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Public Sector

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IN THIS ISSUE —

SCC confirms jurisdiction of Provincial Courts over Federal procedural issues

In *Canada (Attorney General) v. TeleZone Inc.,* [2010] S.C.J. No. 62, the Supreme Court of Canada ("SCC") dealt with the contention of the appellant, TeleZone, that it was wronged by the Ministry of Industry Canada in the Ministry's rejection of its application for a licence to provide telecommunication services. It should be noted that while TeleZone did not seek to have the decision overturned, or for TeleZone to be provided with a licence, TeleZone did seek damages to compensate for the cost of the application process.

TeleZone had started operations in 1992 with the goal of providing a Personal Communication Services ("PCS"). Throughout TeleZone's efforts to raise capital and acquire the necessary expertise to provide a network, the appellant was in contact with Industry Canada, which allegedly encouraged the appellant to continue with its efforts.

In 1995, Industry Canada issued a call for PCS licence applications. The accompanying policy statement advised applicants that up to six licences would be granted. In the call, Industry Canada set out a number of criteria which applications were to be measured against. The call did not explicitly provide Industry Canada with the right to consider additional factors.

TeleZone submitted its application, at a cost of approximately $20 million. Industry Canada subsequently released its decision in respect of the applications. There were only four successful applicants, and TeleZone was not one of them.

TeleZone alleged that by awarding less than six licences, the Ministry breached an implied term of the policy statement that fewer than six licences would be granted only if there were fewer than six successful applicants. As TeleZone had met the criteria set out in the call, it submitted that Industry Canada must have considered additional factors that were not set out in the call. Based on these breaches, TeleZone alleged that Industry Canada had breached its duty of care and its duty to act in good faith.

At the Federal level, issues arising from an administrative decision are typically attacked through the process of judicial review under the *Federal Court Act*, which allows the Federal Court to review a decision and grant limited remedies. As TeleZone was not requesting that Industry Canada's decision be overturned, the question in this case was one concerning the Court's jurisdiction.

The Attorney General argued that TeleZone's action in Superior Court amounted to a collateral attack on the administrative decision, which is barred by previous jurisprudence. The SCC, however, determined that the Attorney General's position was contrary to recent amendments to the Act, which had removed the Federal Court's exclusive jurisdiction over many causes of action.

In light of the legislative intent of the amendments, and along with the increased focus on providing individuals with access to justice, the SCC held that the Superior Court does, in fact, have jurisdiction to hear this action and, if TeleZone is successful, to award compensation for the alleged wrong. The matter was allowed to continue in Superior Court.

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Letter of Credit acceptable as substitute for Bond

In *Bois A. Lachance Lumber Ltd. v. Conseil Scolaire Catholique de District des Grandes*

Rivieres, [2010] O.J. No. 4476, the Ontario Court of Appeal dealt with an appeal arising from the respondent's claim that the appellant School Board breached its obligations to treat all bidders fairly and equally.

The Board had issued a call for tenders for a site development project. Two organizations submitted a bid and the Board selected the lower bid. The respondent alleged that the Board accepted a non-compliant bid. The source of the respondent's contention was that the selected bid failed to provide a Performance Bond and a Labour and Material Payment Bond, each for 50% of the value of the contract. After its bid was accepted, the winning bidder provided the Board with a letter of credit, in place of the performance bonds.

At trial, the Superior Court held that the Board had breached its obligations to treat the bidders fairly and equally as the winning bid had failed to comply with the conditions of "Contract A" (the call for tenders). The trial judge also held that the letter notifying the winning bidder that it was successful was insufficient to create the actual contract, "Contract B", since the Board and winning bidder had negotiated a method to get around the requirement to provide performance bonds.

The Court of Appeal overturned the trial decision, finding that the trial judge had erred in its assessment of requirements of "Contract A". In the view of the Court of Appeal, the call for tenders only required bidders to provide a performance bond *upon acceptance of the bid*. The Court of Appeal did not read in any requirements to the call for tenders that would require the bidders to provide proof of the ability to provide the bonds if their bid was accepted.

The Court of Appeal also held that, as the winning bidder was compliant, the Board had discharged any duties it owed to the respondent. Upon acceptance of the successful bid, the Board was able to, and in fact did, accept an alternate type of security in place of the performance bond. As result, the Court of Appeal set aside the judgment of the Superior Court and dismissed the respondent's claim.

