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Public Sector

Procurement Law Newsletter

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Do not make promises in procurement that you cannot keep

Fraudulent misrepresentations may be costly.

In *Business Development Bank of Canada v. Experian Canada Inc*. (2017 ONSC 1851), the defendant's fraudulent misrepresentations cost it $41,140,416.00 for damages and costs incurred by the plaintiff as a result of its unsuccessful dealings with the defendant. Parties must be cautious not to make promises in the procurement process which they know they cannot deliver upon.

The plaintiff, Business Development Bank of Canada (BDC), brought an action for damages for fraudulent misrepresentation and breach of contract against Experian Canada Inc. and Experian Information Solutions Inc. (collectively Experian), who subsequently counterclaimed.

In early 2008, BDC sought to find a replacement for its existing commercial lending software. Through a procurement process, Experian responded to BDC's

Request for Information. As a result of representations made by Experian and its employees during the procurement process, BDC entered into a Software Development, Implementation, License and Support Agreement (Agreement) with Experian to replace BDC's software system. Shortly after the implementation of the new software, BDC began to realize that Experian could not deliver on the representations it made in the Agreement. BDC terminated the Agreement and subsequently created its own lending software called CLICS, which used a mix of commercially available and custom software.

BDC brought an action against Experian alleging that Experian fraudulently misrepresented the features of the lending software system it could deliver, and thus breached the Agreement. The Ontario Superior Court of Justice found that Experian did in fact make a fraudulent misrepresentation. The Court found that Experian represented in a response to BDC's Request for Information that it had a base product that already existed which it could implement at BDC. This representation was false, as no such base product existed. Experian intended BDC to rely on this false representation, BDC was induced to rely upon this representation, and BDC suffered damages as a result of this representation.

The Court thus allowed BDC's claim for damages arising from Experian's fraudulent misrepresentation and awarded BDC $41,140,416.00 for the incremental costs it incurred because of its unsuccessful dealings with Experian and for its loss of economic benefits arising from Experian's fraudulent misrepresentations.

Note the 2017 Judgment with respect to a 2008 procurement. Such delays are not unusual in complex commercial matters. ■

Owner not obligated to use its discretion to waive a Bid's non-compliance

Where an owner decides not to exercise its discretion to waive a bid's non-compliance with the terms of a tender, the unsuccessful bidder will not likely succeed in bringing an action for damages. Such was the case in *Surespan Construction Ltd v Saskatchewan*, (2017 SKQB 55) where the defendant was successful in dismissing the claim against them on summary judgment.

The defendant, the Government of Saskatchewan, published an Invitation to Tender through the Ministry of Highways and Transportation (Ministry) to build a bridge in Saskatchewan. Only two contractors submitted bids: the plaintiff, Surespan Construction Ltd (Surespan), and Structal Bridges. The bids were considerably higher than the Ministry's cost estimate for the project and, before accepting either bid, the Ministry held that both bids were non-compliant as neither bidder possessed the proper qualifications. The Ministry proceeded to reject both bids, cancel the bid competition, and re-tendered the work as two separate projects.

Surespan subsequently commenced an action against Saskatchewan alleging that Surespan's bid was compliant , or, in the alternative, that any non-compliance was not material, was waived by the Ministry and that upon submission of its bid, a contract was formed between Surespan and the Ministry. Surespan claimed that the Ministry failed to act honestly and in good faith and claimed damages for compensation for its lost profit. The Ministry and Surespan both applied for summary judgment.

Upon inspecting the terms of the tender, the Saskatchewan Court of Queen's Bench found that two salient provisions in the tender

required bidders to meet specified Occupational Health and Safety requirements and required contractors to hold a prescribed Canadian Welding Bureau certification. The latter requirement was at issue. The Ministry made inquiries with Surespan about the welding certification requirement. Surespan gave three responses, each of which constituted a conditional or qualified bid that was not consistent with the wording of the welding certification requirement.

