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Public Sector

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Damages awarded against Government for unfair advantage to existing Provider in RFP

In *Envoy Relocation Services Inc. v. Canada*, [2013] ONSC 2034, the Ontario Superior Court of Justice (Court) awarded damages for lost profits against the Canadian Government (Government) for defects in the Government's RFP to provide services related to the relocation of transferred federal employees. The Court determined that the Government had unfairly preferred an incumbent service-provider by providing inaccurate estimates of anticipated work volumes.

Royal LePage Relocation Services (RLRS) won a bid to provide services in 2002. Shortly thereafter, the Government discovered a conflict of interest concerning one of its employees who attended a boat cruise with an RLRS official. The 2002 evaluation process was also flawed because there was a compressed posting period that favored the incumbent RLRS.

RLRS also had the advantage of participating in the pilot project for the relocation program prior to the 2002 RFP. RLRS's position thus led to advantageous knowledge of the assessment process and a close relationship with bid assessment personnel. The 2002 contract was then terminated, which led to the 2004 RFP.

The 2004 RFP requested that bidders include a provision for property management services (PMS), as the Government preferred that transferred workers rent-out rather than sell their homes. However, the RFP failed to accurately disclose anticipated work volumes for PMS.

The price evaluation formula required bidders to bid a percentage figure for performing PMS based on an assumed number of employees requiring the service. However, the percentage of employees who opted to rent-out rather than sell was far lower than the numbers estimated in the RFP. This provided an advantage to RLRS, who possessed inside knowledge of the historically low number of participants in the PMS program. RLRS bid zero charge for PMS, while other bidders bid a fair market value based on the RFP's estimated work volume. In fact, PMS, when requested, were billed by RLRS and authorized by Government employees.

The Government gave no explanation for the disparity between the estimate and the actual number of PMS participants, which the Court determined constituted a misrepresentation to the advantage of RLRS. The Court concluded that this gave RLRS a $42 million pricing advantage over Envoy in the 2002 RFP, and a $48 million advantage in the 2004 RFP.

The Court determined that the zero bid of RLRS meant the bid was non-compliant, and therefore could not be accepted by the Government. The Court also held that Envoy was prejudiced by the misleading PMS volumes, which undermined the integrity of the bidding process. The Court also held that the Government had acted in bad faith and breached the duty to conduct a fair evaluation process as the grossly inaccurate estimates were a hidden preference that favored RLRS. The Government failed to provide fair and equal treatment in the tender process by failing to conduct the process in a transparent and fully documented fashion:

"I conclude that the Contract A of the 2004 CF and GOC/RCMP contained a duty of fair and equal treatment that concealed preferences to the advantage of any bidder should not be contained in the tender documents. By reason of the PMS provisions (as well as the method of selection terms) contained in the 2004 RFP that provided a concealed unequal and unfair advantage to RLRS, the defendant violated the implied duty of fair and equal treatment".

The Government argued that the hidden flaws in the RFP did not constitute unfairness since all bids were evaluated according to the RFP's terms. The Court rejected this argument, holding that the duty of fairness extends beyond determining whether the evaluation was conducted according to the terms of the RFP. The duty requires the Government to accurately disclose relevant performance and evaluation considerations to be used in evaluating the bids:

"[T]he definition of what constitutes an unfair evaluation would include an evaluation carried out on an RFP that includes concealed advantages or disadvantages to any bidder. Any aspect of the tendering process upon which an evaluation is based is part of the evaluation process. Accordingly, if the tender terms are inherently unfair because of undisclosed preferences, the evaluation based on those tender terms is equally unfair".

The Court found that had RLRS's bid been disqualified for non-compliance, Envoy would have won the 2004 RFP. Envoy was entitled to lost profits in not being awarded the contract, which totaled approximately $30 million.

