Keel Cottrelle LLP
Barristers & Solicitors

Toronto —
36 Toronto St. Suite 920 Toronto ON M5C 2C5
416-367-2900 fax: 416-367-2791

Mississauga —
100 Matheson Blvd. E. Suite 104 Mississauga ON L4Z 2G7
905-890-7700 fax: 905-890-8006

Public Sector

Procurement Law Newsletter

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KC Launches Newsletters

Keel Cottrelle LLP is pleased to announce the launch of this Newsletter. The Newsletter will focus on Public Sector Procurement Law. The Newsletter will be published bi-annually. Suggestions or contributions for the Newsletter are welcome.

Keel Cottrelle LLP is also transitioning the existing Education Law Newsletter and Human Resources Digest from Edu-Law to Keel Cottrelle LLP. The Firm will publish the Education Law Newsletter and Human Resources Newsletter directly.

The Editors

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Investigating Rumours - Does a Purchaser have any Duty?

An interesting issue that may arise during the procurement process is what to do when rumours are started about one of the bidders, particularly by another bidder. In *Double N Earthmovers Ltd. v. Edmonton (City)*, [2007] S.C.J. No. 3, such a dispute went before the Supreme Court of Canada regarding a call for tenders issued by the City of Edmonton. The City sought bids on a 30-month contract to supply equipment and operators to move refuse at a waste disposal site with the tender documents requiring that all equipment be 1980 vintage or newer. The City awarded the contract to Sureway Construction of Alberta Ltd., but permitted Sureway to supply equipment that was manufactured prior to 1980. Double N Earthmovers Ltd., the second lowest bidder, had warned the City prior to making the selection that they suspected Sureway did not own any equipment manufactured in 1980 or after, but the City selected Sureway regardless. Double N sued the City for breach of the duties owed to them under the tendering process, seeking the profits Double N would have realized had it been awarded the contract. The action was dismissed at both trial and the Court of Appeal.

While the decision of the Supreme Court of Canada answered the issue for the parties, it leaves the general issue potentially open to further interpretation by the Courts. The majority of the Supreme Court agreed with the decision at trial and at the Court of Appeal. However, the minority of the Supreme Court did not agree. Consequently, an analysis of both the majority and minority Reasons is worthwhile for assessing how similar cases may be decided in the future.

The majority reiterated the principles set out in previous decisions of the Supreme Court that an implied term of the contract created by the tendering process is that an owner will only accept a compliant bid; and further, that an additional implied obligation on the part of owners was to treat all bids “fairly and equally”.

Double N argued that the City breached its duties by accepting Sureway’s non-compliant bid. Double N argued that one unit was represented as manufactured in 1980, but was actually manufactured in 1979. The majority of the Supreme Court dismissed this argument because the bid, on its face, promised to supply a 1980 unit. Since the City accepted this, Sureway was obliged to supply a 1980 unit and that obligation was enforceable by the City. Double N also argued that the item listed as a “1977 or 1980 Rental Unit” was noncompliant as the 1977 unit was noncompliant on its face and the rental unit was non-compliant because it did not contain the specifications required by the tender. The majority of the Supreme

Court referred to the Conditions of Tender where it was provided that "*Bidders are advised that all the instructions to Bidders and Conditions of Tender (as supplemented herein) must be strictly complied with and failure to do so either in whole or in part may invalidate the bid in question.*". The conditions also provided that: "*The City reserves the right to reject any and all Tenders, and to waive any informality therein, to award by item or class. The lowest or any Tender may not necessarily be accepted.*" The majority of the Court concluded that the absence of specifications for the rental unit was the sort of informality contemplated by the conditions. Further, the majority did not construe the tender documents as preventing the City from accepting a promise to provide rental equipment or equipment that had not been previously registered with the City.

Double N further argued that the City had a duty to investigate Sureway's bid, especially when Double N had alerted them to the equipment issues. The majority of the Court found there was no express obligation to investigate the equipment bid prior to acceptance. They agreed with the Court of Appeal in concluding that there was no such implied duty. The Court of Appeal stated: "*To impose a duty on owners to investigate whether a bidder will comply with the terms of its bid would overwhelm and ultimately frustrate the tender process by creating unwelcome uncertainties.*" The majority of the Supreme Court added that: "*allegations raised by rival bidders do not compel owners to investigate the bids made by others. This would encourage unwarranted and unfair attacks by rival bidders and invite unequal treatment of bidders by owners. This would frustrate, rather than enhance, the integrity of the bidding process*".

Double N also alleged that the City breached its duties by engaging in impermissible "bid shopping," through pre-award negotiations with Double N and with Sureway. The majority found that according to the terms of the tender, the City was entitled to negotiate with the lowest bidder after the City's initial evaluation and in this tender, Sureway was the lowest bidder.

