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Public Sector

Procurement Law Newsletter

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Court confirms principles of transparency and fairness in public procurement

In *Metercor Inc. v. Kamloops (City)*, [2011] B.C.J. No. 543, the British Columbia Supreme Court dealt with a petition from Metercor Inc., formerly known as CMI (CMI) to set aside the decision of the City of Kamloops to hire Neptune Technology Group (Canada) Ltd. (Neptune). Neptune was hired to both install and supply residential water meters. The City's decision was made based on their evaluation process of examining requests for proposals, a process which CMI

claimed gave preferential treatment to Neptune.

The City's water meter committee established a process for reviewing each request for proposal (RFP), which was broken into various stages. Only proponents who passed the mandatory and review stages would have their price proposals considered. CMI claimed that the City's RFP evaluation process ran contrary to their policies which stated that both price and quality were major considerations in purchasing. CMI argued the City was in breach of its duty of fairness, transparency, openness and equality to all proponents.

Both parties agreed that the City's procurement procedures needed to be transparent, open and fair to all proponents, and that their selection process was subject to judicial review under the *Judicial Review Procedure Act*. Furthermore it was agreed upon that the standard of review for this decision was "*reasonableness*" and that "*the City had a duty to treat all proponents fairly and equally*" under common law and the relevant jurisprudence. The City's purchasing policy was also deemed appropriate for consideration in a judicial review matter.

The Court concluded that the City did not breach its duty of fairness and that its evaluation process was open and transparent. The City's water meter committee evaluated all proposals as per their duty of fairness owed not only to all proponents, but to the City of Kamloops as well. The water meter committee was entitled to evaluate each proposal and make conclusions as they saw necessary based on their established criteria. The Court stated that it was not entitled to interfere with the decision-making, regardless of whether or not the Court would have reached a similar conclusion.

The Court also noted that the City's familiarity with Neptune may have resulted in an advantage for the proponent, but it did not make the process unfair for CMI or any other proponents. Furthermore, the City's analysis of given items in the evaluation process did not result in preferential treatment given to Neptune.

In assessing the reasonableness of the outcome, the Court stated that the City's decision not to consider price unless a given proposal had met the final stage of an evaluation was not reasonable. While the Court noted it "*should not interfere with the autonomy of the municipality*", it noted the City's process could result in an unreasonable result. For example, a proponent would not have its price considered even if it received a mark that fell slightly below the 75% requirement in the evaluation process. This would be the case even if another proponent received a mark only slightly above the 75% requirement. The Court noted that eliminating the consideration of price in the multi-stage process was significant with respect to this project, which not only involved millions of dollars but also affected how the City was spending tax payers' money.

The Court stated that the City would have to reconsider the price in addition to the evaluation scores of each RFP, but did not

require the City to begin the process all over again. The Court reiterated that it would still be the water meter committee's choice as to who they wished to contract with and that they were not bound to enter into negotiations with any particular party.

The Court left it to the parties to make submissions on costs if they were unable to come to an agreement.

The decision supports a single process where all requirements are considered. The rejection of the allegation of unfair advantage is important since a contrary finding might suggest it would be difficult for existing vendors to bid.

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Court determines tender not compliant

In *Maple Reinders Inc. v. Cerco Developments Ltd.*, [2011] B.C.J. No. 1313, the British Columbia Supreme Court dismissed an action for breach of contract by Maple Reinders on the basis that no contract arose between Maple Reinders and Cerco.

The plaintiff, Maple Reinders, was an unsuccessful bidder following a tender process relating to the construction of an apartment building. Maple Reinders commenced an action for breach of contract against Cerco alleging the construction contract was improperly awarded to another bidder.

In dismissing the action, the Court considered only whether an initial contract had been formed between Maple Reinders and Cerco as a result of Maple Reinder's submitted tender. The Court stated that in order for a contract to be formed on the basis of a tender submission, the tender bid must be materially compliant with the terms set out in the tender documents.

At the conclusion of the tender process, Cerco had received three bids for the construction process. On its face, Maple Reinder's bid was the lowest. However, Maple Reinder failed to include in their documents both the mandatory and voluntary alternate prices requested by Cerco. Following adjustment based on the alternate prices provided by another bidder, Cerco awarded the other bidder the contract stating that their bid was lower than that of Maple Reinders.

