issued. When B. & R.'s tender was received by the government, on December 9, 2013, addendum number five had not been issued. However, neither B. & R.'s tender form nor its amendment submitted on January 13, 2014 included an acknowledgement that it had received addendum four or five. R.J.G. submitted its bid on January 13, 2014 with all addendums acknowledged.

Despite B. & R.'s failure to include an acknowledgement of addendums four and five on its tender form or in its amendment, the province found that both B. & R.'s and R.J.G.'s tenders were compliant. However, the tender of B. & R. was lower and the province awarded it the contract. R.J.G. subsequently challenged the award of the contract based on the assertion that B. & R.'s failure to acknowledge receipt of the addenda in its tender form was a material error which could not be overlooked. B. & R. relied on the wording in the instructions to bidders that a failure to acknowledge receipt of the addendums in the tender form would be considered an incomplete tender. The province argued that to find that B. &.R.'s bid was non-compliant would be to put form ahead of substance and that the failure to refer to all the addendums in the tender form was not a material error but rather a mere irregularity.

The court held that the legal test to decide if the error was material was the substantial compliance test. The test required an inquiry on an objective basis to determine whether the defect would have affected the price of the contract or the work to be done and the ability of the province to fairly determine whether the tender had been complied with. The court relied on *Cougar Engineering and Construction v. Newfoundland and Labrador*, (2015 NLCA 45) where it was found that that a bid should not to be rejected based on a mere irregularity. The court held that the applicant had not established that the error by B. & R. was material. The court noted that since the email acknowledgements also included substantial increases in the bid price it was clear that B. & R. was taking the increased costs associated with addendums four and five into account in its final bid. The court found no evidence that the government was or could have been misled by the informality of the use of emails to make these acknowledgements or that it was unfair to the other bidders. The court was satisfied that the acknowledgement by B. & R. of addendums four and five by email was a mere irregularity and as a result the claim was dismissed.

This case stands for the principle that a small error or irregularity will not cause a bid to be non-compliant if it would not mislead the evaluator, affect price or work done, or cause unfairness to the other bidders, and that substance governs form. ■

Court holds damages not recoverable unless complainant clearly would have been awarded tender

In *Graillen Holdings Inc. v. Orangeville (Town)*, (2016 O.J. No. 2915) the court refused to award damages despite finding that the only other bidder's tender was non-compliant. The court held that Graillen Holdings Inc. (Graillen) had not proven that if the other bid had been rejected the tender would have been awarded to it. Instead the court held that the town of Orangeville would more likely have cancelled the tender and issued a new, more specific tender.

Before 2010 Orangeville relied on Graillen and The Region of Huronia Environmental Services Ltd. (Rhoes), which were both owned by the same shareholder, to dispose of the town's human waste which is referred to as bio-solids. In 2010 the town of Orangeville issued a call for tenders regarding the collection and disposal of bio-solids from the town's water treatment centre. Rhoes submitted a response to the tender along with another company, Entec Waste Management Inc. (Entec), who submitted the only other response to the tender.

Around the same time as the tender in 2010 Orangeville negotiated with Graillen regarding the purchase of the property Graillen used for bio-solids storage. Orangeville agreed to buy the property for seven million dollars with a closing date of July 29, 2011. Importantly, the agreement of purchase and sale contained a termination clause which gave Orangeville the right to terminate the purchase if, after performing due diligence, the town felt that the purchase was unadvisable. The purchase of the land and the issuance of the tender became intertwined when Entec proposed, as part of its bid, a unique plan which through a process known as dewatering significantly reduced the size of bio-solids and thus reduced the area required to store bio-solids. If Orangeville pursued this method of waste management it would eliminate the need for off-site bio-solid storage during the winter months and there would be no need to purchase the Graillen property, which was primarily used as a waste storage facility.