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Court confirms non-disclosure of budget and discretionary interests

In *GDC Gatineau Development Corp. v. Canada (Minister of Public Works and Government Services)*, [2009] F.C.J. No. 1660, the Federal Court dealt with a judicial review application seeking an order quashing the decision of the Minister of Public Works and Government Services (the "Minister") to cancel a tendering process in connection with a proposed office in Gatineau, Quebec.

In 2007, the Minister published a Request for Information ("RFI") in respect of this project. The RFI was followed by a Selection of Invitees to Tender ("SOIT"), which was issued to determine the competence of the bidders. Included in the SOIT were a specimen Invitation to Submit an Irrevocable Offer, a specimen lease, a form of Standby Letter of Credit, and criteria for evaluating Requests for Qualifications ("RFQ"). The applicant and two other bidders submitted an RFQ in accordance with the SOIT.

Upon submission of the RFQ, the applicant was invited to, and did, submit an Irrevocable Offer to Lease. The applicant was the only one of the three bidders to be invited to submit an Offer; the other two bids were non-compliant and the respective bidders had filed challenges with the Canadian International Trade Tribunal grounded in concerns regarding fairness.

During the next two months, the applicant inquired as to the status of its Offer. Each time, the applicant was advised that the Offer was still under examination. Towards the end of 2008, the applicant was verbally advised that the project had been cancelled, and would be re-started later. A letter was sent to bidders on the same day, notifying bidders that the project was being cancelled due to an absence of a proposal that fully met the Crown's requirements.

The reasons for rejecting the applicant's Offer were as follows: (i) the annual rent exceeded the rent range of the project and the Ministry's budget; (ii) the letter of credit was required to be irrevocable, however, the applicant's was revocable; and, (iii) some documents in the Offer were unsigned.

The applicant alleged that the "rent range" was not disclosed to bidders prior to submitting an Offer, and that the "rent range" was based on a report that contained incorrect information. Furthermore, the latter two reasons for rejection were unwarranted and unjustified technicalities. The applicant sought to have a meeting with the Minister to discuss these concerns, but was refused.

As this was an application for judicial review, and not an action for breach of contract, the applicant was required to satisfy the Court that the tendering authority had acted in an unfair, unreasonable or arbitrary manner, based its decision on irrelevant considerations, or acted in bad faith. On the evidence, the Court dismissed the application for judicial review for the following reasons.

The Court determined that it did not have authority to assess the wisdom of a decision rendered or the accuracy of the information relied upon, except in those rare instances where the reasons given are merely a pretence for something else.

The Court rejected the applicant's contention that the Ministry breached its duty by failing to advise applicants of the existence of the Ministry's budget for the project since reasonable applicants should expect that the Ministry will have a budget for the project. Thus, the applicant was reasonably aware that its bid would be scrutinized to ensure that its pricing was competitive, regardless of whether this was expressly communicated to bidders. Furthermore, requiring the Ministry to disclose its budget places the Ministry in a poor competitive position.

The Court also rejected the applicant's argument that the Minister improperly considered the challenges before the Canadian International Trade Tribunal brought by the other two bidders in deciding to relaunch the bid process. In rejecting this argument, the Court reiterated the fact that it is not up to the Court to substitute its views of what is relevant evidence and what weight, if any, to ascribe to such evidence. In acting in good faith, the Minister was entitled to rely upon and give weight to any evidence that appears relevant. While the Court would prefer that wholly unmeritorious challenges are not considered by decision makers, there was no evidence that the two challenges were unworthy of consideration.

The Court also rejected the applicant's contention that, as sole compliant bidder, the Minister had a duty to negotiate with the applicant to arrive at an acceptable price. To accept such a proposition would be, in the Court's opinion, an effective removal of the Minister's freedom to contract, and specifically, the Minister's freedom to reject an offer.

Court confirms award of restitution for cancelling RFP

In *McMeekin v. Northwest Territories (Liquor Commission),* [2010] N.W.T.J. No. 5, the Court of Appeal dealt with a complaint arising from the Department of Finance's decision in awarding a contract to a bidder through the Request for Proposal ("RFP") process as well as its decision to subsequently cancel the RFP.

