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Court of Appeal determines that purchaser's representation to supplier that there was no competition was negligent and comments on good faith

In *Oz Optics Ltd. v. Timbercon, Inc.*, [2011] ONCA 714, the Court of Appeal partially allowed the appeal of the supplier on the basis that the Trial Judge erred in dismissing the Appellant's claim for negligent misrepresentation.

In 2002, the Respondent, Timbercon, Inc. (Timbercon), approached the Appellant, Oz Optics Limited (Oz), to design and manufacture a fibre-optic product known as a manual attenuator which Timbercon intended to supply to Lockheed Martin (Lockheed) for use in the construction of jet fighter planes. In 2003, they also began to consider the design of an automated attenuator.

Initially, Oz manufactured ten manual attenuators which were delivered to and paid for by Timbercon. Shortly after, Timbercon sent Oz a purchase order for 500 manual attenuators with a consignment agreement. Oz did not sign either the purchase order or the consignment agreement and without advising Timbercon whether or not it was accepting the order on a consignment basis, proceeded to ship 500 manual attenuators to Timbercon.

In 2003, Timbercon represented to Oz that it would be the sole supplier of the automated attenuator by stating in an e-mail that "*there was no competition*" and that an order of the automated attenuators for Lockheed was imminent. Lockheed requested a meeting with Timbercon to conduct a technical audit of the product and a conference call was held between Oz and Timbercon in preparation for the meeting. The day after the call, Timbercon contacted DiCon Fiberoptics, Inc. (DiCon), a competitor of Oz, with a view to involving DiCon as a potential supplier of the automated attenuators. Oz continued to prepare for the meeting with Lockheed. At the meeting, although Timbercon informed Lockheed that there was an alternative supplier, it did not inform Oz. Upon receiving DiCon's quote, Timbercon advised DiCon that it had a higher quote and provided it with an opportunity to reduce its quote. Timbercon then marked up Oz's unit price by 72 percent and the DiCon unit price by only 42 percent and submitted both quotes to Lockheed. Lockheed sent a letter of contract to Timbercon on the basis that the automated attenuators would be purchased from DiCon. The next day Oz learned for the first time that another supplier was involved and that DiCon had been granted the order to supply the automated attenuators.

The Court of Appeal considered the Trial Judge's reasoning on three issues.

Firstly, in determining whether or not the purchase of the manual attenuators was merely a consignment order or an outright sale to Timbercon, the Trial Judge held that when Oz shipped the manual attenuators to Timbercon without advising the latter that Oz did not accept the consignment order, it left the nature of

the order unresolved between the parties. While it did not sign the consignment agreement, it did not express any objection to it either. The Court of Appeal held that in reaching this decision the Trial Judge reviewed and analyzed all the relevant evidence as to whether the order was a consignment order and refused to interfere with this conclusion.

With regards to the second issue, Oz alleged that Timbercon misrepresented that it would receive large orders from Lockheed for the supply of automated attenuators that were to be designed and manufactured by Oz, as the sole supplier. However, the Trial Judge dismissed these allegations on the basis that the representations made by Timbercon that the contract was possible, in the works, imminent, only needed the final details worked out and might involve large quantities were mostly accurate. In assessing the Trial Judge's analysis of this issue, the Court of Appeal held that the Trial Judge failed to consider the central misrepresentation by Timbercon that Oz would remain the sole potential supplier for the production of the attenuators and the fact that the other representations were *mostly accurate* was immaterial. In holding that Timbercon acted negligently, if not nearly fraudulently, in continuing to make the representation that Oz remained the sole supplier under consideration, the Court of Appeal found that Oz had established the case for negligent misrepresentation and allowed the appeal on that ground.

Lastly, although the Trial Judge found that Timbercon deliberately rigged the two bids in a manner that was unfair to Oz, the Trial Judge held that Timbercon was not liable for a breach of the duty of good faith because absent a contractual relationship, fiduciary relationship, or some other exceptional circumstance, there was no legal duty to act in good faith. The Court of Appeal also considered the fact that there was no formal bidding process and that the ordinary elements of contractual tendering relations were not present (there was no period of irrevocability of the quote, no requirement of bid security, no request for tender providing the specific terms of the request and procedure for assessment, or any other factors common to the tendering process). In light of the reluctance of past courts, particularly the Supreme Court of Canada, to extend the doctrine of good faith beyond the context of a contractual relationship, the Court of Appeal refused to overturn the Trial Judge's finding.

The Court of Appeal's decision to overturn the Trial Judge's finding that there was no negligent misrepresentation is a strong signal that the courts do not look favourably on purchasers who mislead their suppliers for their own commercial benefit. Care should be taken to inform the suppliers of all relevant information during procurement to encourage a fair and transparent process. Further, note should also be made of the Court's comments relating to good faith.

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Manitoba Court of Queen's Bench Awards damages for failure to enter into awarded construction contract

In *Manitoba Eastern Star Chalet Inc. v. Dominion Construction Co.*, [2011] M.J. No. 439, the Manitoba Court of Queen's Bench (the Court) dealt with an action brought by Manitoba Eastern Star Chalet Incorporated (Eastern Star) against Dominion Construction Company Inc. (Dominion) and determined whether Dominion was the successful bidder in a tendering process, liable for its failure to enter into a construction contract as per its bid, and whether its bid was in compliance.

Eastern Star owned and operated a seniors housing complex in the City of Winnipeg. Eastern Star hired a consultant who "*orchestrated a tendering process*", whereby three construction companies would be approached and invited to bid on a construction project. On February 27, 2009, Dominion and the other two companies submitted their bids, which were then opened on February 28, 2009. Dominion's bid was the lowest and Eastern Star, being primarily concerned with price going into the tendering process, was content with Dominion's bid.

On March 2, 2009, the consultant's senior architectural project manager received a call from an individual named Eric Johnston (Johnston) who had prepared and formulated Dominion's bid and he told Johnston that the bid was *"low and probable".* Johnston forwarded an email that same day to Eastern Star noting that Dominion had discovered a mathematical error in the Offer Price and Dominion had *"no choice"* other than to withdraw its bid from the Project. On March 11, 2009, the consultant's Principal forwarded a letter to the Vice-President of Dominion stating Dominion's irrevocable offer (dated February 27, 2009) had been accepted for the construction project, included the stipulated price contract and also a request that it be executed and returned.

