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Public Sector

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IN THIS ISSUE —

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Court finds conspiracy and bid-rigging — awards damages

In *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.*, [2009] O.J. No. 286 (S.C.J.), the Superior Court of Justice held that Gabriele had conspired to submit false bids and had unlawfully obtained price reductions in a land sale transaction by conspiring with Ontario Reality Corp. personnel. As a result, Gabriele was liable in conspiracy and unjust enrichment.

Importantly, the Court clarified the burden of proof in civil cases in which there were allegations of criminal or morally blameworthy conduct. According to the Superior Court, the burden of proof is not proportional to the seriousness of the allegations. Accordingly, there is one civil standard and that is proof on the balance of probabilities.

The present action arose from seven contracts between the ORC and Gabriele or one of its subsidiaries. Of these, only three involved the procurement process.

MARKHAM/PICKERING/DUFFINS CREEK TRANSACTION

In this contract, the Request for Proposals (RFP) provided that a limited number of consultants were being invited to tender. The consultants were to provide professional project administration, field supervision and verification services. Furthermore, the successful bidder would act as the ORC's agent in ensuring that the work was completed. After the close of the bidding, it was determined that Sirman Associates Ltd. was the successful bidder.

Part of Sirman's responsibilities under Contract B (the final contract between the owner and the successful bidder as contemplated in the RFP) was to prepare RFPs for specified work items and to solicit three competitive bids. Sirman, however, did not conduct a proper tender process. Instead, Sirman sent a fraudulent letter to the ORC stating that an RFP had been submitted to six companies and that all six companies had bid on the project. Sirman also attached a falsified document which set out the respective bids along with Sirman's recommendation that the contract be awarded to Gabriele. The ORC, upon reviewing the falsified bids, agreed with Sirman's selection of Gabriele as the successful bidder.

The Court found that Sirman and Gabriele had colluded from the outset, before Sirman tendered in response to the ORC's request for tenders, and had agreed on a plan to submit false bids with the result that Sirman would be awarded the management contract and Gabriele would be awarded the subcontract. The Court also found that no work was performed by Gabriele. However, despite the lack of work, Gabriele continued to submit invoices for work done to Sirman, which were forwarded to the ORC.

As a result, the Court found that "*the means were unlawful in that to the knowledge of both, phony bids were sent to ORC to give the appearance of legitimate tendering when none existed*." The Court further concluded that "*the ORC was defrauded by the submission of false invoices.*"

BRITANNIA/TOMKEN PROPERTY

In this contract, the ORC claimed that the original bid process was "unfairly

manipulated" and that there was an unlawful conspiracy between Gabriele and the property's marketing coordinator. The Court relied on the established principle that all bidders are to be treated fairly and equally. This principle was violated in this case as the marketing coordinator was found to have disclosed to Gabriele the terms of the competitive tenders and the information needed to improve his bid in order to be the successful bidder. However, no other bidders were given such an opportunity.

The Court found that the bidding process was manipulated by Gabriele and the marketing coordinator in order to harm the ORC and, consequently, benefit Gabriele's interests. Accordingly, "*what occurred … is that [the marketing coordinator] and … Gabriele conspired to arrange for Gabriele's company to be the winning bidder for the property pursuant to an agreement, tacit or otherwise, that Gabriele would be given an opportunity to improve his bid in order to beat any other bid that was received.*" This constituted unlawful conspiracy.

The Court held that the marketing coordinator owed a fiduciary duty of loyalty to the ORC. By disclosing the competitive bids to Gabriele with the result that Gabriele improved his bid and, subsequently, became the successful bidder, the marketing coordinator was in breach of that duty.

KINGS HIGHWAY 2A

In this contract, it was claimed that the property was obtained as a result of bid-rigging due to the fact that two of the three bids were made by Gabriele interests. Upon the evidence, the Court concluded that there were two wrongdoings. Firstly, the ORC realty branch provided Gabriele with confidential evaluation information prior to submitting a proposal. Secondly, Gabriele created the appearance of a competitive bidding market by tendering two bids, each from a different Gabriele interest. The Court held that "*in the circumstances, the manner in which the two bids were made was deceitful. The impression given was that they were two separate bids from different parties when in fact Gabriele had an interest in both bids. It was also done to give the appearance of a competitive bidding process, and the fact that someone else happened to make a third and independent bid does not remove the deception that took place by Gabriele.*"

As a result of the finding that Gabriele engaged in deceit and bid-rigging, the Court found that "*obtaining property by deceit is something for which courts of equity have long enforced an obligation to return the fruits of the deceit. The obtaining of the property was due to the deceitful practices of Gabriele. The plaintiff's have a legitimate reason to ensure that the defendants and others not engage in deceitful bidding practices …*"

As a result of the Court's findings on the three contracts above as well as the four others not discussed, the Court held that the appropriate measure of damages was the profits earned on the resale of the properties.