Finally, Double N argued that the City breached its duty by awarding the contract to Sureway on terms other than those set out in the tender documents. In the alternative, Double N further argued that by permitting Sureway to supply equipment manufactured prior to 1980, the City breached its duty. Double N argued that the City should have ordered Sureway to perform as promised or should have cancelled the contract and either re-tendered, abandoned the contract, or awarded the contract to Double N as the next lowest bidder. The majority determined that the City was unaware of Sureway's deceit until after it had accepted Sureway's tender and thus did not violate any duties owed to Double N because the City did not enter into the contract on terms other than those set out in the bidding documents. In response to Double N's alternate argument, the majority, relied on the *Ron Engineering (1981)* decision of the Supreme Court, and noted that this conduct occurred after the award of the Contract, thus any obligations on the part of the owner to unsuccessful bidders had been fully discharged.

In conclusion, the majority dismissed Double N's appeal and held that Double N's bid received fair treatment throughout the bidding process.

There were strong dissenting Reasons. The minority would have allowed the appeal on the basis that the decision resulted in Sureway profiting from its deceit, and also enabled the City to escape entirely from its implied obligations. The minority stated: "*The City's casual approach to Sureway's bid, particularly in light of the warning it received about the bid's likely non-compliance, was unfair to other bidders who provided accurate information in accordance with the tender specifications. The obligation to accept only a compliant bid would be meaningless if it did not include the duty to take reasonable steps to ensure that the bid is compliant*". The minority went on to say that the obligation to accept a compliant bid requires that reasonable steps be taken to evaluate the bid for compliance before acceptance. Furthermore, the minority could not see how the integrity of the bidding process was protected by allowing a bidder to "*get rid of the competition unfairly and then hash it out with the owner after it has been awarded the contract*." In the minority's view, the City failed to insist on compliance with the essential terms of the tender and the City breached its duty to treat all bidders fairly and equally.

Consequently, depending on the facts of a specific case, it may still be possible to successfully argue that an owner has not complied with the duty owed to bidders where reliable information concerning a competitor is brought to the attention of an owner. Owners should be cautious in approaching this issue.

The first approach might be appropriate terms in the tender or RFP documents dealing with information supplied by competitors.

If there are no relevant terms, and if timing permits, the evaluator could alert the rumouring proponent that the evaluator requires a meeting, including the bidder who is the subject matter of the rumour, to review the issue of the rumour, and then a meeting could be arranged together with the proponent who is the subject matter of the rumour. At that point, the rumouring proponent might withdraw the allegation. If not, by conducting the interview, one of the following outcomes should be achieved:

1. The proponent of the rumour could prove the rumour to be true, in which case the bidder who is the subject matter of the rumour would be disqualified.

2. The proponent of the rumour may not be able to prove the rumour to be true at such time, in which case, the following may result:

(a) the bidder who is the subject matter of the rumour may claim against the proponent of the rumour; or

(b) the bidder who is the subject matter of the rumour may quietly withdraw from the process once reminded that if such bid is successful, and it is subsequently shown that the rumour is true, such bid would be in breach of the terms and conditions of the Invitation Request and the bidder would be liable to the owner as a result thereof.

In either case, the owner might avoid legal liability.

It is quite clear from the decision of the Supreme Court of Canada in *Double N* that this is an issue which requires extreme caution on the part of owners. Dare we say that every owner should obtain legal advice in such circumstances.

Procurement: How to Minimize Legal Risk

While it is impossible to completely eliminate the risk of legal action arising out of a procurement process, there are steps that an organization can take to significantly reduce such risk.

The power to set the terms and conditions of the bid process lie with the organization seeking bids. In general, an organization should remember two general maxims throughout the bid process: first, an organization seeking bids should be fair, be forthright and should act in good faith; and second, all decisions made by an organization during the process should be well-thought out and reasonable.

A review of the terms and conditions of a tender or RFP places an organization seeking bids in a better position to achieve goals without being challenged. Some issues to address include:

o The ability to pre-qualify or exclude bidders based on past experience should be clearly set out in the bid documentation.

o The impact of the *Municipal Freedom of Information and Protection of Privacy Act* should be brought to bidders' attention, if applicable.

o The inclusion of a clause allowing the organization to cancel the bidding process and start all over again and the specifics of what such a process would look like should be specifically set out in the bid documentation.

o An organization's power to waive certain conditions, issue amendments to the bid documents, change the scope of work, or to accept alternates or equivalents, should be specifically set out in the bid documentation.

o The effect of both latent and patent errors in a bid should be set out in the bid documentation.

o Organizations should consider inclusion of a clause that limits liability for any issues that may arise as a result of the procurement process.

o An organization should ensure that unusual clauses, such as liquidated damages clauses (organizations should avoid "penalty" clauses which are usually unenforceable), are explicit and clear.

o A privilege clause that permits an organization not to select the lowest bid should be included . Similarly, preferences in the bid process, such as quality of service, should be set out.

o An organization should determine the specifics of its evaluation process. Inclusion of the evaluation process (criteria and weighting) in the bid documents may or may not be desirable depending on the circumstances.

o Negotiations after a successful bidder has been selected should be conducted with care to ensure that conditions or terms do not breach those set out in the bid documents.