On March 17, 2009, the consultant was advised that Dominion would not be executing the stipulated price contract, stating that its bid had been non-compliant in accordance with the instructions. Eastern Star negotiated a contract for the construction project with the next lowest bidding company, Bird Construction Company (Bird), and they completed the project. Eastern Star sought damages in the sum of $647,000.00 from Dominion, being the difference between Dominion's bid and Bird's bid.

The Court stated that undoubtedly, Dominion wanted to bid and intended to submit the bid that it did for the construction project. The Court stated that this was important with respect to the notion of compliance with bid requirements and Eastern Star's duty to reject tenders which were non-compliant, a duty based on the notion of treating all bidders fairly. As stated by the Court, *"the requirement to deal fairly with all bidders stands at the core of the integrity of the bid process".* The Court stated that case law has indicated *"the test for bid compliance is not one of perfection, but instead is one of substantial compliance".* The Court also stated that *"substantial compliance allows an owner a limited discretion to waive minor non-material irregularities in a tender".* After reviewing several cases, the Court noted that compliance issues should be

considered within their particular facts and context.

The Court decided that Dominion intended to make and execute the bid in the manner that it did. The Court noted that the method of signing and sealing the bid was substantially compliant with the bid process and Dominion had intended its submission of its bid to be fully binding on it.

The Court further mentioned that the instructions to the bidders also included that a non-compliant bid could be retained for consideration at the discretion of the owner. The Court noted that the *"non-compliance"* evidence in the case did not amount to a failure to address an important or essential element of the tender documents and *"not so significant"* as to affect the deliberation of the owner in its determination of which bid it would accept. Thus the failure of Dominion to refer to four structural addenda by their correct numbers was noted by the Court to be an *"understandable error"*. The Court stated that Dominion intended to refer to all four addenda in its bid and had taken the four addenda into account in preparing the bid. The Court noted that if this had been an incident of non-compliance, Dominion's bid was substantially compliant in this regard.

Furthermore, the failure of Dominion to include a copy of the by-law resolution within its bid was deemed to be consistent practice with other bids Dominion has submitted, as well as with the conduct of the other two bidding companies. As such, the Court did not find this omission to be material.

The Court further noted that Dominion's bid was compliant with respect to the contract bid documents, as a valid contract was entered into by both Eastern Star and Dominion.

The Court awarded Eastern Star a sum of $518,059.85, as well as interest and costs of the action. The Court stated that if costs could not be agreed upon by the parties, this issue could be brought back before the Court.

This case reiterates the importance of a bidder's intention in both making and executing a bid, as well as the Court's use of the test of *"substantial compliance"* in determining whether or not a bid is compliant with a given tender or RFP. Notably, the Court also drew attention to how this interplays with the duty to treat all bidders fairly, and an owner's responsibility to not only reject bids which are non-compliant, but also to carefully consider all bids.

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Ontario Superior Court awards damages for delay in allowing construction work to proceed

In *Bre-Ex Ltd. v. Hamilton (City)*, [2012] O.J. No. 281, the Ontario Superior Court of Justice (the Court) allowed an action by Bre-Ex Ltd. (the Plaintiff) for damages against the City of Hamilton (the City) as a result of the City's delay in allowing the Plaintiff to proceed with work at a landfill site after it had been awarded a contract.

The City had been experiencing problems with leachate retention during its operation of landfill site and wanted to install a drain system forcemain and pumping station to eliminate the problem. Challenges associated with this work involving debris

and odour control of vector, vermin and digging in an active landfill site. The City had issued a call for tenders for constructing a new leachate collection system in the fall of 2001 and had an engineering firm, Gartner Lee Limited (Gartner Lee), acting as a design consultant on the project, providing advice to the City and also assisting with preparation of some of the bid documentation. The Plaintiff submitted an executed form of tender in compliance with all of the instructions. The Plaintiff had also included their proposed investigation and construction procedures and responses to the various requirements.

The Plaintiff's President met with the Senior Project Manager, the Manager of Waste Disposal, the Supervisor of Waste Management and two engineers from Gartner Lee at the City's request in November 2001 to discuss some concerns and on December 11, 2001 the City accepted Bre-ex's tender. The Plaintiff's President contacted one of the managers in early January 2002 and they had a meeting on January 24, 2002. The Plaintiff's President expressed his concerns about the delay in beginning work, stating the work could begin as early as January 30, 2002. Gartner Lee raised concerns that were discussed in the meeting in November, including wanting a personal inspection of the work. The Plaintiff's President resisted (as he did in the November meeting) stating a different method of excavation would be required entailing more work. The City argued that Gartner Lee did not want the Plaintiff to change its methodology but was concerned that if necessary, the Plaintiff would not perform additional de-watering of the trenches. An unsuccessful competitor of the bidding process was also in attendance at the meeting, and the Plaintiff's President raised concerns about this.

The next day on January 25, 2002, the Plaintiff's President expressed concern that the Plaintiff's methodology was not included the contract documents to the Senior Project manager, who in turn, responded that it should not be included. The City issued a notice to the Plaintiff at the end of January to begin construction on February 11, 2002 and complete it within 190 working days as specified within the contract. The Plaintiff's President wrote two letters to the City, one of which stated that the methodology was supposed to be incorporated in the contract, that the Plaintiff had planned to complete the work over two winter seasons and that the Plaintiff had a claim for delay. The Plaintiff received a letter dated February 14, 2002 from the City which raised several complaints, some which the Court found *"patently ridiculous",* including the fact that no notice was received from the Plaintiff indicating its *"desire to proceed anytime soon".* Both Parties continued their disagreement over whether the proposed methodology should form a part of the contract and no agreement was reached until March 19, 2002, when a Letter of Understanding was incorporated into the contract. Difficulties remained and a gentlemen's agreement was reached on April 2, 2002 and the Plaintiff executed the contract on April 12, 2002. The Plaintiff was not in a position then to complete the majority of the work during the winter months because of the delay related to these contract issues beforehand. The Plaintiff submitted a calculation of costs incurred due to delay by the City in June, 2002. A change order was generated by the City to the Plaintiff on June, 2003, but the funds were never released to the Plaintiff.