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Appellate Court characterizes nature and scope of the duty of fairness

In *Hub Excavating Ltd. v. Orca Estates Ltd.*, [2009] B.C.J. No. 752 (C.A.), Hub

submitted the lowest bid in response to a Request for Tenders. After the close of the tendering process, the project engineer represented to Hub that it would be awarded the contract. As a result of these representations, Hub did not submit a bid on a contemporaneous project. The appellants ultimately rejected all bids on the basis that the project was not economically feasible. Hub sued for breach of an implied duty of fairness in the tendering process.

The British Columbia Supreme Court decision of this case was included in the May 2008 newsletter (see "Court finds liability for breach of duty of good faith and negligent misrepresentation", Procurement Law Newsletter, May 2008). In that decision, the B.C. Supreme Court reinforced the integrity principles of the tendering process, namely, the duty of fairness and good faith and the requirement for accurate information.

The Court of Appeal found that the trial judge had mischaracterized the nature and scope of the implied duty of fairness and, therefore, erred in finding that the appellants had breached this duty. Significantly, the Court of Appeal held that the duty of fairness does not arise before the formation of Contract A (the contract formed when the contractor submits a bid in response to a request for tenders). According to the Court, "*the contractual duty of fairness is an implied term of Contract A, and thus only comes into existence when that contract is formed. There is no free-standing duty of fairness in the bidding process independent of that contractual duty*."

The trial judge had held that the appellants had breached their duty to treat all bidders fairly. The Court of Appeal found that the trial judge had also erred on this finding. The Court relied on *Martel Buildings Ltd. v. Canada*, [2000] SCC 60, where the Supreme Court of Canada held that "*a privilege clause does not exclude the obligation to treat all bidders fairly, but the extent of that duty will be defined in the context of the express terms of the tender documents.*" According to the Court of Appeal, the duty to treat all bidders fairly, as established in *Martel*, "*is confined to an obligation to treat all bidders fairly and consistently* ***in the process of assessing bids****. It does not extend to other aspects of the tendering process*" (emphasis added).

The Court of Appeal further held that it was unreasonable for Hub to have relied on the representations made by the project engineer. The Court found that Hub knew that the project engineer did not have the authority to reject or accept bids as this was the authority of the Joint Venture Appellants. As a result, the Court of Appeal dismissed Hub's claim for negligent misrepresentation.

Finally, the Court upheld the business judgment principle by emphasizing that a court should be reluctant to interfere with discretionary business judgments unless the owner has breached a contractual term. The reasons for the lack of interference is that "*court oversight of such decisions would create significant uncertainty for owners as to what degree of pre-bid investigation and economic certainty was required to avoid potential liability before going to tender*."

Therefore, as the trial judge was found to have erred in the characterization and scope of the duty of fairness, the Court of Appeal allowed the appeal.

Court allows owner to engage in negotiations after rejection of all bids

In *Cambridge Plumbing Systems Ltd. v. Strata Plan VR 1632*, [2009] B.C.J. No. 892 (S.C.), the British Columbia Supreme Court reaffirmed the principle that the tendering process terminates upon the rejection of all bids. The Court held that upon rejection of all tendered bids and, therefore, termination of the tendering process, the duty of fairness arising on the formation of Contract A is no longer applicable and, therefore, the defendant could enter into negotiations with any or all of the bidders. This did not constitute bid shopping.

In this case, Cambridge argued that the owners, Strata Plan, breached their obligation under Contract A when it failed to award Contract B to Cambridge. Cambridge further alleged that the owners had entered into unauthorized negotiations with another bidder before the close of the tendering process which also breached the owner's obligations under Contract A. The defendants countered that the plaintiff's bid was not compliant with the terms and conditions set out in the tendering documents.