The terms of the tender stated that any bids that were qualified or conditional in any way would be rejected. As such, the Court found that the Ministry was obligated to reject Surespan's bid. The Court noted that although the Ministry was able to waive compliance with the welding certification requirement, the Ministry was within its authority when it exercised its discretion not to waive compliance. The Court granted the Ministry's request for summary judgment dismissing Surespan's claim in its entirety. The Court held that overall, the Ministry acted reasonably, honestly and in good faith. ■

Court rules RFP can favour multi-service providers and still be fair

In *Kaymar Rehabilitation Inc v Champlain Community Care Access Center* (2017 ONSC 1843) the Ontario Superior Court of Justice found that the Champlain Community Care Access Centre (Champlain) ran a fair procurement process and that there was nothing inherently unfair with a Request for Proposal (RFP) favouring multi-service providers.

In 2000, the plaintiff, Kaymar Rehabilitation Inc (Kaymar), signed a sale of business contract with the defendant, Champlain after Kaymar was the successful winner of a 1999 RFP for the provision of community health care services previously provided by Champlain. Kaymar agreed to hire Champlain's former therapist employees and maintain the collective bargaining unit. Kaymar also inherited the accumulated severance liabilities of Champlain's employees, but the Ministry of Health and Long Term Care agreed to cover the payment of some specific severance costs. Specifically, the Ministry agreed to:

"consider as an allowable cost one time funding to cover the payment of specific severance costs incurred by the successor employer who takes over the employment of direct service workers and subsequently must lay-off these workers as a result of failure to maintain a sufficient level of business as a result of a loss of Request for Proposals in the Ottawa-Carleton area. (...) Once the results of the RFP process are known in 2003, the Ministry will assist the CCAC to manage these costs within the available resources should the CCAC identify this expense as a financial pressure in maintaining adequate service levels within the current CCAC funding allocation."

However, a subsequent RFP issued in 2003 that mirrored the 1999 RFP was awarded to another bidder, not Kaymar. Kaymar brought an action against Champlain alleging that the 2003 RFP was unfair, that it favoured large multi-discipline providers and that it specifically favoured the Victorian Order of Nurses of Ottawa-Carleton (Victorian Order), one of the winning bidders. Kaymar alleged that Champlain decided not to extend its contract with Kaymar because it was concerned about having to pay severance costs.

The Superior Court of Justice dismissed Kaymar's action. The Court found that Champlain was not and could not have been motivated to fix the RFP against Kaymar because of any concerns it may have had with

respect to the severance costs. Champlain did have concerns and a financial interest in the issue of severance costs and there was nothing inherently wrong with Champlain seeking to better understand and prepare for the situation. Champlain was obligated to run a fair procurement process, but the Court stated that it had no obligation to make financial decisions that were not in its own interest. Champlain was permitted to favour multi-service providers if it wanted to. There was nothing inherently unfair about an RFP favouring a multi-service provider. Furthermore, the Court found that the Victorian Order was compliant and had no insider knowledge that would have given it an advantage over the other bidders. Kaymar failed to prove that on a balance of probabilities the procurement was unfair and or that it was disadvantaged. The Court thus found that overall, the process in its entirety was fair.

It should be noted that this 2017 Judgment involves a 2003 RFP. Time and costs would be significant. ■

Plaintiff failed to prove Region breached its by-laws re contracting

In *Weinmann Electric Ltd v Niagara (Regional Municipality)* (2016 ONCA 990) an action alleging that the Regional Municipality of Niagara (Region) breached its bylaws regarding contracting was unsuccessful. The procedure governing contracting in the Region was set out in four consecutive bylaws. Weinmann Electric Ltd. (Weinmann) brought an action against the Region alleging that it breached the bylaws regarding contracting for the provision of goods and services. It alleged that the Region failed to follow the competitive purchasing process when contracting with Regional Trenching, one of Weinmann's competitors, and that it engaged in a pervasive practice of contract-splitting. The trial judge dismissed the action, but Weinmann appealed on the basis that the trial judge erred in law in interpreting the bylaws and that the trial judge made palpable and overriding errors of fact in concluding that the Region's conduct did not violate the bylaws.