In 2006, the Department of Finance issued an RFP for the operation of a retail liquor outlet to replace an outlet previously operated under an earlier contract. Prior to the closing date for the RFP, the appellant contacted the Department of Finance, alleging that the Department had a conflict of interest.

The successful bidder was announced in late 2006. The successful bidder had applied for a development permit to complete the project; however, the Northwest Territories Supreme Court ordered the permit committee to conduct a new hearing to determine whether to issue a permit. No new hearing was subsequently held, and the successful bidder withdrew its application for a permit. Subsequent to this in 2008, the Department of Finance advised all of those who submitted bids in response to the RFP that the RFP had been cancelled.

At trial, the Court addressed the various grounds for proceeding alleged by the appellant, who was self-represented. The Court held that the judicial review application in respect of the initial successful bid was untimely, and thus the application for judicial review was dismissed. Further to the allegation that the Department had a conflict of interest, the appellant requested the resignation of certain individuals. The Court held that, even if the appellant could satisfy the Court that a conflict of interest existed, compelling an individual to resign was not a remedy available to the Court through an application for judicial review or through a civil law suit. The Court allowed the appellant's claim for restitution, but required the appellant to bring this action to the Court by way of statement of claim, as opposed to an Originating Notice.

On appeal, the appellant, who remained self-represented, did not adduce fresh evidence, nor did the appellant raise any errors made by the trial judge. As the appellant merely reiterated its arguments, the Court of Appeal found no basis to intervene, and therefore dismissed the appeal.

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Court confirms inability to bid based on past poor performance

In *Trevor Nichols Construction Co. v. Canada (Minister of Public Works)*, [2011] F.C.J. No. 85, the Federal Court dealt with a motion for summary judgment in respect of whether the Ministry of Public Works (the "Ministry") breached its implied obligations to treat bidders fairly in its procurement process.

The subject matter of the dispute concerns the Ministry's procurement process from 1989 to 1993. Between this time, the plaintiff had submitted the lowest bid on five separate occasions in response to the Ministry's invitations to tender. In 1990, the Ministry advised the plaintiff via By-pass letter that its bids were going to be by-passed due to previous unsatisfactory work and the apparent incapacity of the plaintiff to perform the work tendered upon. The Ministry advised the plaintiff that such by-pass would continue until the plaintiff could demonstrate competence. Despite this notice, the plaintiff continued submitting bids, each being the lowest bid received by the Ministry.

The plaintiff subsequently filed an action against the Ministry alleging that the plaintiff had been treated unfairly, that the defendant breached an implied term of the tender call to accept the lowest bid, and for damages.

The plaintiff asserted that it had not been treated fairly; however, the Ministry argued that it had been treated fairly. In support of the Ministry's position, it was argued that past performance rightfully formed part of the evaluation process as the tender call made it clear that past performance would be considered (bidders were requested to identify previous work).

The Court examined the case utilizing the test for summary judgment, which questions whether there exists a genuine issue for trial. While the tender call did not expressly state that by-pass letters would be considered, it was clear from the tender call that previous work performance would be considered. A reasonable bidder, on the basis of the tender call, would reasonably expect that a by-pass letter regarding previous performance would be considered by the Ministry's evaluators.

On the basis of the evidence, the Court was satisfied that there was no genuine issue for trial and that the Ministry had not breached its implied obligation to treat the plaintiff fairly. Furthermore, the Tribunal held that while the existence of the by-pass letter (and the plaintiff's notice of the letter) did not act to prohibit the plaintiff from submitting bids, the by-pass letter did act to reduce the duty of fairness that the Ministry owed the plaintiff.

This case confirms the importance of including past performance as an evaluation criterion if an Owner does not want to accept a low bid when there is a past history of poor performance by a low bidder.

Court confirms no contractual obligation created

In *Guysborough (Municipality) v. Resource Recovery Fund Board*, [2011] N.S.J. No. 25, the Nova Scotia Supreme Court dealt with a motion for summary judgment from a claim arising from a Request for Proposal ("RFP") in relation to the processing and recycling of scrap tires.

The complainant, Guysborough, submitted a proposal, but was not selected by the Resource Recovery Fund Board ("RRFB"). The complainant asserted that but for errors in evaluating its proposal, it would have been the successful bidder. The RRFB, on the other hand, took the view that the RFP and receipt of the complainant's proposal did not create any contractual obligations between the parties.