With regards to the defendant's assertion that the plaintiff's bid was non-compliant, the Court set out the appropriate approach when assessing the issue of compliance:

"1. Read the terms of the tendering document to determine the owner or tendering authority's scope of discretion to waive defects.

2. Where there is a discretion clause or some indication that there is a discretion to waive non-compliant bids, the default test is the material non-compliance analysis from Graham (Graham Industrial Services Ltd. v. Greater Vancouver Water District (2004), BCCA 5, 25 B.C.L.R. (4th) 214).

3. Identify the defect and assess its importance to the terms of the invitation.

4. If the omission or defect is essential, the materiality of that defect to the owner's decision-making process is measured objectively. In assessing the consequences of the defect, take into consideration the objectives underlying the tendering process as a whole and the reasonable expectations of the parties, particularly the other bidders in the process. If the defect undermines the fairness of the competition or the process of tendering, impacts the cost of the bid or the performance of Contract B, or creates a risk of action by other (compliant) bidders, the bid at issue will be materially non-compliant".

The Court of Appeal noted that only compliant bids may form Contract A with the owner. As such, "*an owner is 'incapable' at law of accepting a non-compliant bid [and this] is an implied term of Contract A.*" The jurisprudence has established that the discretion to waive defects "*never allows an owner to create a Contract A from a <u>materially</u> non-compliant bid [as] a materially non-compliant bid is incapable of acceptance at law.*" (emphasis added).

The defect at issue in this case was the duration of the consent of surety provided by the plaintiff. According to the Court, the consent of surety "*is the guarantee from a reputable surety company that it will provide the requisite security for future obligations that might arise under*

Contract B, should it be awarded. This is critical, of course, but it is material to the performance of the ***construction contract****, not to the tendering process*." (emphasis added). Based on this analysis, the Court concluded that the duration of the consent of surety was not an essential requirement of the tendering document and, therefore, did not constitute material non-compliance. Therefore, the Cambridge bid was compliant and, thus, formed Contract A with the owners.

A significant implied duty created under Contract A is the duty to treat all bidders fairly and equally. The Court upheld the principle that "*the duty of fairness that arises when Contract A is formed exists throughout the process of assessing bids in the tendering process. Until that process is over, either through acceptance of a bid, rejection of all bids, or when the irrevocability period has lapsed, an owner is obligated to treat all bidders fairly and equally in their assessment of those bids*." In this case, the Court held that the owner's rejection of all bids due to budgetary limitations effectively terminated the tendering process. As such, their implied obligations under Contract A were also terminated. The Court found that "*once a judge finds that an owner properly rejected all bids and that the tendering process was over, she or he is open to 'conclude that subsequent negotiations did not occur in the context of a true tendering process in which [the owner] was still evaluating the previous bids.'*" On this basis, the Court found that the owner correctly assumed that the possibility of negotiations was available upon the termination of the tendering process. As such, their subsequent negotiations with one of the bidders did not constitute bid manipulation.

Therefore, although it was found that Contract A was formed between Cambridge and the defendants, the owners fairly rejected Cambridge's bid along with all other bids resulting from the tendering process which effectively terminated the tendering process. As such, the owners were allowed to engage in negotiations with one of the bidders and this did not constitute bid shopping.

On the foregoing, the B.C. Supreme Court rejected the bid shopping allegation and found that the owners were within their rights to negotiate with bidders after the termination of the bidding process.

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Court upholds owner's right to award contract to more qualified, higher bidder

In *James A Brown Ltd. V. Caisse Populaire Welland Ltee.*, [2009] O.J. No. 1089 (S.C.J.), the Ontario Superior Court upheld the owner's decision to bypass the lowest bidder as the owner was entitled to award the contract to a more qualified, higher bidder.

In this case, an architect employed by the defendant invited ten general contractors, including the plaintiff, to bid on the defendant's addition and renovations. After the tender process was opened, it was noted that the three lowest bidders were relatively close in their estimated prices, with the plaintiff's bid being the lowest. The defendant instructed the architect to obtain further information from the three lowest bidders. As a result of the additional information, the defendant awarded the contract to the third

lowest bidder. The plaintiff sued for damages as a result of the defendant's decision.

Importantly, none of the contractors had been "pre-qualified". Furthermore, the Request for Proposals (RFP) stated that "*the lowest tender or all tenders need not be accepted*." In addition, the tender form contained an acknowledgment that the "*owner may accept a tender or reject any or all tenders without explanation*." Finally, the Building Committee was to decide on the successful bidder based on the architect's recommendation.