Other considerations include:

o A disgruntled unsuccessful bidder is often satisfied once the bidder knows that the process was fair and that the successful bidder brought a legitimately superior bid. For this reason, a post-bid debriefing for unsuccessful bidders should be offered.

o Caution should be exercised when using vendor precedent contracts. Specifically, "entire agreement" clauses pose problems for the relevance of the pre-bid contract and the duty of fairness to unsuccessful bidders.

These are a brief sampling of issues to

consider when reviewing tender documents. For further assistance in preparing or reviewing tender documents or for a presentation on related issues for your organization, please contact Keel Cottrelle LLP.

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The impact of exemptions under the Municipal Freedom of Information and Protection of Privacy Act

The *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M-56, provides a right of access to information under the control of institutions and has a significant impact on the business operations of institutions. Exemptions under sections 6(1)(b) (substance of a closed meeting), 10(1) (third party information) and 11(c) and (d) (prejudice economic and other interests) of the Act are commonly asserted by institutions refusing to disclose information. The tests to be met with respect to these exemptions will be explained below with reference to recent Orders by the Information and Privacy Commissioner of Ontario.

Section 6(1)(b) – Closed Meetings

Under section 6(1)(b) of the Act, a public institution may refuse to disclose a record that reveals the substance of deliberations of a meeting of a council, board, commission or other body, or a committee of one of them, if a statute authorizes holding that meeting in the absence of the public. It has been emphasized in several Orders that the section 6(1)(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. The exemption has been held to apply if the following three part test is met:

1) A council, board, commission or other body, or a committee of one of them, held a meeting;

2) A statute authorizes the holding of the meeting in the absence of the public, and

3) Disclosure of the record would reveal the actual substance of the deliberations of the meeting.

Under part 3 of the test, the word "deliberations" has been held to mean discussions conducted with a view towards making a decision, and the word "substance" is generally interpreted to mean more than just the subject of the meeting. In an important appeal by the *York Region District School Board* (Order MO-1344), it was established that Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, the exemption was found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings.

The IPC may find that an institution erred in exercising its discretion where the institution does so in bad faith or for an improper purpose, in situations where the institution takes into account irrelevant considerations, or if it fails to take into account relevant considerations.

Section 10(1) – Third-Party Information

The section 10(1) exemption differs from sections 6(1)(b) and 11, as it is a mandatory exemption. It is stated in every decision where Section 10(1) is asserted that its purpose is to limit disclosure of information which is held by government and constitutes confidential information of third parties, including private-sector organizations, that could be exploited by a competitor in the

marketplace. As stated by the Ontario Superior Court of Justice in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851, with respect to the equivalent provision in the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F. 31, the exemption is "designed to protect the 'informational assets' of private businesses and other organizations from which the government receives information in the course of carrying out its public responsibilities."

Under section 10(1):

"A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency".

For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. The record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. The information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. The prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

The commercial and financial information of third parties is often at issue. Commercial information has been defined in the case law as information that relates to the buying, selling, or exchange of merchandise or services. It can apply to both for-profit and non-profit organizations and has equal application to both large and small enterprises. Financial information has been defined as information relating to money, its use or distribution, and must contain or refer to specific data. Examples of this include cost accounting methods, pricing practices, profit and loss data, and overhead and operating costs.

For part 2 of the test, information may qualify as "supplied" if it was directly provided to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information provided by a third party. The Court in *Boeing Co. v. Ontario* found that "information in a contract is typically the product of a negotiation process between the parties and that the content of a negotiated contract involving a governmental institution and another party will not normally qualify as having been 'supplied.'" The Court also held that: "*Even where the contract is preceded by limited negotiation, or where the final agreement substantially reflects information that originated from a single party, the Commissioner has concluded that the information was not supplied.*" However, there are exceptions to this principle as shown in Order MO-2093 involving a request made of the City of Hamilton for information regarding tenders for the supply and implementation of computers. In this decision, information relating to price and a

list of projects for reference purposes contained in one of the bids was found to be "immutable" and supplied to the City within the meaning of the "supplied" component of part 2 of the test. Order PO-2384 was quoted in the decision where it was decided that, "one of the factors to consider in deciding whether information is supplied is if the information can be considered relatively 'immutable' or not susceptible of change." Examples given of 'immutable' information included fixed costs such as overhead or labour costs already set out in a collective agreement that determined a floor for a financial term in the contract. Another example given was where a third party provided its financial statements to the institution.

To satisfy the "in confidence" component of part two of the section 10(1) test, the parties resisting disclosure must establish that the parties had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. All of the orders citing this provision list the following factors in relation to determining whether an expectation of confidentiality is based on reasonable and objective grounds. These include whether the information was:

- Communicated to the institution on the basis that it was confidential and that it was to be kept confidential

- Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization

- Not otherwise disclosed or available from sources to which the public has access

- Prepared for a purpose that would entail disclosure.