The Court relied on prior jurisprudence to determine whether a contractual relationship was formed once the complainant submitted a bid. The RRFB argued that an intention to create a contract must be found in the RFP in order for a contract to have formed. The complainant argued that the Court was required to look at any extraneous evidence that applies to the RFP, such as "knowledge sessions", a "Draft RFP Release Briefing", three addendums to the RFP and subsequent response to questions posed by the complainant.

The Court adopted the approach of the RRMB and examined the terms and conditions of the RFP. Upon a review of the RFP, the Court noted many provisions that essentially provided bidders with a carte blanche in designing their proposal. There was no express provision in the RFP that required a bid to be accepted by the RRMB.

On the basis of the lack of guidance provided in the tender call and the lack of requirement for the RRMB to accept any

bid, the Court found that the parties had not entered into a "Contract A"; rather, the RFP represented an invitation to propose, and nothing more. The Court also rejected the complainant's argument that the RRMB owed it a free-standing duty of fairness since the RFP in this case was all about negotiation. Consequently, the Court granted the RRFP its motion for summary judgment.

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IPC confirms third-party disclosure

In *Order MO-2562 (Thames Valley District School Board)* (October 28, 2010), an appeal of *MA10-102*, the Information and Privacy Commissioner (the "Commissioner") dealt with a contractor who sought to have its information excluded from a record disclosed by the School Board.

A requester of information had sought records pertaining to the Board's pricing information relating to identified snow removal and sanding tenders in three school zones. The Thames Valley District School Board (the "Board") identified a record containing a list of the contractors used by the Board, along with the dollar value of the winning bids.

Prior to disclosing this information to the requester, the Board notified the 25 contractors who would be the subject of the disclosure to obtain their views in respect of the disclosure. The Board decided to disclose the record 30 days after the date of their decision, allowing the contractors a window of opportunity to object to the Board's decision to disclose.

One contractor objected to the Board's decision to disclose the information. The contractor was of the view that ss. 10(1)(a) and ss. 10(1)(c) [third party information prejudicing a competitive position or resulting in undue loss or gain] of the *Municipal Freedom of Information and Protection of Privacy Act* (the "*Act*") exempted its information from being included on the disclosed record.

The dispute went to mediation; however, mediation was not successful. The Commissioner identified the purpose of ss. 10(1) as protecting "informational assets" of a business or other organization. To garner protection under ss. 10(1) of the *Act*, an organization was required to satisfy the commission that: (i) the record revealed information which is a trade secret, scientific, technical, commercial, financial or labour relations information; (ii) the information was supplied to the Board in confidence, either expressly or implicitly; and, the prospect of disclosure is required to give rise to a reasonable expectation of harm to the organization, as set out in subsection 10(1).

It should be noted that the objecting contractor did not take the opportunity to make representations to the Commissioner. On the basis of the evidence, the Commissioner determined that the record contained information in respect of pricing, which satisfied the first stage of the test (that the information be commercial or financial). No evidence was provided in respect of whether the information was provided to the Board in confidence; however, the Commissioner held that determining whether the information was given in confidence was unnecessary.

Unlike the precondition of ss. 10(1), which requires the information to be *supplied* in confidence, the information here was *negotiated* between the Board and the contractor. Furthermore, the information represents the amount that the contractor was reimbursed for its services; such information cannot be said to have been "supplied" to the Board.

The Commission upheld the Board's decision to disclose the entire record, as the information at issue was not supplied to the Board and therefore was not protected from disclosure by ss. 10(1).

CITT interprets ambiguity in favour of bidder

In *Meta-Business Advantage Ltd. v. Canada Revenue Agency,* [2009] C.I.T.T. No. 98, the Canadian International Trade Tribunal (the "Tribunal") dealt with a complaint arising from Canada Revenue Agency's ("CRA") solicitation for the establishment of up to five supply arrangements with process improvement providers.

The complainant alleged that CRA failed to evaluate its bid in accordance with the published evaluation plan, and that CRA applied a definition of "project" that was not provided for in the Request for a Supply Arrangement ("RFSA").

The procurement process was a four-stage process. There were twenty-two bids in all, with only ten proceeding to the fourth stage of the process. The complainant's bids failed to comply with the requirements of the first stage, and thus were not subsequently considered.