The town decided to award the tender to Entec and as a result, it had no need for the Graillen storage facility located on the property that the town had agreed to purchase. On September 28, 2010, Orangeville terminated the agreement and requested the return of the two hundred and fifty thousand dollar deposit that had been paid. However, Graillen's lawyer refused to return the deposit because in his opinion the termination clause could only be used based on issues which arose from the property itself such as a problem with the title to the land.

The entire sequence of events led to two lawsuits. Rhoes and Graillen sued Orangeville claiming that the tender was improperly awarded to Entec and Orangeville counterclaimed against Graillen for the return of its deposit.

Rhoes proposed that the Entec bid was non-compliant because after the close of the tender Entec submitted additional documents to support its bid and to establish its qualifications. Rhoes submitted that the Entec bid had not included a signed copy of either the pre-bid health and safety checklist or the signed contractor safety agreement. In fact, Entec did not submit those documents until almost a year later. The court held that Rhoes was correct and that Entec had failed to properly comply with the terms of Contract A by not submitting the required documents and as a result its bid was non-compliant.

Regarding a remedy, Rhoes proposed that since it was the only other bidder and the only compliant bidder it should have been awarded the contract. While this might seem a common sense conclusion, the court did not agree that such a remedy was available to Rhoes. The court determined that the appropriate question to be answered was whether Rhoes had proven on a balance of probabilities that Orangeville would have awarded the tender to Rhoes, if the Entec bid had been disqualified. The court held that Rhoes had not met this burden. Instead the court found that the dewatering process proposed by Entec was so valuable to Orangeville, because it would save them money paying a contractor to haul sewage and also because it allowed the town to avoid spending $7 million to purchase the Graillen property, that rather than accept Rhoes' bid, Orangeville would have cancelled the tender and issued a new tender with a view to soliciting tenders which offered a dewatering component.

To succeed in recovering damages under Contract B, the plaintiffs were required to prove, on a balance of probabilities that, but for the improper acceptance of the non-compliant Entec bid, the plaintiffs would have been the successful bidders. The court held that it had not done so and ruled in favour of Orangeville. The court also awarded Orangeville two

hundred and fifty thousand dollars based on the counterclaim for its lost deposit. The court held that Graillen's lawyer's interpretation of the termination clause was incorrect and the language used in the termination clause was broad enough to provide the town discretion to terminate the agreement if it was advisable to do so, which could arise from any number of scenarios not just a problem with the land itself.

This case serves as a caution to bidders who wish to challenge the award of contracts in procurement processes. Complainants must ensure that they have actually lost potential profits before bringing an expensive court challenge. ■

Alberta Court of Appeal holds it is inappropriate to apportion damages for a breach of Contract A based on the losses of the winner of Contract B

In *Elan Construction Ltd. v. South Fish Creek Recreational Assn.*, (2016 A.J. No. 710) the Court of Appeal partially overturned the decision in *Elan Construction Limited v South Fish Creek Recreational Association* (2015 ABQB 330). In that case the trial judge ruled that despite winning the case Elan Construction Ltd. (Elan Construction) was not due any damages because it would have faced the same losses as Chandos Construction Ltd. (Chandos), the company who was inappropriately awarded the contract. The Court of Appeal held that it was a palpable and overriding error for the trial judge to assume that Elan Construction would have had the same losses as Chandos. As a result the Court of Appeal overturned the previous decision in part and awarded Elan Construction $572,868 in damages.

The case arose out of a call for tenders by the South Fish Creek Recreational Association (Fish Creek). Fish Creek had planned to build a major recreational centre in Calgary. It sought and received bids from potential contractors for the project and eventually awarded the contract to Chandos. Elan Construction argued that Fish Creek had breached Contract A by negotiating with another bidder during the bid evaluation process, as well as, evaluating the bids based on undisclosed criteria. At trial, Elan Construction successfully showed that Fish Creek had breached Contract A. However, when assessing damages the trial judge took into account that Chandos sustained heavy financial losses in its performance of Contract B. The trial judge was of the opinion that Elan Construction would have fared no better and limited the damages award based on the belief that Elan Construction would have incurred losses similar to those Chandos sustained.