The Court held that Maple Reinders knew of and understood both the mandatory and voluntary requirements in the tender documents for alternative pricing, yet failed to produce such pricing even after it was requested from Cerco. The mandatory nature of the alternative pricing information in the tender documents implied that it was required information that played an important role in Cerco's consideration of the bids submitted.

The Court concluded that there was a failure to address an important requirement of the tender documents and that there was a substantial likelihood the omission of the alternative pricing information would have significantly impacted Cerco's deliberations in deciding which bid to select. Since Maple Reinder's tender bid was missing required information, it was therefore materially non-compliant and constituted only a counter offer.

Again, the Court reinforces the requirement that a tender be compliant in order for a bidder to be able to insist on contracted rights.

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Court confirms reasonable expectations for contractor knowledge and work

In *Penner v. 1000232 Ontario Ltd. (c.o.b.) Winmar*, [2011] O.J. No. 3661, the Ontario Superior Court of Justice awarded judgment against the defendant restoration company, Winmar, for deficient workmanship on a fire restoration project on the plaintiff, Penner's home.

Winmar was contracted to perform a full interior restoration following a fire at the plaintiff's 80 year old home. The restoration work was to include mechanical, electrical, plumbing, finishes and insulation. Winmar warranted that all restoration work on the home would be performed in a good and workmanlike manner and would be free from defect under normal use and service for a period of 12 months from the date of installation.

In reaching a decision, the Court held that based on the warranty and the nature of the relationship between the parties, Penner expected his house to be restored to its pre-fire state and relied on Winmar to carry out the necessary work in that regard. This was particularly so since Penner was aware that his insurer had authorized and was paying for Winmar's restoration work.

During the course of the restoration work, Winmar's contractor observed the foundation of the house via a crawl space beneath the house and noted that in his opinion to restore the house properly it would have had to be jacked up and re-supported. This did not occur.

The Court held that Winmar was aware of the location in which the fire started and the amount of water used in suppressing the fire, and that Winmar failed to investigate the effect of the water on the surrounding areas of the house, which included the crawl space and foundation. However, Winmar neither raised the foundation issue with Penner nor took any action to correct it. As a result, Winmar was held liable for damages in the amount required to fulfil their duty of bringing the house in line with its pre-fire state.

This case confirms that there is a reasonable expectation that a contractor will have and use the necessary experience and/or expertise to do the work.

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Court rules against intervenor judicial review

In *Canada (Attorney General) v. Siemens Enterprises Communications Inc.*, [2011] F.C.J. No. 1214, the Federal Court dismissed a motion by West Atlantic Systems (WAS) for leave to intervene in a judicial review proceeding.

The judicial review proceeding and intervention motion at issue came after a lengthy chronology of events. In summary, the Attorney General sought judicial review of a decision of the Canadian International Trade Tribunal finding that the conduct of the Department of Public Works and

Government Services in carrying out a procurement process was deficient and not compliant with the *North American Free Trade Agreement* (NAFTA). Following the release of the Court's decision in *Entersays Networks of Canada Ltd.*, 2011 FCA 207, a case raising similar procurement issues to those at issue in this matter, the Crown requested this judicial review application be disposed of without an oral hearing. It was only at that time that WAS sought an opportunity to file a motion for intervener status.

In reaching its decision to dismiss the motion, the Court discussed the purpose of the rules of intervention, noting: "*The rules permitting interventions are intended to provide a means by which persons who are not parties to the proceedings may nevertheless assist the Court in the determination of a factual or legal issue related to the proceedings. These rules are not to be used in order to replace a respondent by an intervener, nor are they a mechanism which allows a person to correct its failure to protect its own position in a timely fashion*".

The Court held that the motion by WAS for leave to intervene was merely an attempt by WAS to substitute itself for Siemens as the respondent in the judicial review application. Further, WAS was aware of these proceedings and chose to wait until only one week before the date originally set for oral hearing of the judicial review to make its motion. Therefore, WAS had not met its duty to indicate its intention to intervene at the earliest possible opportunity.

This decision demonstrates the complexity of procurement litigation.