The Court based its decision on numerous principles established by the case law. Specifically, the Court acknowledged the following principles:

- the bidding system must be protected where possible (*Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111);

- there is an obligation to treat bidders fairly and equally (*Double N Earthmovers Ltd. v. Edmonton (City)* (2005), ABCA 104, aff'd [2007] 1 S.C.R. 116);

- the existence of a privilege clause does not exempt the duty to treat bidders fairly and equally and, further, an owner can only award work to a higher bidder where there are valid and objective reasons for doing so (*Sound Contracting v. City of Nanaimo* (2000), BCCA 312, leave to appeal to SCC refused [2000] S.C.C.A. No. 392;

- a privilege clause does not allow the purchaser to consider irrelevant, unreasonable and extraneous factors or undisclosed criteria (*Thompson Bros. (Const.) Ltd. v. Wetaskiwin (City)*, [1997] A.J. No. 882; *Martselos Services Ltd. v. Artic College*, [1994] N.W.T.R. 36); and

- where the owner has not acted unfairly, the court cannot substitute its decision for that of the owner (*Sound Contracting* supra).

The lack of any pre-qualification process was a significant factor in the Court's decision. As there was no pre-qualification process, the defendant was permitted to gather additional information regarding the qualifications of the three lowest bidders and their ability to complete the project in accordance with the plans and specifications, on time and within budget. According to the Court, "*this was, [in effect], a post-qualification process and in embarking upon it, the defendant was performing due diligence, an exercise that decision makers are entitled to perform to ensure the quality of the decision making process*."

While the gathering of the additional information regarding the three lowest bidders was not conducted perfectly, the process of gathering additional information was not unfair to the plaintiff and, further, did not compromise the integrity of the bidding process. The Court held that the defendant had numerous valid reasons to award the contract to the third lowest bidder and that these reasons were "*neither capricious nor arbitrary*." The defendant's reasons constituted a reasonable business judgment and, as such, should not be disturbed by the courts.

The Court further stated that "*the defendant was also entitled to discuss with others, whose opinions were respected and trusted, to ascertain the reputation of the contractors with whom it was dealing, to*

validate or neutralize their concerns." Based on these reasons, the Court upheld the defendant's decision and dismissed the action.

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Experience of subcontractor a valid assessment criterion

In *Cherubini Metal Works Ltd. v. New Brunswick Power Corp.*, [2008] N.B.J. No. 490 (C.A.), the issue before the court was whether a lower bidder could be bypassed due to the inexperience of one of its subcontractors. The Queen's Bench decision of this case was included in the November 2007 newsletter (see "Court supports consideration of experience in evaluating tenders", Procurement Law Newsletter, Vol. 1, Issue 2, Nov 2007). In the lower court's decision, the Queen's Bench held that the New Brunswick Power Corporation did not breach its duty of fairness when it investigated the capacity of the plaintiff, who was the lowest bidder.

The Court of Appeal upheld the decision of the Queen's Bench that a soliciting public agency need not accept the lowest bid where it was determined that a subcontractor lacked the requisite experience. There was no palpable and overriding error on the part of the trial judge.

The Court of Appeal further held that there is no implied obligation on public agencies to disclose the relative weight assigned to each assessment criterion on the basis that this lacks an element of practicality.

In this case, the Court upheld the principle that a public agency cannot base its decision to award Contract B on the fact that it had past dealings or previous experience with a particular bidder as this "*effectively favour[s] one bidder over the others and depriv[es] the latter of a realistic chance to compete on an equal footing*." However, the Court noted that this was not what occurred in this case. Here, the agency relied on its past experience with the successful bidder in order to determine if they had previously worked on similar projects. Therefore, the trial judge's decision was upheld.

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Appellate Court confirms owner cannot accept non-compliant tender

In *Maystar General Contractors Inc. v. Newmarket (Town)*, [2009] O.J. No. 3939 (C.A.), the Ontario Court of Appeal upheld the decision of the Application Judge that an uncertain bid price had the effect of making a bid non-compliant and, therefore, was incapable of being accepted. As the public owner had accepted the uncertain bid, it had breached its duty under Contract A to the appellant, Maystar, to treat all bidders fairly and equally.