The Plaintiff brought forth an action saying that there was compensable delay from

December 11, 2001 to January 24, 2002. The City stated there was *"some slight but overall reasonable delay"* regarding communicating the compensation award to the Plaintiff but that the Plaintiff wrongly refused to proceed with the work as directed. Moreover the City stated that approval of the Plaintiff's methodology did not form *"a condition precedent"* to the Plaintiff's *"obligation to execute the pro forma contract for works"* as provided in the tender document package.

The Court concluded that there were two periods of delay; a delay in communicating awarding the contract to the Plaintiff and a delay in resolving issues associated with the terms of the contract. The Court stated that there was a compensable period of delay that the City was responsible for beginning on January 6, 2001. The Court stated it was reasonable to assume that the City would have advised the Plaintiff of the award of contract during the irrevocability period, whereby the Plaintiff could have began preparing documentation prior to January 6, 2002 and commenced the work promptly.

The Court noted that there was an express term of the bid package by which the methodology would form part of the contract based on provisions listed. The Court rejected the City's argument that methodology was "*not specifically referenced*" in the list of contract documents and therefore, was not a part of the contract. The Court reiterated that general provisions stipulated the contract documents should include specifications, the definition of which included *"descriptions or instructions pertaining to the method and manner of performing work".*

The Court further stated that as a result of this delay, the Plaintiff's commencement of work and a split schedule *"became necessary"* and the Plaintiff was thus entitled to compensation for both periods of delay. The Plaintiff was awarded damages for Revenue Loss, Fuel and Labour, Refinancing, Excavator Rental, and Replacement Equipment Rental. The Court did not award punitive damages stating that was intended for "*particularly egregious conduct*", but did state the Plaintiff was entitled to prejudgment interest. The Court left the parties to come to an agreement on costs, stating that if this was not possible, it would hear written submissions on costs.

This decision reflects the importance of honouring timing provisions within a given contract in light of any concerns that may arise prior to commencement of the contractual work. Additionally, it addresses the importance of understanding and paying attention to general provisions within a contract, particularly in the absence of specific references to given issues such as the inclusion of particular methodology or documentation.

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British Columbia Supreme Court dismisses action for breach of contract against City of Vancouver

In *Innovations for Audio Video Inc. v. Vancouver (City)*, [2011] B.C.J. No. 2141, the British Columbia Supreme Court (the Court) reviewed a decision on appeal from the Provincial Court of British Columbia, Small Claims Division, where the Appellant, Innovations for Audio Video Inc. (the

Appellant) argued that the Trial Judge had erred in dismissing its action for damages for breach of contract against the Respondent, the City of Vancouver (the Respondent).

The Appellant brought the action on the basis that the Respondent failed to award the Appellant a contract to install a sound system in Killarney Ice Rink in 2009. The Respondent had issued a Request for Proposal (RFP) for the installation and supply of a sound supply system in the ice rink in January 2009 but then cancelled this request in May 2009 as there was no funding available. The Killarney Community Centre Society (KCCS) supplied funding seven weeks later and one of the companies who had submitted a bid under the RFP was awarded the contract. A representative for the Appellant made a request for documents from the Respondent and was provided with copies of emails sent during the tender process which he alleged, showed clear bias *"and a determination to disqualify his bid for reasons that were both unfair and based on misapprehensions about his product"*. The Appellant brought forth this action on the basis that the *"RFP gave rise to binding obligations"* and that since the Appellant had submitted the lowest bid compliant with the RFP, the Respondent had been obligated to award the Appellant the contract. The Appellant further argued that the Respondent did not comply with a duty to treat all proposals fairly and that the RFP cancellation followed by KCCS providing funding "*was a sham, used to defeat the tendering process*".

The Trial Judge determined that the Respondent had discharged its obligations to treat all proposals fairly once the RFP process had been properly terminated. The Trial Judge found that the Appellant was not entitled to damages for loss of profit as that amount had included the representative's wages and he had not been a party to the action. The Trial Judge also found that punitive damages were not applicable to the case.

The Court stated that the standard of review for findings of fact on the appeal was that of correctness. The Court found that the Trial Judge had carefully considered all of the evidence and was unable to conclude that any overriding or palpable error had been demonstrated. The Court found that the Respondent's concerns, expressed through emails regarding warranties and their applicability in Canada was reasonable based on the information the Respondent had at the time. Additionally, the Court was unable to conclude based on the evidence that KCCS's funding was *"a sham"* and that the Respondent cancelled the RFP in order to avoid awarding the contract to the Appellant.

The Court further agreed that once the RFP was *"validly cancelled"* the Respondent was discharged of obligations that came with its issuing of the RFP, including its obligation to treat all proposals fairly. The Court stated that in some circumstances, obligations may exist that are created by the bidding process and that a cause of action exists where an owner departs from his or her own bidding rules. The Court stated that "*it is always a matter of contractual interpretations*" and that "*any implied duty of fairness depends on the reasonable expectations of the parties arising from the tender documents*". In this particular case, the Court noted that the RFP stated that Respondents *"were not bound by standards of compliance or by the lowest bid",* that there would be no remedies for any action taken by the Respondents under the tendering process,

and that the Respondents could cancel the RFP at any time. The Court concluded that as a result, there was no error with the Trial Judge's conclusion and dismissed the appeal.

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Court allows escalation costs

In *Dexter Construction Company Ltd. v. Nova Scotia (Attorney General)*, [2011] N.S.J. No. 647, the Nova Scotia Supreme Court (the Court) considered whether Dexter Construction Company Ltd. (Dexter) was entitled to damages in contract on the basis that contracts for highway construction between Dexter and the Province of Nova Scotia (Nova Scotia) contained an escalator clause.

Dexter is a large construction company who entered into four highway construction contracts with Nova Scotia in 2005. It was contemplated that the paving portions of the contracts would be performed in 2006. One ingredient in the asphalt required for paving is Performance Grade Asphalt Binder (PGAB). The price of PGAB increased between the date Dexter tendered the contracts and the time the PGAB was purchased. Dexter commenced an action against Nova Scotia claiming damages as a result of Nova Scotia's failure to compensate Dexter for the increase in price of PGAB.

It was understood at all times that the asphalt paving would take place in 2006. The parties agreed that at the time that all bids were submitted, the price of PGAB was $345 per metric tonne, while at the time of purchase for use on the paving projects its price was $510 per metric tonne.