The 2015 *Elan Construction Limited v South Fish Creek Recreational Association* Alberta Court of Queen's Bench decision was reviewed in the May 2016 KC LLP Public Sector Procurement Law Newsletter: "Court confirms the principle of good faith as a requirement in tendering".

Elan Construction appealed the award of damages and Fish Creek cross-appealed against the trial judge's decision that it had conducted the procurement process in an unfair manner.

On its cross-appeal, Fish Creek took the position that a privilege clause in the tender gave it the sole and unfettered discretion in regard to the evaluation process, which in its opinion meant it had the right to evaluate bids using whatever criteria it deemed appropriate.

The Court of Appeal rejected this argument holding that although the term sole and unfettered discretion gave Fish Creek considerable leeway when assessing bids it did not give Fish Creek the right to depart from the fundamental contents of the instructions to bidders which bidders relied on when composing their bids. The Court of Appeal held that this requirement not to depart from the fundamental contents of the instructions to bidders was necessary to maintain the integrity of the bidding process. Further, the Court of Appeal held that the right to evaluate whether or not a bidder met a bid requirement in an owner's sole and unfettered discretion did not provide Fish Creek the right to ignore, alter or delete bid criteria at its discretion. The Court of Appeal felt that the trial judge had not erred in holding that Fish Creek's evaluation of the bids was a departure from the reasonable expectations of the bidders which constituted a

breach of Contract A and it dismissed Fish Creek's cross appeal.

In its appeal of the damages award Elan Construction argued that there was no reason for the trial judge to have discounted its lost profit to zero. The Court of Appeal held that the trial judge had incorrectly discounted Elan Construction's damages on the basis that Elan Construction would have suffered the same losses as Chandos. The trial judge assumed Elan Construction would have faced the same losses as Chandos in regard to subcontractors who had defaulted, poor weather and design flaws. The Court of Appeal held that by awarding damages on the basis that the successful bidder lost money on the project, the trial judge had improperly placed the burden on Elan Construction to prove that it would not have suffered similar losses. According to the Court of Appeal, that burden was the responsibility of Fish Creek and in the Court of Appeal's opinion it had not provided sufficient evidence to meet that burden. The Court of Appeal held that the trial judge's reasoning was based on speculation and an improper reversal of the burden of proof.

Therefore, Elan Construction was awarded nearly the full amount of profit it expected to make on the project. The Court of Appeal did not award the full amount because there were two specific losses suffered by Chandos which would also have been suffered by Elan Construction because they related to a contractor both Elan Construction and Chandos had planned to use.

The Court of Appeal upheld the trial judge's decision on liability but modified the damages award, in order to provide Elan Construction a more accurate award of damages which did not provide for reductions based on Chandos' losses. This case makes it clear that a privilege clause, no matter how broad, cannot remove the requirement to evaluate bids in accordance with the principles of fairness because the integrity of the bidding process must be maintained. Also, the Court of Appeal held that the burden of proving that a plaintiff would have suffered similar losses as the bid winner should be placed on the defendant. ■

Manitoba Court of Appeal holds Charter challenge was a collective bargaining issue

In *Millen et al v Hydro Electric Board (Man) et al* (2016 MBCA 56) the Court of Appeal upheld a ruling that the action was appropriately within the jurisdiction of the Manitoba Labour Board despite the plaintiffs' argument that the government procurement process violated the *Canadian Charter of Rights and Freedoms* (*Charter*).

The plaintiffs launched a constitutional challenge against the tendering policy of the Manitoba Hydro-Electric Board (Hydro). The policy required bidders on specific Hydro projects to agree to join, and pay dues to unions which were regulated by collective bargaining agreements.

The plaintiffs took the position that the tender requirements breached the *Charter* because the provisions of the collective agreements which required employees to pay union dues infringed their freedom of expression and freedom of association. The plaintiffs sought a declaration that the provisions of the tendering policy which violated the *Charter* were of no force or effect.