In this case, the Town of Newmarket submitted a Tender Notice for the construction of the Stickwood Walker Recreation Facility. It invited four contractors to tender, including Maystar, the lowest bidder, and Bondfield, the successful bidder. Subsequent to the opening of the tenders, it was determined that Maystar was the unofficial, lowest compliant bidder as per the Unofficial Total Bid Price. However, at a subsequent meeting with Town staff, the project architect noted a discrepancy in Bondfield's bid, namely, that the

Stipulated Price differed from the Total Price and G.S.T. The Town consequently corrected Bondfield's Unofficial Tender Results with the result that Bondfield's Total Price was made to conform to their Stipulated Price. As such, Bondfield was determined to have the lowest bid and, therefore, was awarded the construction project. Maystar challenged the bid amendment and the subsequent determination that Bondfield was the successful bidder.

The Application Judge found that Bondfield's bid price was uncertain. Accordingly, as price is an "*essential element of a bid, …an offer that is uncertain as to price cannot form the basis of a binding contractual relationship*." The application judge distinguished the present case from *Bradscot (MCL) Ltd. v. Hamilton-Wentworth Catholic District School Board*, (1999), 42 O.R. (3d) 723 (C.A.), where it was held that the G.S.T. and Tender Amount Summary provisions in the Tender Form were "*superfluous or subordinate*" as they were a summary of the determining Stipulated Price. As such, the Court of Appeal in *Bradscot* found that the discrepancies between the subordinate provisions and the principal Stipulated Price did not create uncertainty and, therefore, the bid was compliant. In this case, however, the Total Price provision was neither superfluous nor subordinate. It was, instead, "*an important component of the tender*." The Court of Appeal upheld the Application Judge's decision. As the figures in the G.S.T. and Total Cost provisions differed significantly from that in the Stipulated Price, a reasonable person would not have been able to conclude which price Bondfield intended to submit. Accordingly, "*the price was uncertain and therefore … the bid was non-compliant and incapable of forming the basis of a contract*."

Having concluded that Bondfield's bid was non-compliant for uncertainty, the Town was found to have breached the duty of fairness under Contract A. Relying on the principle of fairness and equality between bidders as established in the case law, the Court of Appeal held that "*the integrity of the tender process is essential in order to foster a fair and orderly bidding process where contractors will expend the time, effort and expense to bid, knowing they will be treated fairly and equally. A public owner cannot undermine that process by purporting to accept a bid with an uncertain price, or to encourage contractors to believe that they can communicate with owners after the fact to clarify or explain inconsistencies in their bids*."

As part of their defence, the Town attempted to rely on certain articles in the Instructions to Bidders on the basis that these articles provided them with the authority to accept Bondfield's bid. These articles allowed the Town "*to check all arithmetic extensions to ensure they were correct, consider Bondfield's intent, waive any discrepancies, errors or other defects or deficiencies in the bid form or submission, determine whether a bid was substantially compliant, and accept an unbalanced, irregular or informal bid*." However, the Application Judge was not able to find that any of the articles allowed the Town to accept Bondfield's bid and, therefore, rejected this argument. Furthermore, the Application Judge found that the discrepancy in Bondfield's bid price created uncertainty and, as such, "*constituted a fundamental error that was not able to be unilaterally corrected or waived using any of the provisions of the*

Instructions to Bidders." The Court of Appeal agreed with this decision on the basis that the Town's actions constituted an amendment of the bid which made the G.S.T. and Total Price consistent with the Stipulated Price.

The Town further argued that the articles set out above gave them the authority to accept a non-compliant bid. As with the previous argument, the Application Judge rejected this argument on the reasoning that the above articles did not explicitly provide for such an option. The Court of Appeal also upheld this decision. The articles did not explicitly give the Town the authority to accept non-compliant bids.

Based on the foregoing, the Court of Appeal upheld the decision of the Application Judge and dismissed the appeal.

There are a number of principles which may be gleaned from this decision. In the first place, it should be noted that the Town did not have an article in the tender documents allowing it to accept a non-compliant bid. This is a specific clause which owners might consider. In addition, notwithstanding the expansive language of the Instructions with respect to "arithmetic extensions" etc., both Courts determined that the actions of the Town constituted an amendment and not the correction of an error. Perhaps owners should consider including in the Instructions to Bidders a very clear clause indicating that bidders must pay specific attention to the possibility of arithmetic errors and ensure that the Stipulated Price is the same as the Total Price and GST.