All four contracts incorporated the *"Standard Specification Highway Construction and Maintenance"* contract, which contained a clause allowing for a price increase to be considered where the Supplier's Posted Rack Price increased "*subsequent to the end of the calendar year in which the asphalt work was initially scheduled*" and "*In the opinion of the Department, the lateness in tender call makes it unreasonable for the Contractor to finish asphalt work that year*".

Nova Scotia submitted that the work was originally scheduled for 2006, which was the year the paving was contemplated to be performed.

In finding for Dexter, the Court first considered the principles of contract interpretation, such that the intention of the parties should be determined by the words used in drafting the contract in light of the surrounding circumstances which were prevalent at the time.

The Court then considered the meaning of *"scheduled"*, and concluded that even though the work was to be performed in 2006, the work was scheduled in 2005. The posted rack price of PGAB did therefore increase subsequent to the end of the calendar year the work was initially scheduled.

Finally, the Court considered the evidence of the intention of the parties on the basis that the paving season in Nova Scotia is typically from mid-May to October. The contracts in this case were entered into in August and November, 2005. The lateness of the tender calls therefore made it unreasonable for

Dexter to finish the asphalt work in 2005 and it was therefore deemed the intention of the parties that the work was to be performed in 2006.

The Court concluded that as a result of the contract provisions, consideration should have been given as to whether a price change for the PGAB was justified. Dexter should have been allowed to charge the price paid for PGAB when purchased for $510 per metric tonne in 2006. Dexter was awarded damages in the amount of $522,000.00.

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Court considers issues for pricing on preferred basis

In *Polar Supplies Ltd. v. Nunavut (Minister of Community and Government Services)*, the Nunavut Court of Justice (the Court) allowed a judicial review application by Polar Supplies Ltd. (Polar Supplies).

Polar Supplies is a company providing various construction services in and around Cape Dorset. Polar Supplies acts in direct competition with Huit Huit Tours Limited (Huit Huit), another Cape Dorset based company. There is a history of litigation between Polar Supplies, Huit Huit and the Hamlet of Cape Dorset (Cape Dorset).

In this case, Huit Huit was building an extension to its hotel and required gravel. Huit Huit made arrangements with Cape Dorset to supply, spread and compact the gravel. The arrangement was approved by the Minister of Community and Government Services, as required by the *Hamlets Act*.

Polar Supplies brought an application for judicial review of the Minister's decision to approve the arrangement between Huit Huit and Cape Dorset, seeking an order quashing the Minister's decision and directing the Minister to reconsider the request to have Cape Dorset carry out the gravel work.

Polar Supplies provided Huit Huit a quote for the gravel work at its standard and not preferred rate. Polar Supplies refused to award Huit Huit the preferred rate on the basis that they did not do sufficient volume of work with the company to warrant the preferred rate.

As required by the *Hamlets Act*, Cape Dorset requested Ministerial approval to carry out the gravel work. The Ministry refused to grant the order, but stated that "*if Polar Supplies Ltd. refuses to provide gravel fill to Huit Huit Tours Ltd. or will only do so at an unconscionable price or on unreasonable conditions, the Hamlet of Cape Dorset may make this request again*."

Cape Dorset did not make any further requests to the Minister for approval to undertake the gravel project. However, Huit Huit corresponded directly with the Minister seeking reconsideration of the refusal on the basis that the prices provided by Polar Supplies were unconscionable. The Minister granted the order and Cape Dorset was notified of the decision the same day.

Polar Supplies was not aware that a request had been made and approval granted to have Cape Dorset carry out the gravel work until Polar Supplies observed Cape Dorset carrying out the work.

The initial issue for the Court to decide was whether the application was moot. In deciding this issue, the Court noted that the

Court must determine whether the dispute between the parties had been resolved. In this case, the Court concluded that it was necessary to consider not only the particular contract under review, but also the history of proceedings between the parties. Despite the gravel work having been substantially completed by the time of hearing the application for judicial review, the Court concluded the matter was not moot as a result of the ongoing contention and litigation between the parties.

The next issue for determination was the applicable standard of review. The parties and Court agreed that the applicable standard of review was reasonableness. In making this decision, the Court considered that the *Hamlets Act* did not contain a privative clause with respect to Ministerial decisions, but that such decisions are policy decisions in nature and, therefore, discretion must be given to the Minister.

The Court then had to consider whether Polar Supplies was entitled to notice of the request for Ministerial approval for Cape Dorset to carry out the work. In concluding that it was, the Court reviewed the duty of procedural fairness owed to Polar Supplies. In this case, the Court noted that the economic interests of Polar Supplies were impacted by the decision of the Minister and therefore they were entitled to "equal access to the decision maker and equal opportunity to be heard."

Despite concluding the lack of procedural fairness itself was sufficient to quash the Ministerial approval, the Court continued to comment on the procedural irregularities in the manner in which the request was made to the Minister. The *Hamlets Act* provided only that a municipality may make a request for approval to carry out private works on private property. In this case, the request for reconsideration came from Huit Huit and not from Cape Dorset.

Finally, the Court concluded that the Minister did not provide sufficient reasons for their decision to approve Cape Dorset carrying out the gravel work on the basis that Polar Supplies was charging an unconscionable price. There was nothing in the record to demonstrate why the price of Polar Supplies was deemed unconscionable.

As a result of all of the above findings, the Court granted the application for judicial review, quashing the Minister's order. It was unnecessary to reconsider the matter since the gravel work was completed.

The Court in this decision carefully assessed the duty of fairness owed to a given party, particularly when the party's economic welfare could be impacted by the Minister's decision to allow a request. This duty of fairness included proper notice, following procedural steps in a fair manner, and the requirement of the Minister to provide sufficient reasons for allowing any such request.

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Court interprets meaning of "Addendum" in context of discrepancy between tendering documents

In *Moorefield Excavating Ltd. v. Arran-Elderslie (Municipality)*, [2012] O.J. No. 1598, the Ontario Superior Court (the Court) considered the effects of a discrepancy in the tender documents with regard to the closing time of a procurement bid.