The previous court, which heard the original motion, held that the plaintiffs' claim was not properly characterized as a *Charter* challenge but was in reality a challenge to the collective bargaining agreements themselves and thus the complaint fell under the exclusive jurisdiction of the labour relations board.

The plaintiffs appealed the decision arguing that the dispute was not a challenge to the provisions of the collective agreements but rather a challenge to the imposition of the tender requirement which forced successful bidders to enter into the collective agreements with unions.

In essence the plaintiffs argued that their claim raised a *Charter* issue that did not have a meaningful connection to a labour relations issue because they were challenging the government policy underlying the agreements which they claimed violated the *Charter*, not

the actual agreements themselves. The plaintiffs argued that the tender requirements breached their freedom of association and expression because the employees of the contractor who won a bid would have no freedom to choose their union representative or to choose not to have union representation.

The defendants countered that the plaintiffs were, in reality, challenging the constitutionality of the provisions within each of the collective agreements in question. The defendants argued that the challenge could not be to only the tender requirements because the tender requirements merely necessitated that the contractors enter into one of two collective agreements and it was the provisions in the collective agreements that were really being challenged as unconstitutional. The defendants pointed out that the plaintiffs chose to sue various parties to the collective agreements who played no role in imposing the tender requirements as evidence to that point.

A two-step process was required to determine if the court had jurisdiction to hear the dispute. The first step involved identifying the essential character of the dispute while taking into account all of the surrounding facts and circumstances. Importantly, the court held that the legal character of the issue or the way in which the parties framed the pleadings were not determinative of the essential character of the dispute. The court also noted that where the alternative jurisdiction was a statutory tribunal, the second step was to determine whether the dispute, fell within the sphere of the issues designated to be decided by the tribunal.

The court found that the relief claimed by the plaintiffs was directed at specific clauses of the collective agreements. As the motion judge found, that argument necessarily involved interpreting the clauses of the agreements in light of the *Charter* and determining whether they were constitutionally applicable to the plaintiffs.

The court felt that this case was not simply a challenge to a government policy or to a piece of legislation. It was a challenge to particular provisions in particular collective agreements and if there was a government policy at issue, it was a policy that was implemented through the terms of those collective agreements. Moreover, the collective agreements existed independent of any government policy, and an attack on the constitutionality of the government policy could not provide a remedy without also challenging the collective agreements. The court held that it was clear that the labour board had jurisdiction over those issues.

The characterization of the dispute, demonstrated that it arose out of the collective agreements, and issues rooted in labour relations, which fell under the purview of the labour board. Although the court refused to hear the *Charter* challenge the facts of the case raise interesting issues regarding *Charter* challenges in future procurement processes. ■

Canadian International Trade Tribunal confirms undisclosed criteria cannot be used to evaluate bids

In *Talk Science to Me Communications Inc. v. Canadian Nuclear Safety Commission,*(2016 C.I.T.T. No. 8) the Canadian International Trade Tribunal confirmed that the use of undisclosed criteria during the bid evaluation process, prejudices the integrity and efficiency of the competitive procurement system. The tribunal held that undisclosed assumptions used as part of the evaluation process in this case were cause for a valid complaint to the tribunal and warranted damages.

Talk Science to Me Communications Inc. (Talk Science to Me) brought a complaint to the Canadian International Trade Tribunal because it felt that the Canadian Nuclear Safety Commission (CNSC) had discriminated against it while evaluating bids submitted for the provision of English writing and editing services for a variety of projects. Talk Science to Me claimed that CNSC had used undisclosed criteria as part of the evaluation process which was not included in the Request for Proposal (RFP). The tribunal agreed, holding that if CNSC had specific requirements in mind those requirements needed to be specified in the RFP.

Talk Science to Me's complaint was based on a provision in the RFP which required four full time professional editors. The dispute arose out of CNSC's interpretation of the meaning of full time and professional. Importantly, CNSC's interpretation had not been included in the RFP. The wording used in the RFP required the bidder to demonstrate that it had three or more full-time professional editors to work on writing and editing projects.