Subcontractors confirmed to have no standing to apply for judicial review

In *Irving Shipbuilding Inc. v. Canada (Attorney General)*, [2009] F.C.J. No. 449 (C.A.), the Court of Appeal upheld the Trial Division's decision that subcontractors of an unsuccessful bidder have no standing to apply for judicial review of the tender process.

The issue before the Court of Appeal in *Irving Shipbuilding* was whether a subcontractor of an unsuccessful bidder on a government procurement contract could apply for judicial review regarding the fairness of the procurement process when the unsuccessful bidder had decided not to litigate. The Court of Appeal held that the Minister of Public Works and Government Services Canada did not owe a duty of fairness to the subcontractors as there was no contractual relationship. Furthermore, there was no statutory right to procedural fairness.

The Trial Division decision of this case was included in the May 2009 Newsletter (see "Court Reviews Standing and Conflict Issues in Government Bid", Procurement Law Newsletter, May, 2009). The issues before the trial judge were the appropriate jurisdiction of the application and the issue of standing to bring an application for judicial review. The trial judge held that Irving and Fleetway, as subcontractors, did not have standing to bring the application for judicial review due to the fact that they were not "directly affected" by the award of the contract to another bidder as they were only the subcontractors of the unsuccessful bidder. Furthermore, the Trial Judge held that, due to the nature of the work at issue, the

Federal Court rather than the Canadian International Trade Tribunal was the appropriate forum to bring the application for judicial review.

The Court of Appeal, after deciding that it had jurisdiction to hear the case, upheld the Federal Court's decision that the subcontractor of an unsuccessful bidder has no standing to seek judicial review as they are not "directly affected". In addition, they are not owed a duty of fairness by the public agency.

The Court of Appeal relied on subsection 18.1(1) of the *Federal Courts Act*, which deals with a public law proceeding to challenge the exercise of public power:

> 18.1(1) *An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.*

With regards to the issue of jurisdiction, the Court of Appeal held that as the power of the Minister, a public official, to award the contract is statutory and the contract was a matter of public interest due to the fact that it was for the maintenance and servicing of the Canadian Navy's submarines, the matter was correctly brought before the Federal Courts for judicial review under subsection 18.1(1).

The Court noted that there are difficulties faced by an applicant when attempting to establish a ground of review which would correctly warrant intervention by the Court in the procurement process by way of judicial review. The general rule is that "*the closer the connection between the procurement process and the exercise of a statutory power, the greater the likelihood that the activity can be subject to judicial review*."

The Court held that the issue of standing should be decided based upon the duty of procedural fairness, as pled by the appellants, rather than by engaging in an abstract review. In this regard, if the appellants established a right to procedural fairness, they would be deemed to have a right to bring the matter before the Court. According to the Court, there are three ways in which a duty of fairness may arise: contract, legislation, and the common law.

With regards to a duty of fairness arising from contract, there are two contracts in the procurement process that may give rise to this duty. The first is Contract A which is formed when a Proposal is submitted in response to a Request for Proposals (RFP). The second, Contract B, is the contract between the successful bidder and the public agency as contemplated in Contract A. The Court found that subcontractors of a bidder had no contractual relationship with the Minister and, therefore, could not rely on Contract A as creating a legal duty. Importantly, the Court noted that had the subcontractors entered into a joint venture with the contractor in order to bid for the project, or had they formed a company with the contractor for the purpose of bidding on the contract, they would have been a party to the contract and, thus, would have been owed a duty of fairness under contract.

The Court was further unable to find any duty of fairness created by statute. With regards to the common law, the Court held that "*the common law duty of fairness is not free-standing, but is imposed in connection with the particular scheme in which the impugned administrative decision has been taken.*" Generally, however, it will be inappropriate to apply a

public law duty which was "*developed in the performance of governmental functions*" in a contractually governed commercial relationship. The Court based this conclusion upon the following reasons:

1. "*Judicially imposed procedural duties in favour of subcontractors would undermine the right of a bidder for a procurement contract to determine what, if any, steps it should take in the event of an apparent breach of Contract A.*"

2. Procedural rights not only serve the public interest in good government, they are also the personal right of "*those whose substantive rights or interests they protect*."

3. The reasoning behind the appellants' argument that they are entitled to procedural fairness would open the flood gates to "*potential procedural rights-holders*."