In Order MO-2151 involving the Town of Oakville, the records withheld were portions of the successful proposal submission for an identified expansion project. The Commissioner accepted that "*a record can be supplied 'in confidence' notwithstanding that it did not explicitly state that the record was to remain confidential*." In this case, it was found that section 10(1)(a) applies to unique information that discloses a particular approach to the project taken by the affected party and qualifies for exemption, however, general public information about the work done by the affected party does not.

In order to meet part 3 of the test, parties must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." The IPC has held that evidence amounting to a speculation of possible harm is not sufficient, which makes the test very difficult to meet.

For example, in a July 2006 Order involving the *Toronto District School Board* (Order MO-2072), the Board's decision to deny access pursuant to sections 10(1)(a) and (c) was overturned in adjudication. The record at issue was a Bid Evaluation resulting from a Request for Proposal (RFP). The Board had notified all of the parties who had responded to the RFP of the information request, and several parties did not consent to a release of the records.

The Adjudicator found that both the first and second parts of the test were satisfied. With respect to confidentiality, while previous orders have established that the Act can apply to information contained in a record, notwithstanding that there is no confidentiality provision, the existence of an explicit confidential arrangement is evidence of the confidentiality expectations of the parties.

Under part 3 of the test, the Adjudicator was not persuaded that disclosing the information remaining at issue in the Bid Evaluation could reasonably be expected to result in any of the harms outlined in sections 10(1)(a) or (c) of the Act. The Board and several of the affected parties suggested that price is one of, if not the only differentiating factors between competitors and that release of that information would therefore have an immediate impact on their ability to compete for future engagements equitably. The Adjudicator was not convinced that price was a determinative factor. The Adjudicator found that in only two cases out of twenty-four was price the disqualifying factor. Further, the Adjudicator was not convinced that there was any inherent value in the information contained in the Bid Evaluation as a result of the passage of time. In addition, the Adjudicator stated that the fact that a party may be subject to a more competitive bidding process for future contracts does not in and of itself significantly prejudice their competitive position or significantly interfere with their contractual or other negotiations. Finally, the Adjudicator found that a more competitive bidding process does not in and of itself result in undue loss, as articulated in s. 10(1)(c). It should be noted that the test does not require "significant" prejudice.

In general as laid out in MO-2103-I respecting the Township of Georgian Bay, "*details of agreements between the government and those who partner with it in providing public services will usually be available for public scrutiny*", which is consistent with statements made by the Commissioner in the 2005 Annual Report: "*The right of citizens to access government-held information is essential in order to hold elected and appointed officials accountable to the people they service. This is particularly true for details of government expenditures and the right of the public to scrutinize how tax money is being spent. When government organizations use individuals or companies in the private sector to help develop, produce or provide government programs or services, the public should not lose its right to access this information.*"

Section 11(b), (c) and (d) – Economic interest

Section 11 of the Act contains an economic and other interest exemption for institutions. The purpose of section 11, as stated in several orders, is to enable discretionary protection of certain economic interests of institutions. Under s. 11, a public institution may refuse to disclose a record that contains:

"(c) Information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution; or

(d) Information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;".

To demonstrate that disclosure of the record "could reasonably be expected to" prejudice or be injurious, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." As with the test under s. 10(1), evidence amounting to a speculation of possible harm is not sufficient. The purpose of section 11(c), in particular, is to protect the ability of institutions to earn money in the marketplace.

Order MO-2030 involving the Municipal Property Assessment Corporation ("MPAC") provides examples of where such exemptions can apply. The information at issue was from a database known as the Ontario Assessment System ("OASYS"), which contains data about property owners

and their property. A Councillor for the City of Toronto filed an access-to-information request to be given access to the names, addresses and property data of constituents within their respective ward either through online access or CD. Generally this type of access is permissible, but there is a charge for it. In the Commissioner's opinion, MPAC provided "*detailed and convincing evidence that disclosure of the records at issue could reasonably be expected to prejudice its economic interests or competitive position under section 11(c), or be injurious to its financial interests (section 11(d))*." The Reasons given for the decision were: *"If MPAC is required to disclose information from the OASYS database or through Municipal Connect to the appellant under the Act, it would be deprived of the significant amount of fees that a request of this size would generate. Moreover, it would be required to release the same information to anyone else who asked, which could reasonably be expected to jeopardize MPAC's ability to earn money in the marketplace*."

In the Peel dairy vending case (Order MO-1915 referred to above) the Board also argued that sections 11(c) and (d) of the Act were applicable. The Board argued that, in the future, third parties would be unwilling to either do business with the Board, or provide necessary information to the Board during negotiations, if contracts were disclosed. The adjudicator ruled the argument speculative at best. The Adjudicator agreed with the appellant's position that disclosure of the information at issue may actually result in potential competitors attempting to offer more favourable contract terms to the Board, and that this could in fact improve the Board's competitive position. The Adjudicator was not satisfied that disclosure of the record could reasonably be expected to result in these same vendors refusing to do business with the Board, and thus result in injury to the Board's financial interests under section 11(d).