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Court deals with implications for Fair Wages Legislation

In *Ocean Steel & Construction Ltd. v. Arseneault*, [2011] F.C.J. No. 819, the Federal Court dismissed an application for judicial review of a decision of a fair wage officer and inspector of Human Resources and Skills Development Canada (the inspector) that the applicant Ocean Steel had not paid the respondent workers appropriate wages.

The Court held that the appropriate wage rate for the respondent workers was that established by Human Resources and Skills Development Canada (HRSDC)'s Regional Director, Atlantic Region, found in the Fair Wage Schedule for New Brunswick-East, made pursuant to the *Fair Wages and Hours of Labour Act*, RSC 1985, c L-4 (the Act) and the *Fair Wages and Hours of Labour Regulations*, CRC c 1015 (the Regulations).

Ocean Steel fabricates, supplies and installs reinforcing steel for construction projects. They entered into a subcontract for the supply and installation of concrete reinforcing steel at the Canadian Forces Base (CFB) in Gagetown, New Brunswick which incorporated the Fair Wage Schedule. The Labour Conditions of this contract stipulated that *all persons employed by the subcontractor were required to be paid wages in accordance*

with the attached Fair Wage Schedule of New Brunswick – East.

The inspector conducted a fair wage inspection of the wages paid to the applicant's employees from January to March 2010 and found that there were wages owing for fifteen "rodman" employees. Ocean Steel commenced this application for judicial review as a result of the inspector's finding.

In reviewing the inspector's finding, the Court concluded the appropriate standard of review was that of reasonableness since the inspector's decision was based on an entirely factual question. The Court noted that the role of the inspector was to determine into which category of the Fair Wage Schedule for New Brunswick – East the respondent employees fell and whether they had been paid in accordance with the rates for that category. These were purely factual issues which therefore attracted review on a reasonableness standard.

The Court held that once approved by the regional director, the Fair Wage Schedule was applicable to federal construction contracts, including Ocean Steel's subcontract for the concrete work at CFB Gagetown. The inspector did not have any discretion in determining whether or not to apply the applicable Fair Wage Schedule.

Finally, the Court held that despite the position of "rodman and rodsetter" not appearing in the Fair Wage Schedule for New Brunswick – East, the respondent employees were entitled to be paid wages at a rate not less than that established for an equivalent character or class of work.

This decision demonstrates the complexity of public procurement with the added issue of fair wages at the Federal level.

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CITT confirms procurement is not required to accommodate particular supplier

In *Daigen Communications (Re)*, [2011] C.I.T.T. No. 78, The Canadian International Trade Tribunal rejected a complaint by Daigen Communications that the Request for Proposal (RFP) requirements imposed by the Canadian Food Inspection Agency (CFIA) were unfairly discriminatory.

The CFIA issued an RFP for the provision of scientific translation services on an as-and-when-required basis. Included in the RFP was a requirement that the successful supplier provide both English-to-French and French-to-English translation services. Daigen Communications alleged this requirement unfairly discriminated against an entire category of translation service providers dedicated exclusively to translation from French into English.

Daigen Communications sent a memo to the CFIA suggesting that in addition to being discriminatory, the requirement also militated against the CFIA securing the best quality French-to-English translations. A request was made by Daigen that the requirement be revised to

allow only French-to-English scientific translators to compete.

In rejecting the complaint, the Tribunal reviewed the jurisdiction of government in defining and satisfying the parameters of its procurement solicitation so long as the process is reasonable and without conditions that are impossible to meet. The Tribunal confirmed that a government institution need not structure a procurement to accommodate any particular supplier.

The Tribunal noted that as long as a procurement is not deliberately constructed to preclude certain suppliers or to direct the procurement to a favoured supplier, a government institution may choose to procure a combination of services by way of a single solicitation, even though this might have the effect of excluding some suppliers. Further, the fact that certain bidders have competitive advantages regarding a particular tendering process is simply part of the ordinary ebb and flow of business; if a bidder is at a disadvantage, it does not necessarily follow that the procurement process is discriminatory.

The Tribunal found no evidence suggesting the CFIA structured the procurement with the intent of excluding particular suppliers and held that it was logical to require translation services to and from both languages be bundled into a single procurement.