The bylaws imposed different and more onerous contracting requirements on parties depending on the value of the goods and services being purchased. Department staff were generally authorized to issue a simple purchase order for procurements of small amounts, whereas purchases over $10,000 involved a more formal processes. One of the bylaws also prohibited contract-splitting.

The Court of Appeal found that the trial judge did not err in interpreting the bylaws. While there was a bylaw that prohibited contract-splitting, it did not specify the scope of work that a contract was required to cover. The Region was thus free to determine the scope of work encompassed by any contract which it entered into and use a task-oriented approach in completing projects rather than a contract-based approach. Furthermore, the Trial Judge was correct in finding that there was nothing in the bylaws that restricted the amount of work that could be procured from a single supplier.

The Court of Appeal also found that the trial judge made no palpable and overriding errors. The Court of Appeal upheld the trial judge's findings, which included that there was no evidence that Weinmann was treated unfairly, there was no credible evidence that the Region engaged in contract-splitting to avoid the procurement regime set out in the bylaw and that there was no evidence that the Region did anything improper in purchasing goods and services from Weinmann's competitor. The Court of Appeal went on to note that even if Weinmann could establish that a bylaw was breached,

Weinmann failed to establish any damages as Weinmann's argument that it would have obtained the contracts was speculative. ■

IPC orders third-party references in Tender not exempt from disclosure

Parties engaged in the procurement process should take note that the references regarding their prior work which they submit with their tender may be disclosed in the future. Parties should review the material they submit on their behalf, or on behalf of others, for potentially confidential or commercially sensitive information, as the material may later be subject to an access request.

In *Order MO-3367; Durham (Regional Municipality) (Re)* ([2016] OIPC No 206) the Ontario Information and Privacy Commissioner (IPC) ordered two reference sheets to be disclosed. The reference sheets were 1-page references completed by third parties in relation to prior work done by the company which was required to submit them with its tender application.

Initially, the Regional Municipality of Durham (Municipality) received a request for access to the named company's entire winning tender submission and any related evaluation materials. The Municipality granted partial access to the winning form of tender for contract, but denied access to two reference sheets claiming that they were exempt from disclosure pursuant to third party information and economic and other interest exemptions found in sections 10(1)(b) and 11(c) of the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) respectively.

References provided by third parties about prior work done by a company engaging in a procurement process will not likely be exempt from disclosure under *MFIPPA.* The IPC noted that the purpose of section 10(1) is to protect the confidential informational assets of businesses that provide information to government institutions. The IPC was satisfied that the information in the reference sheets contained commercial and financial information, but found that there was no evidence that the information was supplied with any expectation of confidentiality. The IPC thus rejected the argument that the reference sheets were exempt under section 10 as it found the records to be a review of prior jobs completed and that no reasonable expectation of confidentiality existed in the documents.

The Municipality also sought to exempt the reference sheet from disclosure under section 11, the purpose of which is to protect certain economic interests of institutions and their ability to earn money in the marketplace. In order for section 11(c) to apply, the IPC stated that the Municipality was required to provide detailed and convincing evidence that disclosure of the reference sheets would potentially result in harm. The Municipality was unable to do so. There was no evidence disclosure of the reference sheets would result in third parties being unwilling to complete other reference sheets in the future. ■

Information that may harm an institution's negotiating position may be exempt from disclosure

A school board may be able to refuse to disclose information sought in an access request where it can prove that disclosure would harm its financial interests as was the case in *Order F17-10; Board of Education of School District No 40 (New Westminster) (Re)* ([2017] BCIPCD No 11). An applicant requested a copy of a report on options for

replacing New Westminster Secondary School. The Board of Education of School District No. 40 (Board) provided the report in a severed form withholding some information under section 17(1) of the *Freedom of Information and Protection of Privacy Act*. Section 17(1) permits public bodies to refuse to disclose information where the disclosure could reasonably be expected to harm the public body's financial or economic interests.