In a June 2006 Order (MO-2060), at issue was a request of the Toronto Catholic District School Board for access to a copy of the lease agreement between the Catholic Board as lessee and the Toronto District School Board as lessor, for the use of a school building.

The Catholic Board denied access to the record relying on the exemptions in sections 6(1)(b), 11(c) and (d) and section 10(1)(a). The Public Board submitted it should be permitted to make submissions on the exemptions at issue, since it too is an institution under the Act. The Public Board, however, was not allowed to make representations and the adjudicator ordered the records to be released. The Public Board commenced an application for judicial review with respect to the Order, and the adjudicator reviewed the application and decided to reconsider the decision. The adjudicator on reconsideration held that the Public Board should be considered a board for the purposes of s. 6(1)(b) and 11(c) and (d) despite the fact that it was not the institution that received the request.

The section 6(1)(b) arguments failed because there was insufficient evidence, such as minutes of meetings, to indicate on a balance of probabilities that the predecessor school board discussed the lease during an in-camera meeting.

With respect to section 11, the Adjudicator found that that the Public Board failed to demonstrate how disclosure of the terms of an 18-year-old agreement could reasonably be expected to prejudice the Public Board's economic or competitive interests, as is required by section 11(c). Further, the adjudicator held that the Public Board failed to provide the kind of detailed and

convincing evidence required to demonstrate injury to its financial interests, as required under section 11(d).

These decisions demonstrate that these issues should be considered prior to engaging in the procurement process. Institutions and bidders should be aware of the tests applied by the IPC, which might influence the process engaged in by the parties.

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Accepting Non-Compliant Bid Leads to Liability to Other Bidders

In *Tercon Contractors Ltd. v. British Columbia*, [2006] BCJ No. 657, the British Columbia Supreme Court examined whether or not an RFP was a tender call, the nature of a joint venture and the application of exclusion clauses, among other issues, in concluding that the defendant Ministry of Transportation and Highways breached its duty of fairness to the plaintiff, Tercon Contractors Ltd.

After several years of negotiations, the province of British Columbia, representatives from the Nisga'a First Nation and the federal government agreed to proceed with the construction of the Kincolith Extension Project, a very difficult construction project building a highway to Kincolith, a traditional Nisga'a village. The province issued a Request for Expressions of Interest based on a fixed-price contract model. As part of the bid, each team was required to provide a description of its legal structure, such as a joint venture versus partnership. Bidders were required to report any changes to legal structure.

The Ministry received six bids; however it decided to change the delivery model of the project. The Ministry invited the original six bidders to bid on an "alliance-model" contract, where the bidder would assume the financial risk for excess cost up to a certain point. The RFP was issued and included a clause that addressed material changes to a bidder's circumstances after submitting a bid.

After the RFP was issued, but before closing, one of the invited bidders, Brentwood, communicated to a Ministry representative by letter that it would be forming a joint venture with a non-invited company, EAC, as a result of a change in the availability of certain subcontractors. The letter was followed up by a phone call in which the Ministry representative confirmed that Brentwood was the qualified team and therefore the project must be in its name. It was further indicated that the structure of the team would be reviewed at the evaluation stage of the bid.

The final bid submitted by the Brentwood and EAC team was in the name of Brentwood. EAC was described as a "major member of our team" without further specification as to the legal relationship between the parties. EAC was listed as a subcontractor, however the relationship between Brentwood and EAC did not resemble that of a contractor-subcontractor. Following the Ministry's change to the delivery model, the structure of the Tercon project also changed, as certain subcontractors were no longer needed, while new contractors needed to be added. These changes were mandated by the Ministry's changes to the project structure and did not represent a change to the original eligible proponent under the initial Expression of Interest.

The evaluation process set up by the Ministry for evaluating the bids was two-fold—it consisted of a project evaluation panel (PEP) and an independent review panel (IRP). The mandate of the IRP was to

evaluate the fairness and consistency of the PEP evaluation process. After the initial review of the bids, Tercon and Brentwood were the highest ranking bidders, with Brentwood attaining a slightly higher score. The IRP had concerns about the subcontracting structure of the Brentwood bid, as well as issues that it raised with respect to the "alliance model" and risk for excess cost. A clarification was sought from Brentwood; however, no mention was made by the Ministry representative of the earlier communication with Brentwood with respect to the change to a joint-venture. Following interviews with Tercon and Brentwood and the short-listed proponents, the PEP wrote a report in which Brentwood was referred to as Brentwood/EAC and as a joint venture. These references were later removed, and when the successful bidder was determined and communicated, it was said to be only Brentwood, with no mention of EAC as a joint venturer.

Brentwood, EAC and Ministry representatives entered into negotiations to have the building contract signed in the name of the joint venture; however, the Ministry was unwilling to have the contract in the name of any one other than the original bidding proponent. Accordingly, Brentwood signed the contract with the Ministry and Brentwood and EAC entered into a separate contract as between themselves with respect to their joint venture. During these negotiations, the Ministry was operating under the assumption that the Brentwood bid was eligible. Tercon brought the action against the Ministry to recover damages resulting from the Ministry's failure to reject Brentwood's allegedly non-compliant bid.