The source of the deficiency in the complainant's application was the mandatory requirement that bidders provide summaries of five projects completed within the previous decade. The complainant identified five projects; however, CRA determined that three of the identified projects were actually one single project, and thus, the complainant had failed to comply with the requirement.

The complainant contended that CRA applied an unreasonable definition to the word "project" which caused the complainant's bid to be deficient. The complainant argued that it did not have an obligation to seek clarification as it was understood that the word "project" would be given its ordinary meaning. As the term "project" was not defined by the RFSA, the complainant argued that it should be given the benefit of any ambiguity.

CRA argued that the Tribunal should not interfere with the decision and that, except where evaluators fail to stay within the confines of the procurement process, the Tribunal should not substitute its judgment for that of the evaluators. CRA argued that as the complainant used the same description, mandate, and contact person for each of the three projects, it was reasonable for CRA to take the view that the projects were one single project.

In assessing the competing arguments, the Tribunal examined the terms of the RFSA. The Tribunal noted that the RFSA provided no direction as to what constitutes a separate "project" and that the RFSA did not prohibit bidders from listing projects with similar or identical work.

The Tribunal applied the ordinary meaning of the term "project" to determine whether CRA acted reasonably. Since the complainant had identified specific, different work for each of the three projects, the Tribunal held that CRA's evaluation was unreasonable. As a remedy, the Tribunal ordered CRA to re-evaluate the complainant's bids, treating each of the three projects as distinct projects.

This case highlights the importance of clearly defining terms in procurement documents, where such terms may not have their ordinary every-day general meaning to an Owner.

CITT confirms rejection based on quality of photographic support

In *Dendron Resource Surveys v. Department of Natural Resources*, (CITT; July 2010), the Canadian International Trade Tribunal (the "Tribunal") dealt with a complaint arising from the Department of Natural Resources' procurement process for the provision of aerial photograph scanning services in various resolutions and sizes.

The complainant alleged that the Department of Natural Resources failed to provide specifications for one of the evaluated products, while some bidders had prior knowledge in respect of those specifications. Furthermore, the complainant alleged that its bid was not evaluated in its entirety in respect of the requirement that was the source of the rejection.

As part of the procurement process, mandatory requirement R4 was as follows: "*The bidder shall demonstrate their technical experience by creating a mosaic from scanned aerial photographs. [The Department of Natural Resources] will provide the bidder with six scanned aerial photograph images required to complete a 'mosaic' task …*" No specifications were expressly set out in respect of the mosaic.

The Department of Natural Resources received three proposals. The complainant was not the successful bidder. In an e-mail to the complainant, the Department of Natural Resources advised the complainant that the mosaic was deficient in a number of ways (poor reproduction, the toning was off, poor contrast, etc.).

The complainant argued that the Department of Natural Resources erred in its evaluation as the complainant had produced a mosaic that was, in the complainant's opinion, "perfectly valid" and "of high quality" given the generic term "mosaic". Thus, the Department of Natural Resources considered criteria that was not set out in the tendering process. It should be noted, however, that the complainant did admit that the mosaic it produced was not of the best-quality.

The Department of Natural Resources contended that the procurement process was fair and that it was clear that the purpose of mandatory requirement R4 was to allow the Department to assess the quality of mosaics produced by the bidders. The Department of Natural Resources asserted that the complainant's failure to produce the best quality mosaic did not render the procurement process unfair. The complainant's mosaic was unanimously criticized as sub-standard by the evaluators, and this was the basis for the rejection of the bid.

The Tribunal agreed with the Department of Natural Resources. In the Tribunal's view, the objective of requirement R4 was to implicitly allow the Department of Natural Resources an opportunity to assess the technical expertise of bidders. Thus, the complainant reasonably ought to have known that such an evaluation necessarily would include an assessment of the quality of the mosaic, including gradation adjustments.

The complainant's second complaint was that the Department of Natural Resources failed to evaluate its mosaic in its entirety. The basis of this complaint was that the complainant had stated that "*results could be improved with a more intensive effort*", and that by failing to consider that sentence, the Department of Natural Resources did not consider the bid in its entirety.

The Department of Natural Resources argued that a statement that a better mosaic *could* be produced does not demonstrate that the complainant specifically *could actually*

produce a better mosaic. The Tribunal accepted this argument holding that a mere statement that better results could be achieved does not adequately demonstrate or guarantee that those results will actually be achieved. Consequently, both of the complaints were dismissed.