The Municipality of Arran-Elderslie (Municipality) relied on the services of Genivar Consultants LP (Genivar) in their procurement of a contract for the replacement of a water main. The Request for Tenders (RFT) and the Information for Tenderers (IFT) issued by the Municipality specified the closing time as 1:00 p.m. on the closing date. However, the closing time was listed as 2:00 p.m. on the original Form of Tender (FOT) as well as the Revised FOT (RFOT), which was attached to a subsequent Addendum. The four-page Addendum addressed various issues, mainly dealing with revised specifications, and instructed all Tenderers to replace the initial FOT with the RFOT, which was enclosed.

On the closing date, the representatives of Genivar and the Municipality believed that the closing time was 1:00 p.m. On this basis, the representatives opened the four bids that had been received shortly after 1:00 p.m. The representatives identified the lowest bidder as Moorefield Excavating Ltd. (Moorefield) and communicated this information to Moorefield. However, shortly thereafter, two additional bidders arrived and claimed that the closing time was 2:00 p.m. The representatives re-examined the tender documents and accepted the new bids. The contract was awarded to one of the new bidders.

The General Conditions contained an Order of Precedence which established the hierarchy of authority with regard to tender documents in the event of an inconsistency. Under the General Conditions, "Addenda" ranked above "Instructions to Tenderers" (equivalent in this case to IFT) which in turn ranked above "Tender" (equivalent in this case to FOT).

The Court rejected Genivar's argument that the RFOT formed part of the Addendum, and that the time listed on the RFOT therefore took priority over the time listed in the IFT. The Court reasoned that the text of the Addendum did not indicate that the RFOT formed part of the Addendum (as opposed to merely constituting a separate replacement FOT). In other words, the RFOT enclosed in the Addendum did not correct the discrepancy, but rather permitted it to persist. The Court concluded that since the Addendum did not signal any explicit intention to clarify or resolve the discrepancy, it must be resolved in favour of the 1:00 p.m. closing time listed in the IFT, according to the Order of Precedence.

The Court also stated that the Municipality committed itself to the 1:00 p.m. closing time by opening the four initial bids shortly after 1:00 p.m. This result flows from the critical nature of the timing of bid submissions in the context of the need to maintain the integrity of the public tender process. The Court declared the Municipality in breach of contract, and referred the action to trial to determine the basis and quantification of damages to be paid.

This decision is significant because it clarifies the meaning of an "Addendum" and illustrates how the mere reiteration of an inconsistent element within tendering documents does not necessarily establish the precedence of that element or, for that matter, correct the inconsistency.

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Court grants motion for summary judgment despite complexity of facts and issues

In *Intellibox Concept Inc. v. Intermec Technologies Canada Ltd.*, [2011] O.J. No. 4958, the Ontario Superior Court of Justice (the Court) granted the Defendants, Intermec Technologies Canada Ltd. (Intermec) and Georgia-Pacific Corporation (Georgia), motions for summary judgment on the basis that the Plaintiff, Intellibox Concept Inc. (Intellibox), was one of a number of unsuccessful bidders on a potential project to utilize radio frequency identification (RFID) technology in association with recyclable plastic containers (RPCs), that the Plaintiff could not prove any of the necessary constituent elements of its claims, and that there were no genuine issues which would require a trial.

In 1999, Stephane Deschenes, a consultant working at Gogh E-Solutions Inc. (Gogh) entered into an agreement, on behalf of Gogh, with IPL Plastics Inc. (IPL) under which IPL was required to purchase any RFID tags exclusively from Gogh. This agreement was later assigned to Deschenes and then to Intellibox. The Intermec Defendants were leading RFID innovators and in 1999 Intermec appointed Deschenes, and later Intellibox, as one of its nonexclusive resellers pursuant to Intermec's standard form reseller agreement.

In 2000, Georgia-Pacific invited proposals from identified vendors of RFID technology, by way of a request for quotation (RFQ) and Intellibox was one of seven RFID vendors that responded to the RFQ. However, Georgia-Pacific decided that none of the responses to its RFQ had resulted in satisfactory proposals and asked Intermec to develop, manufacture and deliver a custom, encapsulated RFID tag. Georgia-Pacific wrote to the potential RFID vendors, including Intellibox, to advise them that Georgia-Pacific had concluded that no existing RFID product satisfied its needs and that it had contracted with an existing tag manufacturer to develop a custom tag. Ultimately, Georgia-Pacific and Intermec entered into a purchase agreement for the purchase of custom RFID tags.

Intellibox alleged that there were numerous issues involving significant disputes in the evidence thus constituting genuine issues requiring a trial.

Intellibox's breach of contract claim against Intermec relied on an implied term in the CRA, the operative agreement between the Plaintiff and Intermec. The Plaintiff argued that Intermec could defeat the overarching purpose of the CRA by actively marketing its own products directly to the customers of any reseller. In order for the CRA to be given business efficacy, there must be an implied term that Intermec could not sell RFID tags directly to end-users, or at least not to end users to which any reseller had already directed its marketing efforts. However, the Court held that terms may only be implied into a contract where they do not contradict an express term of the contract. Since the term advanced by the Plaintiff directly contradicted the clear language of the CRA, it could not be implied into the contract.

The claim for breach of fiduciary duty focused on the allegation that Intermec had reason to know what Georgia-Pacific's needs were, and that Intellibox relied on Intermec to provide it with the most suitable RFID tag for Georgia-Pacific's

needs. The Court did not find any evidence that Intermec provided Intellibox with any less effective technology or less favourable pricing than other Intermec resellers or other than what was available at the time.

Deschenes maintained that Intermec was aware that Intellibox considered the identity of its potential customer, Georgia-Pacific, as well as all details with respect to the RFID business opportunity being promoted by Intellibox to Georgia-Pacific, to be confidential. The Court held that Intellibox's failure to designate any information provided in connection with the Georgia-Pacific RFQ as confidential under the proprietary information agreement was fatal to its argument concerning Intermec's breach of confidence. However, even in the absence of this point, the Court found that Intellibox had not made out a case for breach of confidence.

Intellibox argued that Georgia-Pacific utilized the information in respect of the Intermec RFID products provided by Intellibox in its proposal in order to solicit a direct quote from Intermec in respect of the same product and to purchase some of those products in order to conduct testing of the RFID tags. The Court dismissed this argument on the basis that Intellibox was unable to demonstrate that any confidential information was, in fact, conveyed.