After reviewing the facts, the Court turned to an analysis of the law. The Court first asked whether there was a Contract between Tercon and the Ministry. The defendant Ministry argued that the RFEI that it issued was not a tender call, but was a request for proposals with negotiation. The Court concluded that the issue of whether or not a Contract is formed "depends on the precise language and the intention of the tender call" and that the name of the document is not determinative. The Court pointed out that the procurement documentation did not say that it was not a tender call and the court concluded on all the facts that the "*overwhelming balance of the terms of the RFP considered within the specific context of the circumstances*" support the conclusion that the parties in this case intended to create contractual relations. The Ministry also advanced an argument that the Tercon bid was not compliant; however Tercon argued that the deficiencies were covered under the "waiver of defects" clause. The Court reviewed the case law on what should be considered material for the purposes of accepting a non-compliant bid and concluded that the deficiencies were not material.

The next issue was whether or not the Brentwood bid was non-compliant. The Ministry argued that the Brentwood proposal was not a joint venture and that it was entitled to accept the Brentwood proposal since it was submitted in Brentwood's name only. The Court concluded that, on the facts, the Brentwood / EAC arrangement was a joint venture.

The Court then analyzed whether the Ministry's review was fair to all bidders and the Court concluded that by allowing Brentwood to submit its bid as a joint venture with EAC, who was ineligible to bid, the Ministry breached its duty of fairness. The court concluded that by submitting its bid as a joint venture, Brentwood was given an unfair competitive advantage.

The final issue to resolve was whether the exclusion clause contained in the bid

documentation could be relied on by the Ministry. This clause precluded any claim for compensation arising from the RFP process. The Court concluded that the Ministry's breach in accepting a non-compliant bid was fundamental and that it would not be fair or reasonable to enforce the exclusion clause in these circumstances, as doing so would "*render the duty of fairness that underlies the dealings between the owner and the bidder meaningless*".

For these reasons the Court awarded damages to Tercon.

This decision re-emphasizes the duty of fairness as well as the risk of accepting non-compliant bids.

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School Board found not liable to subcontractor in bid depository process

On July 29, 2005, the Ontario Court of Appeal in *Schaible Electric Ltd. v. Melloul-Blamey Construction Inc.*, [2005] O.J. No. 3226, dismissed an appeal by Melloul-Blamey, the general contractor, from a trial judgment awarding Schaible Electric Ltd, the subcontractor, damages of $45,000 for loss of profits due to breach of contract.

In August, 1999, the Hamilton-Wentworth District School Board tendered the construction of Waterdown Public School pursuant to the Ontario Bid Depository Standard Rules and Procedures. These rules were binding on the owner, the prime contractor and the trade subcontractors. General contractors submitting tenders were required to include a bid from a list of pre-qualified electrical and mechanical subcontractors. The process began with subcontractors submitting bids to the Bid Depository, which were then disclosed to the general contractors. Schaible Electric was the lowest bidder for the electrical contract and as a result was carried by Melloul-Blamey in its tender to the Board. Melloul-Blamey was the low tenderer and was awarded the contract by the Board. However, once they were awarded the contract, Melloul-Blamey contracted with C. Wallingham Electric Inc, the second lowest bidder, for the electrical subcontract. Schaible commenced an action against Melloul-Blamey and the Board for breaching their obligations owing to it.

The Trial Judge held that the preliminary Contract does not extend to an owner and a subcontractor in the bid depository process and therefore did not form Contract A between Schaible and the Board. The Board had complied with any duty owed to potential subcontractors by insisting that the bid depository process be respected. The standard form incorporated into the contract with any subcontractor tendering under the Bid Depository Rules also captured this principle in Article 1.1.2.1 where it stated: "*Nothing contained in the Contract Documents shall create any contractual relationship between … the Owner and a Subcontractor, a Supplier, or their agent, employee or other person performing any of the work*".

The Court of Appeal agreed with the Trial Judge's determination and also saw no error in the Judge's decision to not attribute any of Schaible's costs in the action to the Board. In their Reasons, the Court of Appeal held the School Board was a necessary party to the action; its presence did not extend the trial in any significant way; there were no issues advanced in relation to the School Board, the failure of which caused additional or

unnecessary expense, and; Melloul-Blamey and the School Board were represented by the same counsel.

At trial and on appeal it was argued by Melloul-Blamey that, if a general contractor has reasonable cause for objection to the use of the proposed subcontractor, it may enter into a contract with another. They argued that Schaible's failure to obtain bonding for the full amount of the contract price constituted a reasonable objection to contracting Schaible. The Trial Judge held that Melloul-Blamey did not have the contractual right to demand a bond for that amount. The Court also found that Melloul-Blamey had not conducted appropriate due diligence investigating Schaible's ability to perform the subcontract and, instead of notifying Schaible of the nature of its concerns, relied on rumour in coming to its conclusions about the subcontractor. Therefore, Melloul-Blamey was unable to establish at trial that it "reasonably objected" to contracting Schaible.