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CITT confirms rejection based on lack of experience

In *Falconry Concepts v. Canada (Department of Public Works and Government Services)*, [2011] C.I.T.T. No. 3, the Canadian International Trade Tribunal (the "Tribunal") dealt with a complaint arising from the procurement process conducted by the Department of Public Works and Government Services ("the Department") for the provision of wildlife control services for the aircraft runways and surrounding areas at the Canadian Forces Base. The focus of the complaint was on amendments that were made to the Request for Proposal ("RFP") prior to the bid closing date.

The Department issued an RFP in March, 2010 for wildlife control services. Amendments to the RFP were made on various dates from May 13, 2010 to June 9, 2010, and the closing date was extended until June 16, 2010. The complainant objected to one of the amendments; however, the Department considered all amendments warranted and indicated that they would not further amend the RFP to address the complainant's concerns.

The Department awarded the contract on the basis of the RFP. The complainant, who was an unsuccessful bidder, sought a copy of the technical evaluation of their proposal. Upon review of the evaluation process, the complainant's bid was alleged to be deficient for a failure to comply with the "Wildlife Services Contract Experience" provision of the RFP. The concern of the Department was that the sole owner/operator of the complainant only had experience as an employee of companies providing similar services.

The complainant subsequently alleged that the Department's evaluation displayed a total lack of knowledge of current and past wildlife control, and of the actual requirements of the RFP.

The basis of the complaint was two-fold. The first complaint was that the amendments to the RFP were so onerous that only the incumbent would be able to bid, rendering the procurement process unfair and prejudicial. This complaint was rejected by the Tribunal due a lack of timeliness. The complainant would have had to file its complaint within ten days of becoming aware of the basis of the complaint; however, the plaintiff failed to do meet this deadline.

The complainant also alleged that the Department's evaluation of the complainant's experience was incorrect and misleading. The complainant submitted that he had essentially performed the duties requested in the RFP through employment with other organizations.

The Department took the view that, in the context of the RFP, referred to experience in contracting for the provision of wildlife services, and not as an employee. Supporting the Department's opinion was the express stipulation that "*the Contract must have been performed by the Bidder itself*."

In assessing whether experience of the principal of the complainant was sufficient experience for the complainant, the Tribunal noted that the RFP did not contain a definition for "contract experience". However, the Tribunal held that, if the RFP is read as a whole, the Department's

interpretation of "contract experience" was reasonable.

Supporting the Tribunal's finding was that a portion of the RFP requested bidders to set out its experience in controlling wildlife in the previous five years. This demonstrated that there was a distinction in "control services" and "contract services". Furthermore, the information requested in the bid was "detailed information concerning past experience in relation to each similar contract." The Tribunal took the view that only the party to the contract (i.e. the contractor) would have sufficient information to include in this portion.

Thus, despite the fact that the RFP did not contain an express definition for "contract experience", the Tribunal held that the Department's interpretation and evaluation was reasonable given a reading of the entire RFP. Consequently, the complainant's bid did not demonstrate that the complainant, as a separate legal entity, had the contracting experience required by the RFP.

CITT defines its jurisdiction

In *Re d2k Communications*, [2010] C.I.T.T. No. 143, the Canadian International Trade Tribunal (the "Tribunal") dealt with a complaint arising from the procurement process of the Department of Public Works and Government Services for the provision of graphic design services.

The focus of the complaint was on the price floor that had been imposed by the Request for Standing Offer ("RFSO"). The complainant had submitted the lowest bid, but was passed over in favour of another bid.

The complainant had submitted a bid for the RFP, but had been advised that it would not be issued a standing offer for the service because the hourly rate submitted for the position of artistic director was outside the Range of Acceptable Rates. Specifically, the complainant's hourly rate was below that imposed by the Range of Acceptable Rates.

The complainant brought this complaint, arguing that the imposition of the price floor was contrary to the government's philosophy and that the bidder should not be penalized for having offered the best price.

Subsequent to this, the complainant sought instruction in regards to the process to file a complaint. Five months had passed since the close of the RFSO before this matter was heard by the Tribunal.