Finally, the Tribunal rejected Daigen's argument that bundling translation services together might have a negative impact on the quality of the services provided, stating that this was of little relevance as the CFIA was entitled to balance quality considerations against its cost constraints when conducting its procurement solicitation.

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CITT reiterates principle that procurement need not accommodate particular supplier

In *723186 Alberta Ltd. v. Canada (Public Health Agency)*, [2011] C.I.T.T. No. 86, the Canadian International Trade Tribunal rejected the complaint of 723186 Alberta Ltd - an unsuccessful bidder who claimed the Public Health Agency of Canada (PHAC) unfairly shut out small translation businesses and individual suppliers from the competition as a result of the requirements of the subject Request for a Standing Offer (RFSO).

The PHAC issued an RFSO for the provision of translation services on an as-and-when-required basis. Specific mandatory requirements of the successful supplier included that they provide both English-to-French and French-to-English translation services, that they possess a facility security clearance and that they possess a "Secret" security clearance. 723186 Alberta Ltd. made an objection to the PHAC arguing that the requirements imposed barriers to competition. They proposed that PHAC break up the translation requirements so allow bidders to bid on a single stream and that the security requirements be removed for outsourced translations. The PHAC replied

that they would not be modifying the requirements.

The Tribunal followed the Reasons established in *Daigen Communications*, namely that a government institution need not structure a procurement to accommodate any particular supplier; that as long as a procurement is not deliberately constructed to preclude certain suppliers or to direct the procurement to a favoured supplier, a government institution may choose to procure a combination of services by way of a single solicitation, even though this might have the effect of excluding some suppliers; and that simply because a bidder is at a disadvantage does not necessarily mean that the procurement process is discriminatory.

In this case, the complaint of 723185 Alberta Limited did not disclose any evidence that the procurement was structured with intent to exclude particular suppliers. The requirements did not appear to be overly restrictive.

The Tribunal found it entirely reasonable to assume that dealing with a single supplier for translation services in both language directions would be more efficient than for only one language direction and found no reason to interfere with the security requirements imposed by the PHAC.

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CITT confirms onus on bidder to ensure proposal compliant

In *PA Consulting Group v. Canada (Department of Public Works and Government Services)*, [2011] C.I.T.T. No. 87, the Canadian International Trade Tribunal rejected the complaint of PA Consulting Group (PA Consulting) that its proposal was improperly rejected in relation to a procurement by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Citizenship and Immigration (CIC) for the provision of visa program advisory services.

The complainant, PA Consulting, admittedly sent its proposal to the wrong address. However, PA Consulting alleged that despite being sent to the wrong address, its proposal was improperly rejected because it cooperated with the spirit of the procurement process.

The Request for Proposal (RFP) issued by PWGSC for the provision of visa program advisory services contained a specific clause that indicated where bids were to be returned. The RFP also contained address information relating to the recipient of the services. PA Consulting sent their RFP to the address of the proposed services rather than to the return address for bids. They argued that the layout of the RFP made such a mistake very easy to make, and that the receipt of a courier signature confirming delivery of the RFP resulted in a reasonable expectation that the RFP was in fact being acted upon.

The Tribunal held that since PA Consulting is located in London, England and has no Canadian place of business, its only

possibility for recourse would be under the *Agreement on Government Procurement* (AGP). In order to be eligible for recourse under the AGP, the tender must conform to the essential requirements of the notices or tender documentation at the time of opening. PWGSC had made the RFP requirements clear and had clearly expressed there was no flexibility in the rules. The responsibility for ensuring a proposal is compliant with all essential elements, including its delivery to the appropriate address, rests with the bidder.

This case reminds us that some simple mistakes will invalidate an RFP.

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CITT confirms negotiations do not equal contract

In *Valley Associates Inc. v. Canadian Commercial Corp.*, [2011] C.I.T.T. No. 84, the Canadian International Trade Tribunal rejected the complaint of Valley Associates in relation to a procurement by the Canadian Commercial Corporation (CCC), acting in conjunction with the Department of Foreign Affairs and International Trade (DFAIT).