Talk Science to Me argued that it had provided four full time editors in its proposal but CNSC determined that the proposed editors did not qualify as full time professionals based on their education, employment and work experience. CNSC did not consider two of the four proposed editors as professional editors, and only one of the four was considered a full-time editor while the others were seen as contractors, not employees, or part time editors. Talk Science to Me argued that CNSC had not specified that certain levels of education, work experience or terms of employment were required in order to be considered a full-time professional editor and as such the bids had been evaluated on undisclosed criteria. Talk Science to me also argued that the RFP did not specify a minimum amount of time spent working as an editor in order to be considered full time.

CNSC argued that the term professional editor clearly required certain education credentials, such as a journalism degree, to be considered professional. However, those underlying assumptions were not specified in the RFP and CNSC's reliance on the assumptions violated the requirement to provide potential suppliers with all the information necessary to submit a responsive bid, including the criteria which would be used for awarding the contract. The tribunal held that CNSC had formed its own standard as to what was acceptable in terms of education and experience of the editors and had not disclosed those criteria to the bidders. If CNSC required specific levels of education or certifications, those qualifications should have been explicitly noted in the RFP.

The tribunal also agreed that the RFP did not contain any requirement for an employer-employee relationship and further had specifically contemplated the use of independent contractors. Also, CNSC's interpretation of the requirement for full time editors was invalid. CNSC acknowledged having disqualified certain editors because it determined they may not have been engaged in editing services full-time. The tribunal agreed with Talk Science to Me's argument that this was an admission by CNSC that it had used undisclosed criteria in assessing its proposal, as the RFP did not specify how much of an editor's time must be spent on editing compared with other activities.

The tribunal determined that because CNSC had used undisclosed criteria in its evaluation of Talk Science to Me's proposal the complaint was valid. The tribunal ordered CNSC to re-evaluate Talk Science to Me's proposal and if it was determined to be one of the three highest rated then Talk Science to Me should be issued one third of the remaining work and compensation equal to the profit that would have been earned had Talk Science to Me been awarded one third of the work from the date of the contract award. The tribunal confirmed that the use of undisclosed criteria prejudices the integrity and efficiency of the competitive procurement system and set out that undisclosed assumptions used when evaluating bids will be cause for a valid complaint. This case stands for the principle that bidders must be able to fully understand the criteria that will be used to evaluate bids so they are not disincentivized from participating in the competitive procurement marketplace. ■

Tribunal holds damages should not be awarded based on breach of tender requirements unless actual loss can be proven

In *StenoTran Services Inc. v. Courts Administration Service* (2016 CarswellNat 1305), the Canadian International Trade Tribunal held that the instructions in the Request for Proposal (RFP) had not clearly set out all the necessary requirements to meet the bid. Despite the breach, damages were not awarded because the breach had not led to an actual loss.

StenoTran Services Inc. (StenoTran) brought a complaint to the tribunal relating to a RFP issued by the Courts Administration Service (CAS). The complaint was in regard to the provision of court reporting and transcription services for Federal Court and Tax Court of Canada proceedings in Ontario. StenoTran submitted its bid on July 13, 2015, the last day

bids were accepted. On September 10, 2015 StenoTran inquired as to when a decision would be made. CAS responded that it would inform bidders by the end of September, 2015. By October 9, 2015 StenoTran still had not heard back so it contacted CAS to notify it that StenoTran would extend its offer beyond October 19, 2015. CAS responded that it would inform bidders as soon as possible and then proceeded to contact the two other bidders and asked them to confirm an extension of their offers beyond October 19, 2015, which both agreed to do. On November 13, 2015, CAS informed StenoTran that its bid was not compliant and that the contracts had been awarded to ASAP Reporting and International Reporting, the two other bidders. StenoTran objected, arguing that its bid was compliant and in any case all of the bids were no longer valid because they had expired.