Pursuant to ss. 6(1) of the *Regulation* to the *Canadian International Trade Tribunal Act* [deadline to bring a complaint], a complainant has 10 days to file a complaint from the date on which the basis of the complaint is known or reasonably should have become known. As the complainant was not disputing the calculation of the Range of Acceptable Rates, but rather the existence of the price floor, the complainant had up until 10 days from the closing of the RFSO to file a complaint. The Tribunal was also not swayed by the complainant's efforts to obtain instructions regarding how to proceed with a complaint.

Furthermore, even if the complaint was filed in a timely manner, the Tribunal was of the view that a complaint grounded in "the government's alleged non-compliance with its public policy objective" were not grounds for which the Tribunal can inquire into. Unless the alleged non-compliance is in respect of a term or condition of the procurement process, the Tribunal does not have jurisdiction to find non-compliance. Consequently, the Tribunal decided not to conduct an inquiry into the complaint.

CITT confirms no jurisdiction where no contract awarded

In *Re Information Builders (Canada) Inc.,* [2010] C.I.T.T. No. 149, the Canadian International Trade Tribunal (the "Tribunal") dealt with a complaint arising from the procurement process of the Department of Public Works and Government Services (the "Department") relating to the provision of information intelligence software solutions.

The objective of the procurement process was to extend the value of Industry Canada's systems and databases by providing a standardized set of information integration, delivery and analysis tools. This required the purchase and development of software and related maintenance, warranty and support services.

The complainant had submitted a bid prior to closing, which was scheduled to be March 15, 2010. On June 2, 2010, the Department informed the complainant that its bid was the top bid and invited the complainant to the "stipulated corporate acceptance test", which was the next phase in the process. Just over a month later, the Department contacted the complainant to advise them that the RFP had been cancelled as result of funding issues.

The complainant filed an Access to Information request to obtain a list of bidders to the RFP, and also requested of Industry Canada records of the meetings and e-mails that led to the cancellation of the RFP. The complainant made another Access to Information request for the records that it had sought from Industry Canada.

Prior to receipt of the documents pertaining to the second Access to Information request, the complainant was advised by the Department that there were no known meetings during the time leading to the cancellation of the RFP. However, in the documents obtained through the second Access to Information request, the complainant obtained documents from meetings that were conducted, contrary to the information provided by the Department. Subsequently, the complainant filed the complaint that is the subject of this decision.

The Tribunal decided not to conduct an inquiry into this complaint on two separate grounds. The first was that the complaint was not filed within the 10-day deadline set out in ss. 6(1) of the *Regulations* to the *Canadian International Trade Tribunal Act*.

The second reason that the Tribunal decided not to conduct an inquiry was that the Tribunal lacked jurisdiction. The Tribunal has jurisdiction to determine complaints in respect of a designated contract. As no contract was awarded, and the RFP had been cancelled, there was no contract for the supply of goods or services, and thus there was no designated contract. Therefore, the Tribunal lacked jurisdiction.

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CITT analyzes jurisdiction

In *Enterasys Networks of Canada Ltd. v. Canada (Department of Public Works and Government Services,* [2010] C.I.T.T. No. 148, the Canadian International Trade Tribunal (the "Tribunal") dealt with a dispute arising from a Request for Volume Discount ("RVD") for solicitations by the Department of Public Works and Government Services (the "Department") for the supply of networking equipment.

All of the RVDs were issued under a National Master Standing Offer ("NMSO"). The NMSO was the successor standing offer to the Departmental Individual Standing Offer ("DISO"), which was issued after a competitive Request for Standing Offer

("RFSO"). In the RFSO, bidders were required to demonstrate to the Department that they could provide products meeting the generic specifications of the DISO. Twenty-three companies were issued a DISO, including the complainant. The DISO was subsequently converted to an NMSO.

According to the terms of the NMSO, the Department was authorized to issue call-ups directly to companies, or to open the requirements to competition by sending companies Requests for Quotations, through an RVD. If the Department chooses to open up the process to bidding, the Department is obligated to select a bidder for projects totalling more than $100,000.00.

The technical requirements involved in each competitive bidding process are either generic specifications or particular brand names. Under the latter, bidders are provided an opportunity to propose equivalent products. The process for obtaining authorization to use equivalent products was set out in the NMSO. The process required the bidder to demonstrate to the Department that the equivalent product is, in fact, entirely compatible and of equivalent quality of performance. The process may require a bidder to provide the Department with a sample of the equivalent product. Compatibility testing guidelines were also provided in the NMSO.