In a subsequent decision, the Court increased the lost-profits damage award based on revised calculations, and awarded substantial legal costs. The Court determined that the conduct of the Government in the procurement process

and legal proceedings justified a high legal costs award:

"The concealment of crucial evidence that played a major role in the outcome of the case and misled the Court is grave misconduct. Moreover, this conduct was intended to conceal significant deliberate reprehensible conduct prior to litigation". (emphasis added)

The Court also determined that the defendant's failure to measure up to the public's high expectation of public officials justified the higher award:

"The public sector is expected to act on and execute our values in its daily interactions with the other components and members of our society. When it does not adhere to fundamental principles of good governance and fairness in important matters such as the procurement of goods and services, the Courts and the public are shocked, breeding cynicism and lack of respect for our institutions. Accordingly, I conclude that the plaintiffs are entitled to their costs on a full indemnity". (emphasis added)

This is a significant decision which confirms the principles applicable to the duty of good faith, which includes the duty to treat all possible bidders fairly, and holds the Government to a high standard of conduct.

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Court of Appeal confirms accused bid-rigger to stand trial

In *R. v. Dowdall*, [2013] ONCA 196, the Ontario Court of Appeal (CA) upheld a lower court ruling that the accused stand trial on charges of bid rigging under the *Competition Act* and conspiracy to commit bid rigging contrary to the *Criminal Code*.

The issue for the CA was whether or not the lower Court, which upheld the decision of a preliminary inquiry Judge, made an error in determining that there was *"some evidence on the basis of which a reasonable jury properly instructed could conclude that the RFPs issued by the federal Government were 'calls or requests for bids or tenders'"*, within the meaning of the *Competition Act*.

The accused was in the business of providing IT resources to both the public and private sector. In 2005, Transport Canada (TC) and Public Works and Government Services Canada (PWGSC) issued RFPs, to which the accused responded. The accused was the successful bidder and won the right to a Standing Offer Agreement from TC and a contract with PWGSC. Under these agreements, TC and PWGSC were under no obligation to require the accused to provide services. Rather, the process was designed to avoid TC and PWGSC making any commitment to purchase services unless they chose to do so when such services were required.

The accused argued that it is an error to conclude these RFPs could be considered bids or tenders because they did not result in any contractual entitlements. Instead, they merely created a list of potential suppliers without TC or PWGSC incurring any contractual obligations. The Crown countered that the RFPs resulted in agreements that were contractual in nature and were capable of constituting a bid or tender within the definition of the *Competition Act*.

Under the Contract A/Contract B analysis of the procurement process, the response to the call for bids, Contract A, creates a corollary obligation on both parties to enter into Contract B, upon Contract A's acceptance. The CA stated that:

"[i]n our view, it does not follow, simply because there was no final binding contract for the actual purchase and sale of IT services under the rubric of the procurement process in question, that there is no 'Contract B' or that there is no 'call or request for bids or tenders' as contemplated by s. 47 of the Competition Act on the facts".

The CA also noted that:

"[o]ther factors – depending upon how the evidence develops and is interpreted at trial - may lead to the conclusion the appellants and the Government intended to enter into contractual arrangements that complied with a bid/tender paradigm".

The CA also endorsed comments from the lower court ruling, particularly the finding that *"the many contractual indicia ... are sufficient to potentially characterize this procurement process as creating a bidding contract"*. Furthermore,

"[t]he controlling appellate jurisprudence requires the court to make a finding as to whether the parties intended a contract in the sense of creating binding rights and obligations with respect to the procurement process. Such an intention is to be inferred from the terms of the RFP and all other relevant circumstances. A term permitting the party issuing the RFP to retain the discretion not to proceed to call up work or services is but one aspect of the analysis".

The CA noted that there is a *"high hurdle to overcome"* in overturning a lower Court's decision to commit an accused to stand trial. As such, the Court of Appeal *"may only interfere where the preliminary inquiry judge has made a jurisdictional error, such as finding there is some evidence where no evidence exists to support the charge. Here, we do not agree that no such evidence exists"*. Thus, the CA found that enough evidence existed that would allow a Court to potentially find that the accused had made 'bids' within the meaning of the Competition Act.