The procurement by the CCC and DFAIT was for the provision of X-ray inspection kits in support of Canada's commitment to provide assistance, as part of its Counter-Terrorism Capacity Building (CTCB) Program, to four countries in Southeast Asia. Valley Associates alleged that the CCC engaged in unfair and prejudicial treatment of the complainant throughout the process of attempting to negotiate the final terms and conditions of a directed contract for the supply of X-Ray inspection kits. Valley Associates further alleged that the failure of the CCC to award the contract to Valley caused considerable harm to its fiscal performance and business reputation.

Valley Associates and the CCC engaged in ongoing discussions for several months on several issues surrounding the price, contents, technical specifications and timelines for completion of the X-ray inspection kits. A draft contract was eventually sent from the CCC to Valley. Valley replied with its comments as well as a revised quote. Further discussions ensued regarding the proposed contract and a meeting was ultimately held between the parties to discuss the current status. Following the meeting, the CCC notified Valley that it would not be accepting Valley's submission and was therefore not awarding Valley the contract.

The Tribunal stated the limit on its jurisdiction to hear complaints as set out in subsection 30.11(1) of the *Canadian International Trade Tribunal Act* such that the complaint must be "*concerning any aspect of the procurement process that relates to a designated contract*". The Tribunal considered whether a designated contract existed in this case as between the CCC and Valley Associates.

A designated contract was defined by the tribunal as "*a contract that has been awarded or is proposed to be awarded by a government institution*". The Tribunal held that the evidence provided in Valley's complaint does not indicate such a contract existed in this case. The CCC clearly communicated its decision to no longer pursue a contract with Valley, a

strong indication that no contract had been awarded, or was any longer proposed to be awarded, to Valley for the provision of the X-ray inspection kits. Since Valley Associates' complaint did not relate to a designated contract, the Tribunal concluded it did not have jurisdiction to conduct an inquiry into the complaint.

However, the Tribunal continued its analysis noting that, even it if had found a contract to have been awarded or proposed to be awarded between the CCC and Valley Associates, the contract would not have met the definition of a designated contract as required for the Tribunal to have jurisdiction. The Tribunal held that the X-ray inspection kits were intended to be delivered to foreign recipients as in-kind contributions of goods. As a result, the purpose of the procurement was to provide assistance to other countries under the CTCB Program and therefore Valley Associates' complaint was not related to a designated contract.

Ultimately, the Tribunal summarized the situation succinctly by stating "*the fact that a party may have invested much time and energy in working with the other party does not, in any way, guarantee that it will be awarded a contract*".

CITT considers principles applicable to loss of profit

In *Almon Equipment Ltd. v. Canada (Department of Public Works and Government Services)*, [2011] C.I.T.T. No. 92, the Canadian International Trade Tribunal considered a complaint for compensation filed by Almon Equipment Ltd. (Almon). The Tribunal had previously decided to award Almon one-third of the profit it would have reasonably earned had it been a successful bidder on a contract to remove snow and ice from the aircraft at the Canadian Forces Base (CFB). The contract was written for the disposal and reclamation of glycol and glycol-contaminated materials from the snow and ice removal. The Tribunal had reserved jurisdiction to determine what the final amount of compensation would be, but recommended that Almon and the Department of Public Works and Government Services (PWGSC) try to negotiate an appropriate amount.

The parties were unable to reach an agreement and, as such, Almon filed a submission with the Tribunal estimating a given amount of compensation. The Tribunal heard both parties' submissions and requested that the parties re-examine their submissions and provide additional detailed financial information. The parties filed their submissions and Almon wrote to the Tribunal, questioning the details PWGSC had provided regarding the amount of glycol used and removed during the contract period. PWGSC responded and slightly increased its compensation offer.

In determining the final amount of compensation, the Tribunal reviewed its *Procurement Compensation Guidelines* (Guidelines) and stated that the compensation should be reflective of the actual loss suffered by Almon as a result of the breach of contract. The Tribunal then looked at two proposed methods to

determine the amount of profit lost. One method, favoured by Almon, was the "revenue-less-cost approach". This involved determining the profit by subtracting costs associated with generating revenue from the actual total revenue. The other method, preferred by PWGSC, was the "profit-margin approach" and involved applying a profit percentage to a total revenue figure. The Tribunal decided to use the "profit-margin approach" on the basis that it did not feel Almon adequately demonstrated the costs it would have incurred in performing the work, if PWGSC had awarded Almon the contract.