StenoTran made three arguments to the tribunal. First, it claimed that CAS unfairly declared StenoTran's bid non-compliant, second that CAS allowed bids submitted in response to the RFP to expire and by awarding the contracts after the expiration, improperly issued three sole source contracts. StenoTran's third argument was that CAS did not follow a tribunal recommendation from a previous but related complaint, to undertake a new procurement process within a reasonable time frame, because CAS had taken an unreasonable amount of time to conduct a new procurement.

The first argument was rejected by the tribunal because it did not find that CAS had misinterpreted or misapplied the mandatory criteria in the RFP and that StenoTran had in fact failed to meet certain requirements, resulting in a non-compliant bid. The third argument was also rejected because it did not relate to or indicate a breach of the specific procurement process in question but rather related to the enforcement of a previous tribunal recommendation. The tribunal relied on a ruling of the Federal Court of Appeal in *Siemens Westinghouse Inc. v. Canada Minister of Public Works & Government Services*, (2002 1 F.C. 292) that the tribunal's jurisdiction did not extend to the enforcement of its own recommendations in respect of a past procurement. Thus the tribunal had no authority to rule on CAS's possible failure to comply with a previous recommendation.

The second argument, however, regarding the improper award of contracts after the expiration of the bids was accepted. StenoTran argued that based on the time limit provision in the RFP, which provided that bids would remain open for 60 days after the close of the bid solicitation period, the bids had expired and any contracts awarded after the 60 day period were not valid.

StenoTran argued that because the contracts were awarded after the bids had expired, they were in reality sole source contracts, obtained on an uncompetitive basis and made outside of the procurement process, which had ended 60 days after the close of the bid solicitation period.

The argument turned on the interpretation of the 60 day provision in the RFP which stated that bids would remain open for not less than 60 days from the closing date of the bid solicitation, unless otherwise specified. The same provision also contained a clause indicating that CAS reserved the right to seek an extension of the bid validity period from all bidders in writing, within a minimum of three days before the end of the bid validity period. This time limit provision was not modified in any way and CAS did not seek an extension of the time, as required. Yet CAS still awarded the contracts more than 60 days after the closing of the bid solicitation.

In its defence, CAS argued that the provision in question indicated only that the bids must remain open for a minimum of 60 days but it did not set out a maximum time period for bids to be considered. CAS also argued that because no maximum bid validity period had been expressly set out it was reasonable for the bidders to expect that the contract would be awarded within a reasonable period of time. Essentially, CAS argued that the bids had been open for a reasonable period of time and as such there was no reason for it to seek a time extension.

However, CAS's interpretation of the time limit provision hinged on a narrow and isolated

reading which made much of the wording relating to the time limit and potential time extension irrelevant. The tribunal found that a reasonable construction of the time limit provision giving effect to the entirety of its text, in its ordinary meaning, required bids to be valid for 60 days but not longer than 60 days. Importantly, the provision specifically reserved the right for CAS to seek an extension of the bid validity period, which bidders could choose to accept or refuse. The tribunal held that the ability to accept or reject the extension was inconsistent with CAS's argument that the bids were open for a reasonable period of time regardless of any time extensions. The tribunal found that if CAS wished to avail itself of its right to extend the period of validity beyond the stipulated 60 days, it had to request an extension.

By awarding the contract outside of the bid validity period CAS breached the time limit provision in the RFP and thus breached the requirement to clearly identify the technical instructions regarding bid submission, the criteria that would be used in the evaluation of bids and the methods of weighting and evaluating the criteria. The fact that CAS confirmed with all the bidders after the expiration of the time limit that their bids were still open did not cure its breach.