Intellibox further argued that when it submitted a proposal in response to Georgia-Pacific's RFQ, it entered into a contract, known as Contract A with Georgia-Pacific. However, the Court held that it did not believe that the Contract A/Contract B analysis could be applied to the Georgia-Pacific RFQ and Intellibox's proposal in response to the RFQ.

Intellibox alleged that Georgia-Pacific entered into an agreement for the purchase of RFID tags from Intermec, and supplied those tags to IPL in order for them to be affixed to the RPCs which IPL was manufacturing for Georgia-Pacific. Intellibox also alleged that this necessarily caused IPL to breach its contract with Intellibox and that it was Georgia-Pacific's intent to cause economic harm to Intellibox and to circumvent the IPL/Intellibox agreement. Intellibox also alleged that Intermec and Georgia-Pacific conspired and colluded with each other to injure Intellibox by virtue of Georgia-Pacific's direct purchase of the custom RFID technology from Intermec. The Court held that the record in both of those matters was utterly devoid of any evidence.

Lastly, Intellibox argued that Georgia-Pacific's RFQ constituted an offer to consider bids for a contract to supply the RFID solution Georgia-Pacific was looking for and that Intellibox accepted this offer by submitting a bid. The Court held that the responses to the RFQ were not offers which, upon acceptance by Georgia-Pacific, were capable of giving rise to a Contract B. There was no bid shopping and no breach of any obligation of good faith.

Overall, the Court held that there were no genuine issues the resolution of which would require a trial and granted summary judgment dismissing the action. This case is particularly interesting due to the complexity of the facts of the case and the nature of issues raised by the Plaintiff.

It should also be noted that this case involved an RFQ, which does not create the same obligations for the purchaser.

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B.C. Court can rule on case, despite claims arising in Ontario

In *Conor Pacific Group Inc. v. Canada (Attorney General),* 2011 BCCA 403, the British Columbia Court of Appeal reversed a lower court ruling that British Columbia Courts had no jurisdiction over a set of claims that arose in Ontario.

This case involved two companies: Defence Construction Canada (1951) Ltd. (DCC), a federal Crown corporation with registered offices in all provinces; and Conor Pacific Group Inc. (Conor), a company incorporated in Alberta and registered extra-provincially in Ontario and British Columbia. Following a procurement process, DCC awarded a contract to Conor for the remediation of fuel storage sites and hydrocarbon-contaminated groundwater at the Canadian Forces Base airport in North Bay, Ontario. Conor claimed that the tender documents provided by DCC misrepresented the scope of the remediation project with regards to the types of soil contaminants present and the amount of soil to be treated. Conor claimed that it had relied on these representations to calculate its bid price and to design its treatment systems for the project. According to Conor, it was forced to revise its remediation program as a direct result of the alleged misrepresentations, and thereby incurred additional costs and delays.

As we reported in our November 2011 Newsletter, the Superior Court of British Columbia originally found that the Court did not have jurisdiction because none of the alleged misrepresentations or *quantum meruit* claims arose in British Columbia. However, the Court of Appeal has now ruled the lower court decision was wrong in law. The Court of Appeal held that under the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28, British Columbia courts have territorial jurisdiction over this case solely by virtue of the fact that the defendant, DCC, had a registered address in British Columbia at which it could be served at the time that the proceeding commenced.

This decision illustrates the importance of knowing the rules governing jurisdiction where a claim has potential links to more than one province. Given the cost for an Ontario entity defending in British Columbia, consideration should be given to appropriate attornment and jurisdiction clauses in any Tender, RFP etc., and Contract.

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CITT determines substance more important than form when interpreting mandatory bid requirements

In *Dymech Engineering Inc. v. Canada (Department of Public Works and Government Services)*, [2011] C.I.T.T. No. 117, the Canadian International Trade Tribunal (CITT) dealt with a complaint arising from a procurement by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of the Environment for tiltable poles, made from aluminum and steel, to support wind-measuring equipment. Dymech Engineering Inc. (Dymech) alleged that PWGSC incorrectly declared its bid non-compliant, and sought a recommendation from the CITT that PWGSC declare the bid complaint and award the contract to Dymech. Failing such

a recommendation, Dymech sought damages for lost profits.

PWGSC's Request for Proposal (RFP), which was issued on May 12, 2011, listed several mandatory criteria, including a requirement that all bids must contain a copy of the bidder's Welding Certificate which demonstrated that they had met the requirements under the Meteorological Service of Canada Procurement Specification (MSCPS). The MSCPS requires all welding to be performed by a fabricator certified to the requirements of the Canadian Standards Association (CSA), Standard W47.1 with respect to steel, and CSA Standard W47.1 with respect to aluminum.

Dymech's bid contained two Canadian Welding Bureau (CWB) certificates attesting that Dymech had been certified to CSA Standard W47.1 and W47.2M, in 2002 and 2004, respectively. Both certificates indicated that certification is validated yearly via a Letter of Validation available from the company; however, Dymech did not submit any additional letters related to the yearly validation of certificates. Upon its assessment of the bids, PWGSC declared Dymech's bid non-compliant on the basis that the welding certificates had expired and awarded the contract to another company.

Dymech claimed that the RFP did not clearly require welding certificates to be accompanied by letters of validation, and that the certificates provided met the mandatory requirements of the RFP. Dymech argued that it expected PWGSC to verify the validity of the certificates either by contacting the CWB or requesting the letter of validation after the award of the contract. Dymech claimed that because the RFP requirements were unclear, PWGSC had an obligation to seek clarification regarding the validity of Dymech's certification before disqualifying the bid.

The task of the CITT was to assess whether the RFP contained all the necessary information, whether PWGSC assessed the bids in accordance with the specified criteria, and whether Dymech's bid complied with all mandatory criteria.

In rejecting Dymech's complaint, the CITT relied on the principle that solicitation requirements should generally be read for their substance, not their form. In this case, the CITT found that the RFP clearly required certificates to demonstrate current compliance with MSCPS standards. Because the certificates indicated that certification was validated annually, they could not have constituted proof of valid certification unless accompanied by letters of validation. This case is important because it reinforces the principle that while a procuring entity *may* seek clarification of a proposal, it is not under any *duty* to do so. Since the substantive requirements were clear in this case, the onus was on the bidder to establish compliance.