Although this is a decision in the "criminal" context, it is one in which the Court confirms the indicia of a procurement process.

Canadian businessman convicted of bribing foreign officials administering an RFP

In *R. v. Karigar*, [2013] ONSC 5199, the Ontario Superior Court of Justice (Court) convicted the accused under the Corruption of Foreign Public Officials Act (CFPOA) for bribery in relation to an RFP.

The accused, Mr. Karigar, was an employee of Cryptometrics Canada. He was charged with *"offering or agreeing to give or offer bribes"* to officials with Air India and India's Minister of Civil Aviation as part of the Cryptometrics' attempt to secure a major contract with Air India for facial recognition software.

The Crown argued that the accused played a leading role in a conspiracy to bribe and influence officials responsible for administering the bidding process. The accused argued that the Crown failed to prove a conspiracy or that there were agreements between the accused and any foreign public official.

The Court was satisfied that there was sufficient evidence against Karigar, including the evidence of Mr. Bell, a Vice-President with Cryptometrics, *"who was an unindicted co-conspirator and involved in virtually the entire course of events"*. Bell testified against Karigar under the promise of immunity. The Court also relied upon *"voluminous documentation, particularly e-mail communications"*, as well as statements Karigar made to a Canadian Trade Commissioner in Mumbai and voluntary admissions to the RCMP acknowledging the payment of bribes.

The evidence disclosed that Karigar represented to Bell that *"he and his contacts had the necessary connections with Air India management and politicians to win the contract"*. The two men also travelled to India, where Karigar introduced Bell to senior Air India officials. Karigar subsequently forwarded Bell *"considerable information pertaining to the expected requirements of Air India, including what might be characterized as inside*

information about proposed tender terms and competitors". Bell was also provided a draft version of the tender that had not yet been issued by Air India.

Following the release of Air India's RFP, Karigar, Bell, and other associates, met in a hotel room in India to discuss the submission of their bid. At that time, one of their associates *"raised the point that Indian officials would have to be paid in order to obtain the contract"*. Shortly afterward, Karigar provided Bell *"financial spreadsheets which listed Air India officials who would be paid bribes and the amount of money and Cryptometrics' shares to be offered these officials"*.

In the following weeks, Bell developed their proposal while Karigar provided further inside information concerning potential competitors. At Karigar's direction, Cryptometrics developed a second bid under the name of a different company *"to create the appearance of a separate competitive bidder using Cryptometrics Canada technology, but at a much higher price"*. This was meant to give *"the false impression that there existed a competitive bidding situation"*, which they believed meant Cryptometrics' actions would be less scrutinized.

Karigar later requested a $200,000.00 transfer of funds from Bell. The money was in fact transferred and the Court was satisfied that circumstantial evidence demonstrated the money was intended for Air India's Deputy Director of Security.

Karigar argued that the charges against him required the Crown to prove that there was an 'agreement' between two people, *"one to pay a bribe and one to receive said bribe"*. The Crown, according to the accused, *"failed to present any evidence regarding the payment of these sums to any improper recipient"*, making it impossible for the Court to know *"whether any foreign public official was actually offered or received a bribe or other inducement"*. The Crown countered that *"no evidence of what actually became of the money is necessary to establish a violation of the CFPOA"*.

The Court ruled as follows:

"it is not necessary to establish…that a bribe be actually paid to a foreign official with the power to offer a business advantage. Rather, it is sufficient if the party alleged to have paid a bribe to such an official believes that a bribe is being paid to such an official…Mr. Karigar believed that bribes needed to be paid as a cost of doing business in India and he agreed with Berini and others to pay such bribes. He believed bribes were in fact paid and he said as much to the Deputy Trade Commissioner in Mumbai and to U.S. authorities and to the RCMP".