However, when considering the appropriate remedy the tribunal did acknowledge that the impact of the breach was mitigated by the fact that CAS had confirmed with the bidders that their bids were still open, thus the only breach was that it had requested the extension too late. Also, while the tribunal did find that CAS failed to comply with the relevant provisions of the RFP, the breach was technical and in reality did not cause StenoTran any loss because its bid was non-compliant. The tribunal did not feel that the breach in this case led to any bidder being treated unfairly or that it had an impact on the competitiveness of the process. As such, the tribunal did not believe that the interests of fairness and efficiency or the general public's interest in the integrity and efficiency of the competitive public procurement system required a remedy which would disturb the contracts already awarded or justify the payment of compensation to StenoTran for lost profits or costs incurred in preparing its bid. The tribunal recommended that CAS take measures to ensure that it conduct future procurements in strict adherence to the procedures set out in the tender documents.

The tribunal upheld two important concepts in procurement law in this case. The first is that an entity issuing a procurement process must clearly set out all the necessary requirements to meet the RFP. The second is that damages will not be awarded in procurement cases unless it is clear that the breach in question led to an actual loss. ■

Canadian International Trade Tribunal holds all mandatory criteria must be met for a bid to be compliant

In *MasterBedroom Inc. v. Canada (Department of Public Works and Government Services),* (2016 C.I.T.T. No. 50) the Canadian International Trade Tribunal held that Charley's Furniture had failed to meet all the mandatory criteria in its offer and as such its bid was non-compliant. The tribunal recommended cancelling the contract awarded to Charley's Furniture and awarding it to MasterBedroom Inc. (MasterBedroom).

MasterBedroom brought a complaint to the Canadian International Trade Tribunal. The complaint stemmed from a Request for Standing Offer (RFSO) issued by the Department of Public Works and Government Services (PWGSC). MasterBedroom objected to the selection of the bid winner, Charley's Furniture, on the ground that its bid did not meet a mandatory requirement of the solicitation. Charley's Furniture did not checkmark Toronto as an area to which its bid applied. MasterBedroom submitted that the checkmark list was a mandatory requirement of the solicitation. PWGSC argued that a reasonable interpretation of the RFSO did not require bidders to checkmark the areas they were offering under the mandatory technical criteria section. PWGSC noted that MasterBedroom had submitted the checkmark list twice, once with the technical portion and then again with the

financial portion of its bid, while Charley's Furniture had submitted the list once, with the financial portion of its bid. PWGSC asserted that both approaches were compliant.

However, that argument was rejected by the tribunal which held that both checkmarks were required and that it was not up to bidders to select which mandatory requirements to meet and which to ignore. Rather, the bidders bore the onus of ensuring that their bids met all mandatory requirements. The tribunal also held that the procuring entity's onus was to evaluate bids with regard to the mandatory requirements it set down, thoroughly and strictly.

In this case, the solicitation documents were clear; bidders were to complete the checkmark list both in their technical bids and in their financial bids. The tribunal held that after stipulating the checkmark requirement in duplicate, with each requirement relevant to a distinct portion of the solicitation process, it was not open to PWGSC to indicate, without an amendment to the RFSO, that bidders could be compliant by satisfying just one of the checkmark requirements. The tribunal held that PWGSC's argument effectively asserted that the clear mandatory requirements that it had set down were ambiguous and could be reasonably interpreted in more than one way. However, the tribunal held that it could not ignore the clear construction of the sections of the RFSO, which in its opinion were not ambiguous.

As such, the tribunal held that Charley's Furniture's technical bid was incomplete. It did not include one of the required checkmark lists and as such the entire bid should have been deemed non-compliant. The tribunal recommended that PWGSC terminate the contract awarded to Charley's Furniture for the Toronto area and award it to MasterBedroom. The tribunal also recommended that MasterBedroom be compensated by an amount equal to the profit that it would have earned from the date of the contract award to Charley's Furniture to the date of the subsequent award to MasterBedroom.

The tribunal in this case upheld the rules of procedural fairness in public procurement by finding that all mandatory criteria in a procurement process must be met and that an evaluator is not free to decide which criteria in the bid instructions will be followed and which will not. ■

Overly-broad national security exception does not oust the jurisdiction of the Canadian International Trade Tribunal

In *M.D. Charlton Co. Ltd. v. Department of Public Works and Government Services* (2016 CarswellNat 4033) the Canadian International Trade Tribunal held that a national security exception did not justify limiting the number of potential bidders or remove the tribunal's jurisdiction. The complaint was found to be valid and the Department of Public Works and Government Services (PWGSC) was ordered to reissue the solicitation.