The complainant raised a total of 10 grounds on which to base its complaint. Of these 10 grounds, 4 were not accepted.

Grounds not accepted by the Tribunal for Inquiry

The Tribunal did not accept the complainant's assertion that the Department, through its procurement process, was seeking to purchase items outside the scope of the "Category 1.1. Local Area Network switches. This complaint was not accepted for inquiry because none of the RVDs at issue pertained to Category 1.1.

The Tribunal did not accept the complainant's ground of complaint that the Department allowed certain Original Equipment Manufacturers ("OEMs") to add products outside the scope of "category 1.1 and category 1.2", Published Price Lists. This ground was rejected for inquiry because the process followed by the Department in the addition of products constituted contract administration and did not constitute part of the procurement process.

The complainant alleged that the Department failed to respond to its questions and closed the solicitation process without providing responses. This ground was easily rejected by the Tribunal since the RVD stipulated that responses may not be provided if questions were sent after noon, two business days prior to the closing of the process. The complainant's questions were submitted two hours after this deadline.

The complainant had also requested that the Tribunal inquire into complaints allegedly described in email correspondence between the Department and the complainant. The Tribunal rejected this ground for inquiry pursuant to ss. 30.11(2)(c) of the *Canadian International Trade Tribunal Act* which requires complainants to describe the grounds for complaint with precision. Merely requesting that the Tribunal look into complaints discussed in email correspondence was deemed insufficiently descriptive and precise.

Grounds accepted by the Tribunal for Inquiry

The remaining grounds of complaint that were accepted for inquiry could be divided as follows: (i) the Department did not have justification to specify brand names; (ii) the Department improperly refused to provide additional information and time to bidders to permit bidders of equivalent products to prepare their proposals; (iii) the Department improperly coded industry-standard transceivers (combined transmitter and

receiver) with company-specific product codes; and, (iv) the Department improperly purchased items that did not meet its mandatory specifications.

The complainant argued that, due to concerns related to a desire for a quick procurement process, the Department improperly specified brand names in their RVDs. The complainant argued that the Department's desire for a quick procurement process was not a valid justification for improperly specifying brand names in the RVDs. The complainant also contended that it was possible for the Department to describe specifications rather than merely brand names. The Department countered by arguing that their use of discretion in the procurement process was reasonable and undertaken in good faith, and that no potential supplier raised objections during the procurement process with regard to equivalent products, and that brand names were only specified where interoperability with an existing network was required.

The Tribunal determined that trade agreements do promote the use of general specifications as opposed to brand names so as to provide the government with the best value for its money and to provide bidders with a fair and transparent process. Consequently, the onus was on the Department to demonstrate that the use of brand names was necessary. The majority of the Tribunal determined that while brand names are used only when interoperability require it, the Department failed to establish that general specifications could not be provided in such circumstances. However, failure by the complainant to provide evidence of the discriminatory effects caused by the use of brand names precluded the Tribunal from finding that the Department breached its trade agreement obligations. Note that the minority held that the Department's interoperability defence justified the use of brand names.

The complainant argued that the failure of the Department to extend time to suppliers of equivalent products breached its RVD, which required the extension of bidding time for "complex requirements". The Department argued that the complainant did not require any additional information and had not established that it required extra time to submit equivalent products. The Tribunal determined that the onus was on the complainant to demonstrate that it was not provided with sufficient information. The complainant failed to produce expert evidence, and in the opinion of the Tribunal, sufficient evidence to demonstrate that insufficient information was provided. As a result, the Tribunal determined that the Department did not breach trade agreements or its own documents by failing to provide an extension of time to providers of equivalent products.

The Tribunal rejected the complainant's contention that the use of specific OEM coding precluded the Department from obtaining the best industry-standards. In the Tribunal's opinion, the Department had demonstrated that other OEM coding was available to bidders, if the OEM and OEM model number for each piece of equipment were provided.

The complainant's final allegation was that the Department had requested deliverables in its RVD that did not comply with the mandatory technical specifications of the NMSO. The Department argued that while the technical specifications of the deliverables may not have matched the NMSO, the technical definition of the products did. Upon a review of the products alleged not to conform with the NMSO, the Tribunal found the alleged non-conformity to be ancillary or found that the complainant had not adequately demonstrated that the alleged non-conformities existed.

— KC LLP —

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