4. The appellants' argument that granting them a right to procedural fairness would advance the public interest in obtaining value for money is flawed as bidders already have contractual rights to ensure the fairness and integrity of the bidding process.

5. The extension of the right of procedural fairness to a subcontractor may compromise the efficiency of the tendering process which is not in the public interest.

6. There is a public interest in avoiding undue delay in the performance of Contract B.

7. It is only where there is egregious misconduct of a government official that the courts will allow an action for judicial intervention brought by a subcontractor.

The Court was unable to find, on the facts of this case, that the requisite degree of extraordinary circumstances allowing an action by a subcontractor was established. As such, the appeal of the application for judicial review was dismissed.

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Tribunal places significant onus on bidders

In *ISE Inc. v. Department of Public Works and Government Services* [2009] C.I.T.T. No. 30 ("*ISE*"), the Canadian International Trade Tribunal upheld the rejection of the complainant's bid as non-complaint where most, but not all, of the mandatory requirements were met. Furthermore, where a bidder takes issue with the evaluation criteria, it is important to raise these concerns before bidding and within the required limitation periods.

In this case, the CITT heard a complaint from ISE based on the way in which the procurement process was conducted by the Department of Public Works and Government Services. ISE requested that the CITT recommend that DPWGS "*terminate the existing contracts and issue a new solicitation, that the Tribunal recommend that [DPWGS] compensate [ISE] for its lost profits, and that ISE be reimbursed its reasonable costs incurred in preparing and proceeding with its complaint*." The inquiry was limited to ISE's claim that DPWGS had incorrectly rejected ISE's proposal as non-compliant. ISE claimed that their proposal conformed to the essential requirements as set out in the tender document. The CITT held that ISE's complaint was not valid as it was not made in a timely fashion. Furthermore, the Tribunal held that there is a significant onus placed upon the bidder with respect

to filing complaints respecting the bidding process and ensuring that their bids are compliant with the essential requirements of the tender document.

The Tribunal referred to subsections 6(1) and (2) of the *Regulations* of the *Canadian International Trade Tribunal Act*. Both subsections provide that "*a complainant has 10 working days from the date on which it first becomes aware (or reasonably should have become aware) of its ground of complaint either to object to the government institution or to file a complaint with the Tribunal*." The CITT also relied on the reasons of the Federal Court of Appeal in *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd*. (2002), FCA 284 (CanLII), where it was held that bidders have the onus of establishing that their challenges regarding problems in the procurement process are made when they became aware of them (or when they reasonably ought to have been aware of them). As such, the CITT held that ISE's complaint was not filed within the required time limit.

Significantly, the Tribunal rejected ISE's allegation that there was no available challenge procedures. The Tribunal held that "*there is an onus on suppliers to make themselves aware of challenge procedures and that there is significant publicly available information relating to challenge procedures*."

Also of importance in this case was the fact that ISE was late in submitting six of the 93 required test results. ISE alleged that the six omitted results were not "essential" to the evaluation process. As such, this failure was not a valid basis for DPWGS' rejection of ISE's bid as non-compliant. The CITT rejected this argument. According to the Tribunal, the testing requirements, the mandatory evaluation criteria and the consequences for failing to provide the mandatory information was clear. The Tribunal upheld the authority of DPWGS to define its own procurement needs and, further, to set out the "*mandatory requirements of the solicitation in respect of those needs*." The Tribunal defined "essential requirements" as those that are clearly defined as "mandatory" under the terms of the RFP. "*If a bidder believes any such requirement to be unreasonable, it is incumbent upon the bidder to take steps to seek relief in keeping with the time periods prescribed under section 6 of the Regulations. Absent such steps, to allow a bidder to summarily determine which requirements are 'essential' and which are not would undermine the functioning and integrity of the procurement procedure*."

Finally, the Tribunal declared that a bid must "*conform to the essential requirements of the tender documentation*" at the time at which it is submitted. As such, "*in the absence of specific authority in the solicitation, the government institution has no discretion to disregard, modify or relax the mandatory requirements of the solicitation after the deadline for the submission of bids. The responsibility for ensuring that a proposal is compliant with all essential elements of a solicitation ultimately resides with the bidder*."

In conclusion, based upon the foregoing reasons, the CITT dismissed ISE's complaint and upheld the decision of DPWGS.

— KC LLP —

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