On February 4, 2016 PWGSC issued a Request for Standing Offer (RFSO), which was not made publicly available. Instead the request was only made to three potential suppliers who were prohibited from disclosing the information contained within to third parties based on a national security exception. National security exceptions allow the government of Canada to exclude procurement from some or all of the obligations imposed by relevant international trade agreements where it is required to do so in order to protect national security interests. The tribunal held that when invoking a national security exception the government can withhold information and take any action that it considers necessary to protect national security.

Despite the prohibition against disclosing information in the RFSO to third parties, Newcon Optik forwarded the RFSO to M.D. Charlton Co. Ltd. (M.D. Charlton), its authorized Canadian government distributor. M.D. Charlton felt that the specifications of the RFSO were burdensome and objected to the requirement which limited the bidding to only three potential suppliers. M.D. Charlton asserted that the national security exception had been invoked improperly by PWGSC and its use prevented the procurement from being

conducted in an open, fair and transparent manner. Also, M.D. Charlton argued that the technical specifications of the RFSO had been designed to favour one particular supplier.

PWGSC refused to make any changes to the technical specifications and requested each of the potential bidders sign a non-disclosure agreement. Newcon Optik refused to sign the agreement, and informed PWGSC that it and M.D. Charlton would not submit a bid. Subsequently, M.D. Charlton filed a complaint with the Canadian International Trade Tribunal arguing that PWGSC on behalf of the Royal Canadian Mounted Police (RCMP) had treated it unfairly by limiting the number of bidders and structuring the procurement process to favour one supplier.

PWGSC argued that the tribunal did not have jurisdiction to hear the complaint based on the national security exception it had invoked. The tribunal held that the government should only curtail the application of international trade agreements and the requirement for a fair, open and competitive procurement process, to the extent necessary for the protection of a national security interest, when a failure to do so would compromise national security. In this case, the national security interest at play was the ability of the RCMP to conduct investigations in order to protect public order and safety, as well as human life and health. Importantly, the RCMP identified that the only action necessary to protect this interest was the non-disclosure of the technical specifications of the binoculars. However, the tribunal held that PWGSC went beyond that need when it applied a blanket exemption to the solicitation which attempted to remove the procurement from the jurisdiction of the tribunal. M.D. Charlton argued this was an attempt to avoid the fair competition obligations required for government procurement. The tribunal agreed holding that PWGSC had gone too far in its use of the exception. The tribunal found that just because national security interests were raised, it did not automatically lose jurisdiction and it retained jurisdiction in this case because the tribunal was adequately prepared to deal with cases that required the review to be conducted in a manner that protected confidential information from disclosure.

M.D. Charlton also argued that because the technical specifications were skewed toward one supplier PWGSC was actually attempting to sole source the binoculars from a pre-selected supplier. As such, the RFSO's sent to the other potential suppliers were intended only to give the impression of legitimacy.

The tribunal held that the technical specifications in the RFSO did favour specific suppliers by making it mandatory to provide the products of two of the three invited suppliers and further some of the mandatory requirements could only be met by one supplier. In addition, there was no way for other potential suppliers to propose equivalent products. The tribunal also held that by attempting to use a national security exception too broadly PWGSC unfairly limited the competitive element of the procurement process and attempted to structure the procurement in an unfair manner by favouring a particular supplier.

The complaint was held to be valid and as a remedy the tribunal ordered PWGSC to pay costs in the amount of two thousand seven hundred and fifty dollars and also recommended that the solicitation be cancelled and a new solicitation ordered which should not include technical requirements that favour a specific supplier. This case reinforced the importance of an open competitive process in government procurement and held that national security interests can only infringe on that requirement to the smallest extent required. ■

— KC LLP —

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