The Board stated that it was in the process of preparing request for proposal documentation for its school replacement project and that the procurement process and negotiations were imminent. The Board argued that disclosure of the severed parts of the report would interfere with the fairness and effectiveness of the procurement process and would harm its negotiating position with prospective proponents in that process. Specifically, the Board argued that if the information was withheld, potential proponents could be influenced by the withheld information in preparing their bids which could lead them to inflate their prices. The Board also took the position that disclosure would undermine its ability to use the report as a planning document and as a benchmark to compare and evaluate bids.

Ultimately, the British Columbia Information and Privacy Commissioner (BCIPC) agreed with the Board and found that disclosure of the withheld information could reasonably be expected to harm the Board's negotiating position. The BCIPC held that if the severed parts of the report were disclosed, then potential proponents could use the information to tailor their bids instead of proposing their own independent and possibly lower cost estimates.

The BCIPC accepted the Board's argument that disclosure could hinder the Board's ability to negotiate competitive pricing on the project and harm the Board's ability to attract innovative and creative ideas in respect of the design, construction, costs, risks and other issues regarding the project, to the detriment of the Board's financial interests. The BCIPC thus found that the Board properly exercised its discretion and thus upheld the Board's decision to withhold part of the report under section 17(1). ■

CITT confirms is jurisdiction to review government procurement decisions involving national security exceptions

In *Hewlett-Packard (Canada) Co v Shared Services Canada,* ([2017] CITT No 33), Hewlett Packard (Canada) Co (HP) filed a complaint with the Canadian International Trade Tribunal (Tribunal) with respect to Shared Services Canada's (SSC) Request for Proposal (RFP) for the lease of a high performance computing solution to advance atmospheric and related scientific research. SSC is the federal government's IT agency responsible for delivering email, data centre and network services. HP alleged that SSC improperly determined that HP's proposal failed to meet two of the RFP's mandatory requirements and that, but for these evaluation errors, HP would have been the highest-ranking bidder and would have been awarded the resulting $430-million contract. The Tribunal ultimately found that the complaint was invalid as it had not been entirely compliant with the bid criteria, but the Tribunal heavily criticized the federal government on its use of the national security exception (NSE) in the procurement process and contracts.

The Tribunal criticized how SSC challenges anyone who questions its use of the NSE in procurement. The NSE operates to exempt the government from certain trade rules. In the case at hand, SSC invoked the NSE "for all purposes" which resulted in no requirements

under the trade agreements applying to the procurement. SSC attempted to argue that the Tribunal lacked jurisdiction to hear the complaint. SSC argued that the Tribunal lacked jurisdiction to make any inquiries beyond assuring itself that the NSE had actually been invoked by the proper government institution official. The Tribunal rejected this argument holding that it is settled law that the existence of an NSE is not a jurisdictional bar to the Tribunal's power to review whether procurement was conducted in accordance with the requirements of a trade agreement.

The Tribunal stressed that the NSE is "an *exception* to the principle of open competition that is at the heart of the disciplines of the trade agreements" and that the exception must be used with care to ensure that it is restricted to only what is truly necessary to preserve national security interests. The Tribunal stressed that the NSE should not be invoked to block the Tribunal from reviewing government procurement decisions as that would threaten the transparency and fairness of the procurement process and that the government must justify the use of a NSE where invoked. ■

No harm, no foul Part I - No damages where breach of contract in procurement does not affect ranking of bidders

A party seeking damages with respect to a claim for breach of contract in relation to a procurement process must prove compensable damages. The Supreme Court of Canada in *TPG Technology Consulting Ltd v Canada*, (2017 SCCA No 6) upheld the findings of the lower courts that a breach of contract that does not ultimately affect the ranking of bidders in a procurement process does not warrant an award of damages.