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CITT reiterates that the ACAN procedure should not be used to avoid open competition

In *FreeBalance Inc. v. Canada (Revenue Agency)*, [2012] C.I.T.T. No. 18, the Canadian International Trade Tribunal (CITT) determined that the complaint filed by FreeBalance Inc. (FreeBalance) concerning an Advance Contract Award Notice (ACAN) for a sole-source procurement issued by the Canada Revenue Agency (CRA) was valid because the CRA provided insufficient

information for the sole-source justification and the rejection of FreeBalance's statement of capabilities submitted in response to the ACAN.

In 2011, the CRA issued an ACAN stating its requirements for a commercial off-the shelf (COTS) software product for the modernization of its revenue management system while stating its intention to award a contract to SAP on the basis that SAP was the only firm capable of meeting this requirement. The ACAN invited suppliers that considered themselves fully qualified to meet all these requirements to submit a statement of capabilities. Shortly after, FreeBalance submitted a statement of capabilities to the CRA and stated that in its belief a sole-source procurement, in this case, was not in the best interest of the CRA. The CRA alleged that its technical team reviewed FreeBalance's statement of capabilities and determined that it was technically deficient. The CRA submitted that its evaluation was reasonable and that it was not open to the CITT to second-guess its technical experts.

The CITT held that FreeBalance had submitted evidence that reasonably suggested that the CRA's limited tendering procedure was not justified. FreeBalance did have existing financial applications within the Government of Canada that would have responded to all of the CRA's requirements and was willing to back up this belief by participating in a competitive procurement process. It could well have been that FreeBalance or a third party could offer a competitively priced product that would have met all of the CRA's needs, but without open competition it was impossible to know. Although the CITT acknowledged that it was not in a position to fully assess the technical merits of FreeBalance's proposed solution, it was also not satisfied that SAP was the only supplier able to meet the CRA's mandatory requirements.

The CITT reasoned that although CRA issued an ACAN that did not specifically refer to the SAP module which it had in mind, it did, in effect, evaluate FreeBalance's statement of capabilities as if it were a proposal in response to a fully detailed RFP. Having determined that the statement of capabilities was unresponsive to a few of the requirements of the ACAN — an assessment that, according to FreeBalance, is mistaken — the CRA decided to procure from SAP.

By failing to put this belief to the test of a competitive procurement, the CRA left the CITT with the impression that the overriding reason for a directed contract with SAP was expediency or administrative convenience. The evidence disclosed that the CRA had predetermined that SAP's product was a risk-free solution which would meet its needs, and there were indications that, by the time the long overdue decision was taken to make the upgrade, the CRA was eager to proceed with SAP's contract as expeditiously as possible. In so doing, the CRA used the ACAN procedure to avoid a competitive process. Accordingly, the CITT found that the CRA conducted a limited tendering process that was not justified and was not otherwise consistent with the trade agreements.

As a remedy, the CITT recommended that the CRA conduct a competitive procurement process no later than 90 days after the issuance of the reasons for this determination, in accordance with the applicable trade agreements, for the requirement that is the subject of this complaint. If the CRA had already awarded a

contract for the requirement, the CITT recommended that the CRA compensate FreeBalance for its lost opportunity, in accordance with the CITT's *Procurement Compensation Guidelines.*

In making its decision, the CITT reiterated that an ACAN process should not be treated as a shortcut that skirts the requirement for open competition. Indeed there are provisions in the trade agreements that allow for shorter than normal periods for bidding when time is a crucial factor.

This decision emphasizes the importance of ensuring that a tendering process is consistent with and honours all relevant trade agreements, particularly with respect to conducting an open and competitive procurement process.

CITT confirms bidder must prove compliance

In *BRC Business Enterprises Ltd. v. Canada (Department of Public Works and Government Services*, [2011] C.I.T.T. No. 132, the Canadian International Trade Tribunal (CITT) rejected and deemed invalid a complaint by BRC Business Enterprises Ltd. (BRC) that the Department of Public Works and Government Services (PWGSC) improperly declared its offer non-compliant and failed to evaluate its offer in accordance with the terms of the solicitation documents.

PWGSC issued a Request for a Standing Offer (RFSO) for the supply, delivery and installation of freestanding furniture. Part of the RFSO provided for mandatory criteria to be submitted "*with the offer or within 5 business days upon request from the Contracting Authority*." Test results were included in the category of materials which were mandatory to include. PWGSC subsequently issued amendments to the RFSO requirements, including an amendment which provided that mandatory procurement criteria must be submitted with the offer.

PWGSC advised BRC that its offer for freestanding furniture had been evaluated as non-compliant because of incomplete testing and therefore a failure to provide the required test report.

BRC sought review of PWGSC's decision not to award BRC a standing offer with respect to the freestanding furniture, claiming that they did provide the required test report. PWGSC responded advising that its decision remained unchanged, resulting in BRC filing a complaint with the CITT.

BRC submitted that the language of the RFSO provided that the offeror could choose to submit the criteria with its offer or upon request. BRC alleged that the use of "or" instead of "and" afforded the offerors an option in this regard.

PWGSC submitted in response that the language of the RFSO was intended to mean, and should be interpreted to mean, that PWGSC "*had the option to go back to offerors and seek additional information if it so chose, but that it was not obliged to do so*."

In finding the complaint not valid, the CITT noted that it is a fundamental procurement principle that *"the offeror must ensure that its offer is compliant*

with all essential elements of a solicitation and that the failure to meet any mandatory criteria renders an offer non-compliant."

The CITT held that that the language of the RFSO criteria, including the amendments, was such that its plain meaning left "*no doubt that the offeror could legitimately submit the substantiating documentation with the offer or, after bid closing, upon the request of the contracting authority*."

The CITT disagreed with BRC that the language of the RFSO provisions made it mandatory that PWGSC request documentation where it was not submitted with the original offer. In arriving at this conclusion, the CITT stated that the intention of the parties must be derived from the language of the RFSO itself. In this case, there was nothing in the language of the provisions to support the proposition that PWGSC had an obligation to seek additional information. Rather, the provisions indicated that the obligation to ensure an offer was compliant rests with the offeror.