In determining the revenue, the Tribunal heard Almon's argument that PWGSC failed to consider additional amounts of glycol that had been sprayed and reclaimed. PWGSC stated that the recovery of the particular type of glycol in question was not covered by the contract at issue, nor actually recovered. The Tribunal, in reviewing the contract, determined that PWGSC had submitted invoices based on the appropriate type of glycol reclaimed and also properly demonstrated the quantity of this type of glycol that was reclaimed.

In determining a reasonable profit margin, the Tribunal reiterated that it was not able to determine the costs that Almon would have incurred if it had been awarded the contract (based on the information Almon provided). However, it was able to take information submitted by both parties throughout the compensation process. The Tribunal accepted Almon's argument that superior courts have recognized a profit premium in cases involving breach of contract for specialized services on the basis that competition is limited and that these services "are not readily available". The Tribunal noted that the courts have identified a premium at a rate of 15% - 20%, and considered 20% to be the appropriate amount in this case. This rate was reflective of the specialized services of de-icing and anti-icing, as well as the requirements to properly handle chemicals and store them for disposal.

The Tribunal calculated that Almon would have realized a profit margin of 21.9% on revenues of $1,372,891, coming to a total of $300,663.00. The Tribunal stated that Almon should receive $100,221.00, or one-third of the profit it would have earned on the basis of it being awarded the contract. Almon also argued for legal fees and undue hardship caused through litigation of the matter. The Tribunal determined that Almon's legal fees would not be considered in the decision, as the issue had not been considered in the Tribunal's previous decision.

This decision confirms that loss of profit claims are subject to a number of principles and considerations.

CITT reviews national security exception

In *Opsis, Gestion d'infrastructures Inc. v. Canada (Department of Public Works and Government Services)*, [2011] C.I.T.T. No. 53, the Canadian International Trade Tribunal dismissed a complaint by Opsis, Gestion d'infrastructures Inc. (Opsis),

holding that it did not have jurisdiction to continue its inquiry.

Opsis filed a complaint with the Tribunal concerning a procurement by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of the Environment (EC) for the maintenance and operation of the mechanical and electrical systems at the Canadian Meteorological Centre in Dorval, Quebec and alleging that PWGSC evaluated its proposal improperly.

The Tribunal accepted the complaint for inquiry, following which the contract in question was awarded to Cofely Services Inc. (Cofely). Cofely subsequently requested the Tribunal grant it intervener status, which was so granted. PWGSC then filed a motion with the Tribunal for an order dismissing the complaint on the basis that the Tribunal did not have jurisdiction to inquire into the complaint since the Government of Canada had invoked the national security exception in relation to the subject procurement. The national security exception is found at Article 1804 of the *Agreement on International Trade* (AIT) and provides for exceptions to the provisions of the trade agreements where national security is involved.

The Tribunal does not have jurisdiction with respect to the federal government's determination that a particular matter relates to national security. This determination rests solely with the Government of Canada. The Tribunal stated its role in national security exemptions is therefore limited to determining the issue of whether the exception was actually and validly invoked in the context of a particular complaint.

The issue before the Tribunal was thus whether, in this case, the national security exception in Article 1804 of the AIT was invoked properly and in a timely fashion by the Government of Canada.

In analyzing this issue, the Tribunal noted there are no rules prescribing exactly when the exception must be invoked. The Tribunal held that the national security exception need not be referred to in the procurement solicitation documents in order for its invocation to be valid. Rather, the exception may be invoked at any time before the end of the procurement process, and parties can be informed only after the filing of a complaint with the Tribunal.

In this case, the exception was invoked broadly and in a general context such that it was reasonable for the exception to concern and include future procurements relating to the facilities in question at the Canadian Meteorological Centre in Dorval, Quebec. As a result, the exception necessarily applied to the procurement of labour for the operation, maintenance and performances of repairs at those facilities. Since the complaint under inquiry related to the facilities in Dorval, the exception was found to apply and the Tribunal no longer held jurisdiction to continue the inquiry.

— KC LLP —

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