On appeal to the Ontario Court of Appeal, Melloul-Blamey argued that the Trial Judge erred in not finding a reasonable objection and in holding that Melloul-Blamey was not entitled to demand bonding. The Court of Appeal found that a reasonable objection depends on the facts of each case and accordingly, the court affords considerable deference to the Trial Judge's determination of whether the general contractor reasonably objected. Unless there is a palpable and overriding error, the Trial Judge's determination should not be set aside and therefore was not set aside in this case.

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Court of Appeal confirms no liability to subcontractor

In *Design Services Inc. v. Canada*, [2006] F.C.J. No. 1141, an appeal before the Federal Court of Appeal, the Court overturned the Trial Judge's decision finding that the federal government owed a duty of care to the subcontractors named in a general contractor's bid when the government sought tenders for the construction of a major naval reserve in Newfoundland. This is another case dealing with the issue of possible liability to subcontractors, but raises different and distinct issues from the *Schaible Electric Ltd.* case as summarized above.

The project was tendered on a design-build model, where bid proponents submitted their own proposals, including detailed designs based on the owner's requirements. Olympic's design-team included an architect, as well as several other subcontractors. The bid was submitted by Olympic as the sole proponent. As part of the bidding process, the government retained a right to review any changes with respect to named subcontractors.

When Olympic's bid was rejected in favour of another bidder's proposal, Olympic, along with its named subcontractors, sued the appellant government for breach of contract. Olympic eventually settled their suit against the government, however, the subcontractors remained in the suit. At trial, the judge found that the government did not owe the subcontractors a duty in contract but held that it did owe a duty of care under tort law.

On appeal, the Court of Appeal agreed with the Trial Judge's conclusions that no

duty was owed in contract. The subcontractors argued that they formed a "contractual" joint venture with Olympic when the bid was submitted. The Court of Appeal noted that the relationship between Olympic and the subcontractors lacked the sharing of profit and loss, which characterizes a joint venture. Based on several specific references in the contractual documents, including a clause that specifically stated that nothing in the contract documents created a contractual relationship between the government and any subcontractor or designer, the Court concluded that the trial judge was correct in finding that the government did not owe a contractual duty to the respondents.

With respect to the Trial Judge's finding that a duty was owed in tort, the Court agreed that, as the subcontractor's claim "*did not fit squarely within any of the established exceptions to the common law rule against recovery for pure economic loss*", the test for establishing a new ground of tort liability should apply. The test is two fold: first, do the circumstances disclose reasonably foreseeable harm and sufficient proximity to establish a *prima facie* duty of care; and, second, are there any factors arising from the relationship between the plaintiff and defendant, including policy concerns, that would justify denying liability?

The government conceded that there was reasonably foreseeable harm affecting the subcontractor but, on the issue of proximity, the Court disagreed with the Trial Judge's conclusions. The Trial Judge concluded that there was a quasi-joint venture on the basis that there was a "partnering meeting" between the government and the successful design-build team and that the government had retained a right to review any changes to listed subcontractors. On the first issue, the Court disagreed with the emphasis that the trial judge placed on the "partnering meeting". In addition to pointing out that the "partnering meeting" only occurred post-award, the Court stated that "*…it had nothing to do with …partnering with the design-build team members and everything to do with the efficient completion of the project*." With respect to the second ground, the Court disagreed with the Trial Judge's conclusions, stating that "*the relevant relationship was between [the government] and the proponent, not between the [government] and the proponent's team members*". This conclusion was supported by the fact that all relevant communications were between the government and Olympic and, pursuant to the tendering documents, only Olympic could submit questions to the government with respect to the tender or the tendering processes. The Court also disagreed with the amount of emphasis that the Trial Judge put on the fact that, as part of its evaluation of the bids, the government retained the right to examine and evaluate the subcontractors named on a bid. The Court stated that this was merely part of the government's recognition of the complexity and magnitude of the project and that, as the ultimate responsibility for selecting subcontractors remained with the original proponent, the Court disagreed with the Trial Judge's conclusion that the government's role involved "closely managing" the subcontractors.

While it was unnecessary to examine the second branch of the test since the Court had concluded that a *prima facie* duty of care was not owed to the respondents by the appellants, the Court disagreed with the Trial Judge's conclusion that liability would not be indeterminate in this

case, on the basis that the design-build was a "unique" process. The Court pointed out that this was an error of fact since the design-build tender model is actually quite common in procurement, notwithstanding that a witness testified to its rarity at the trial.

As no liability was found in contract or negligence, the appeal was allowed.

This case raises interesting issues with respect to the potential for liability in procurement matters. The decision is consistent with the principles applied in public sector procurement law. Certainly, an owner can be liable to a contractor for breach of contract and/or breach of the duty of good faith. However, the issues analyzed in this case involve potential liability directly to a subcontractor. The decision of the Court of Appeal is consistent with the expectations for public sector procurement and the rationale confirms the applicable principles.