TPG Technology Consulting Ltd (TPG) engaged in a procurement process conducted by Public Works and Government Services Canada (PWGSC) for a contract to provide engineering and technical support services. TPG had been the service provider under the previous contracts, but PWGSC awarded the contract to another bidder as a result of the procurement process. TPG brought an action against the Federal Crown (Crown) for $250 million in damages for breach of contract in the procurement process. TPG alleged that the winning bidder, CGI Group, was unable to deliver what it had promised and that rather than disqualifying it, the government helped it become compliant by way of a new contract. The Crown was initially successful on a summary judgment motion, but it was reversed on appeal and the case proceeded to trial.

The Federal Court (FC) held that it had concurrent jurisdiction with the Canadian International Trade Tribunal (Tribunal) in actions against the Crown related to procurement matters, but declined to exercise its jurisdiction. The FC thus dismissed TPG's claim holding that TPG failed to fully utilize the remedies available by the Tribunal. However, in obiter, the FC found that a breach of contract had occurred, but that TPG failed to prove that it suffered any resulting compensable damages. Notably, the FC found that the evaluation committee's scoring was flawed and inconsistent. There were 217 criteria against which bids were evaluated and TPG was able to demonstrate that two of them were not applied fairly. Nevertheless, the Crown was able to show that even if TPG had been awarded full marks for those two sections, the result of the procurement process would have been the same.

TPG appealed. The Federal Court of Appeal found that the FC applied the correct legal principles and did not commit any reviewable errors such that there was no basis to interfere with the Federal Court's conclusions

on the merits of TPG's claim. TPG subsequently applied for leave to appeal to the Supreme Court of Canada, but its application was dismissed. No harm, no foul. ■

No harm, no foul Part II - No remedy awarded where deficiency in evaluation inconsequential to outcome

In *Colliers Project Leaders Inc v Department of Public Works and Government Services*, ([2017] CITT No 21), Colliers filed a complaint with the Canadian International Trade Tribunal (Tribunal) with respect to a Request for Proposal (RFP) issued by the Department of Public Works and Government Services (PWGSC) for the supply of project management support services. Colliers was one of four bids that were submitted by the closing date and evaluated as technically compliant. Colliers was informed by letter that it was not the successful bidder. After comparing its bid against the winning bid, Colliers brought its complaint to the Tribunal alleging that PWGSC failed to calculate its price per point score in accordance with the financial bid evaluation instructions provided in the RFP.

The RFP required bidders to submit bids in respect of five categories of professional services and a pricing schedule for each. PWGSC admitted that a sixth category – Senior Project Manager – was erroneously included. Instead of amending the RFP to remove that category, the per diem rates bid for that category was excluded when calculating the evaluated price per point as part of the financial evaluation. However, PWGSC claimed that even if the per diem rates bid for the Senior Project Manager category were included in calculating the evaluated price per point, it would have made no difference to the overall results of the evaluation. To support this position, PWGSC conducted a peer-reviewed re-evaluation of each of the financial bids it received to include the per diem rates.

The Tribunal was required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which in this case were the *World Trade Organization Agreement on Government Procurement*, the *North American Free Trade Agreement* and the *Agreement on Internal Trade*. The agreements require procuring entities to provide bidders with all the information needed to allow them to submit responsive tenders, namely the criteria against which they will be evaluated.

PWGSC admitted that it did not conduct the financial evaluation on the basis of the criteria set out in the RFP. The Tribunal thus held that it failed to evaluate the proposals and award the contract in full accordance with the criteria set out in the RFP, as required by the applicable trade agreements. The Tribunal thus found Colliers' complaint to be valid. However, given that the PWGSC was able to demonstrate that the outcome of a proper evaluation would have been the same regardless of the deviation from the evaluation criteria prescribed in the RFP, the Tribunal did not recommend a remedy in this case as it did not find any prejudice to Colliers. No harm, no foul. ■

— KC LLP —

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