The CITT further commented that this interpretation is consistent with the well-established principle that it is the offeror that bears the onus to demonstrate compliance with mandatory criteria, and that BRC should have sought additional clarification.

As a result, the CITT found that PWGSC was not acting in a manner inconsistent with the provisions of the RFSO in declaring BRC's bid non-compliant, and therefore the complaint was not valid.

This case highlights both the obligation and the responsibility of a bidder to ensure that it has complied with all of the mandatory criteria of a tender, RFP or RFSO and to seek additional clarification with respect to any and all requirements, rather than assume its interpretations of the requirements will be correct.

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CITT dismisses procurement complaints against CRA

In *Access Information Agency Inc. v. Canada (Revenue Agency)*, [2011] C.I.T.T. No. 139, the Canadian International Trade Tribunal (CITT) made inquiries into two complaints filed by the Access Information Agency Inc. (AIA) against the Canada Revenue Agency (CRA) concerning a procurement for Access to Information and Privacy Consultants.

The CRA had put forth a Request for Proposal (RFP) to retain the services of resources that had expertise in treating complex Access to Information and Privacy requests. Two amendments were made to the RFP in response to inquires made from suppliers. The CRA received four proposals, including the AIA's proposal, and on March 25, 2011, the CRA informed AIA of the reasons as to why its proposal had been rejected.

Almost a month later, the CRA informed the AIA that three of its proposed resources had been re-evaluated with respect to mandatory technical evaluation criterion which had increased AIA's score. A day later, it informed AIA's

representative of why its proposal had been rejected.

The AIA filed four objections with the CRA, requesting a re-evaluation of its proposal. On May 27, 2011, the CRA informed AIA that it had re-evaluated all four proposals, sought the services of an independent third party to monitor the process and ensure fairness and that AIA's proposal had ranked third.

On June 2, 2011, the AIA filed a fifth objection with the CRA and on June 3, 2011 and June 10, 2011, it filed its first and second complaints respectively with the CITT.

The CITT informed the parties that it was going to conduct an inquiry into certain grounds of the first complaint brought by the AIA; namely that the technical sub-criteria of point-rated evaluation criterion R3 of the RFP were not evaluated. The AIA alleged that the CRA did not take into consideration all of the information that the AIA had presented regarding a particular resource. The AIA argued that for the sub-criterion regarding the application of the *Income Tax Act* ("*ITA*"), the information provided by AIA's resources was not properly evaluated and that CRA required specific examples of the application of the *ITA*, whereby *"the CRA forced resources to act contrary to law".* The AIA further alleged that the CRA had applied an evaluation criterion concerning the application of the *ITA* that had not been disclosed to the bidders and was not reasonably foreseeable. The CITT informed the parties that it would provide a statement of the reasons of its decision after it conducted an inquiry into these specific allegations.

On June 21, 2011, the CITT decided to conduct an inquiry into specific allegations regarding the second complaint filed by the AIA. In particular, the CITT focused on AIA's allegation that evaluation criterion R6 did not comply with the CRA's RFP because the words *"autres que des notes d'information régulières"* had been eliminated by the amendment to the RFP dated February 14, 2011, and had not been deleted in the French version of the RFP. The CITT decided not to conduct an inquiry into the other allegations of the second complaint. The CITT further stated, in a letter to the parties, that it had decided to combine the proceedings and that it would provide the statement of reasons of its decision at the end of the inquiry.

The CITT first dealt with the CRA's claim that the CITT should dismiss the complaints on the basis that even if the CITT determined that AIA's allegations were valid, AIA's total score would only increase slightly and it would still be ineligible. The CITT stated that it was relevant to examine all grounds of the complaint, that it could not ignore analyzing whether or not trade agreements were breached, and that it was required to determine whether the procurement conducted by the CRA was undertaken in accordance with the various applicable trade agreements.

In analyzing the first complaint, the CITT made note of what it has repeatedly stated: "*... suppliers bear the onus to respond to and meet the criteria*

established in a solicitation" and also that *"... a bidder needs to do more than list an ability in order to demonstrate that it actually possesses that ability*". The CITT further stated that it would not "*substitute its own judgment for that of the evaluators*" unless the evaluators did not apply themselves in evaluating a bidder's proposal, if they ignored "*vital information provided in the bid*", if they *"wrongly interpreted the scope of a requirement",* based their evaluation on criteria which was not disclosed, or had "*not conducted the evaluation in a procedurally fair way*". The CITT stated that none of these circumstances applied to the first complaint. The CITT noted that the way in which the particular sub-criterion in question was applied was not unreasonable and that it was AIA's responsibility to show that it had clearly met an applicable criterion. The CITT further stated that there was no evidence that the evaluators did not properly evaluate AIA's proposal or ignore *"vital information"* in AIA's proposal with respect to the application of the *ITA*. The CITT stated that the RFP was clear in that the sub-criterion in question required a demonstration of a level of knowledge of the proposed resources with respect to the application of the *ITA*. As such, the CITT agreed with the CRA that it would have been possible for AIA to explain or describe "*the precise nature and extent of experience under the ITA*" as requested in the RFP.

With respect to the second complaint, the CITT stated that it did not have "*reason to question CRA's good faith*" when the CRA claimed that it had relied on the English version of the evaluation which had been amended, as all of the bids were in English. Furthermore, the CITT was of the view that AIA was in possession of the French version of the RFP, was able to recognize that it differed from the English version of the RFP and that it was the bidder's responsibility to ask for clarification and/or details as necessary. The CITT further stated that with respect to the complaints, any questions pertaining to the RFPs should have been filed with the CITT within ten working days after the bid closing date and that the CITT should not have inquired into this ground of the complaint.

The CITT found that the complaints were not valid and awarded CRA reasonable costs that it incurred in having to respond to the complaints. The CITT utilized its Guideline with respect to fixing costs for Procurement Complaint Proceedings and gave a preliminary indication of a cost award to the CRA in the amount of $2,400.

Notably, this decision reflects the responsibility of a bidder to ensure that it has responded to all relevant criteria of an RFP or tender and demonstrated how it meets such criteria; not merely that it possesses an ability to do so. Furthermore, it emphasizes that the bidder bears the responsibility to seek clarification and inquire about any uncertainties within an RFP or tender, prior to submitting its bid.

— KC LLP —

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