The post-award meeting is a typical procedure, and the Court of Appeal correctly concluded that such meetings do not demonstrate "partnership", but rather are part of the "*efficient completion of the project*".

Further, the role of the Government with respect to subcontractors was consistent with the practices of the public sector.

This case only demonstrates the lengths to which some bidders will go when their bid is not successful, and this potential for litigation should be factored into the "cost of doing business" by the public sector.

School Board liable for extra costs in asbestos removal

In *Inscan Contractors (Ontario) Inc. v Halton District School Board*, [2005] O.J. No. 1143, the plaintiff contractor was successful in its suit against the school board for breach of contract in connection with additional unexpected costs incurred during an asbestos removal project at a school building.

The school board retained DCS engineering consultant, the co-defendant, to prepare and organize the bid process for an asbestos abatement project at one of its high schools. DCS conducted a test removal to determine the difficulty of the project and concluded that it was unlikely that any difficulties would be experienced by the successful bidder. DCS also conducted a mandatory site-meeting, which was attended by a representative of the plaintiff. At the meeting, DCS provided visual access to what it said was the test removal site and provided photographs of the test removal itself. The contract documentation between the school board and the plaintiff included a clause that addressed the discovery of conditions substantially different from what was initially indicated in the bid materials. Pursuant to this clause, the contractor had an obligation to disclose to the board the existence of such conditions and the Board had a corresponding obligation to investigate and address any reported changes. In addition, the contract documentation gave the contractor a right to terminate under certain conditions.

The plaintiff was the successful bidder and was awarded the contract. Upon commencing the asbestos removal, the plaintiff discovered that there was a sticky

resin behind the fireproofing. The plaintiff attempted clean-up of the residue using a product recommended by DCS; however, progress was slow. After the unforeseen clean-up of the residue was completed, the plaintiff contacted the school board representative and briefed him on the problem. This initial letter was followed up two days later with a letter indicating that the plaintiff would be submitting additional costs associated with the clean-up and that the project might be delayed as a result. The school board wrote back, emphasizing the importance of a timely completion and requested further specifics in connection with the claim for additional funds. The plaintiff provided the requested particulars by additional letter.

While the plaintiff completed the project on time using additional labour, it failed two visual inspections conducted by DCS. The plaintiff claimed the failed inspections directly related to the residue problem. Following completion of the project, the plaintiff submitted an additional claim in an amount close to the figure it had initially provided to the school board. On the advice of DCS, the board denied the plaintiff's additional claim and the plaintiff launched the suit against the board and DCS for negligent misrepresentation and breach of contract.

Based on the evidence, the court made the following factual findings: 1.) the Board could not establish that the plaintiff had notice of facts from DCS's site visit from which it ought reasonably to have known of the presence of the residue problem; 2.) there was a residue underneath the fireproofing that required additional labour and associated costs to remove; and 3.) neither DCS, nor the Board knew, or ought reasonably to have known, of the existence of the residue. In addition, the court concluded that the failed inspections were not directly relevant to the claim.

The court dismissed the claim of negligent misrepresentation on the grounds that, on the balance of probabilities, neither DCS, nor the Board was aware of the residue and therefore the omission of this information in the tender documents did not constitute negligent misrepresentation.

On the breach of contract claim, the court concluded that, as there was no privity of contract between DCS and the plaintiff, the claim against DCS could not be sustained; however, the claim the against the school board was successful. The court agreed with the plaintiff's argument that the Board breached its contract when it failed to investigate the concealed residue condition after the plaintiff brought it to the Board representative's attention. As a result of the Board's breach of its obligations in the face of a changed contractual condition, the plaintiff was required to complete the project by incurring additional and unforeseen costs. The court concluded that the residue problem represented a condition for the project that was substantially different from the information provided in the Contractual Documents, from the details that were available at the site visit or would be normally present at an asbestos removal project. Further, the plaintiff proceeded correctly by informing the Board of the existence of the problem in a timely manner. The court concluded that the plaintiff had suffered damages as a result of the Board's breach.

Significant costs were also awarded to the plaintiff because the Board had refused an early reasonable offer to settle and because the Board forced the plaintiff to bring an action to enforce its rights.

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905-501-4444 rkeel@keelcottrelle.on.ca

KEEL COTTRELLE LLP

100 Matheson Blvd. E., Suite 104
Mississauga, Ontario L4Z 2G7
Phone: 905-890-7700
Fax: 905-890-8006

36 Toronto St. Suite 920
Toronto, Ontario M5C 2C5
Phone: 416-367-2900
Fax: 416-367-2791

Keel Cottrelle LLP
Procurement Law Newsletter

Robert Keel - Executive Editor
Nadya Tymochenko—Managing Editor
Tony Rosato - Procurement Law Editor

Contributors —
The articles in this Newsletter were prepared by Rosslyn Young and Andrea Campbell, who are associated with KEEL COTTRELLE LLP