Karigar also tried to argue that Canada lacked the territorial jurisdiction to try the case. The Court noted that *"the Crown must prove that there was a 'real and substantial link' between the offence and Canada"*. The Court was satisfied of such a connection since Cryptometrics was *"a Canadian company based in Ottawa"*, Karigar was *"a Canadian businessman resident for many years in Toronto"* and *"was employed by or/and acted as an agent of Cryptometrics Canada"*. Furthermore, the conspirators sought *"an unfair advantage, for a Canadian company"* and *"a great deal of the work would be done by Cryptometrics Canada employees in Ottawa"*. These factors provided *"a sufficient substantial connection to confer jurisdiction on this Court over the bribery offence charged"*.

The Court convicted Karigar of agreeing to offer bribes to foreign officials contrary to *CFPOA*.

This decision indicates the overlap between procurement and criminal law in particular circumstances.

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Court confirms 'budgetary concerns' valid reason for cancelling and re-issuing RFP

In *Provincial Fence Products Ltd. v. Conception Bay South (Town),* [2013] NLTD(G) 87, the

Newfoundland and Labrador Supreme Court (Court) considered whether a town's cancellation of its tender for budgetary reasons undermined the *"integrity of the tendering process"* when it then issued a subsequent, similar RFP.

Conception Bay South (Town) *"authorized a tender call for playground and outdoor fitness equipment"* to replace damaged or outdated park equipment and create new parks in residential neighborhoods. Tender 09-11 was advertised, closed, reviewed, and then cancelled due to budgetary concerns. A revised tender, 10-03, was then advertised and awarded to Henderson Recreation, a company *"whose bid on the earlier tender was determined to be non-compliant in its failure to include a bid bond"*.

Provincial Fence Products Ltd., which submitted a proposal in response to the initial tender, alleged that the Town *"engaged in bid shopping"* by awarding the contract to Henderson. It also disputed that the tender was cancelled for budgetary reasons. Provincial Fence declined to bid on Tender 10-03 because it felt it was *"a re-tender of the first tender"* as it *"contained most of the same material"*.

Mr. Tibbo, who oversaw *"the design and development of the Town's parks and recreation facilities"*, testified he instructed that the budget for the tender for playground and fitness equipment would have to be between $65,000 and $70,000. All of the bids received were over budget.

Henderson provided the lowest bid of $94,383.85, but failed to include a bid bond, as per the terms of the tender, and so was found to be non-compliant. The next lowest bid, furnished with a bid bond, was from Provincial Fence for $117,048.79. The Town cancelled the tender as the amount was *"considerably over their anticipated budget for this equipment"*. Mr. Tibbo also testified that, even if Henderson had been compliant, *"he would have recommended a new tender because all the bids were over-budget"*.

Mr. Freake, the Facilities Manager for the Town, *"explained that when the bids exceeded the budget he was instructed by his superiors to re-evaluate the priority of the equipment needed"*. He acknowledged using the Henderson Recreation prices in re-evaluating the equipment needed because *"[h]e felt that the Henderson Recreation prices were appropriate to use in conducting his evaluation of fair market value"*, and that notice of the second tender was then sent to all of the previous bidders *"in fairness"*.

Provincial Fence argued that Tender 09-11 was actually three separate tenders, as it appeared on separate pages and *"three of the contractors bid for only one or two of the three components"*. It also disputed that the tender was cancelled because of budgetary concerns, arguing that there was no established budget or that *"they should nonetheless have been awarded such work as met the budgetary parameters because they were the lowest compliant bidder"*. It also alleged that the Town was negligent the preparation of its tender and *"must award them the contract in order to both maintain the integrity of the tendering process and preclude bid shopping"*.

The Town argued that the cancellation was legitimate and denied any legal obligation to award a part of the tender to Provincial Fence. The Town also argued that *"additional review was necessary"* in order to *"both re-evaluate its requirements for the forthcoming parks ... and seek instructions from the Town Council as to the manner in which public funds were to be spent"*.

The Court declined to find that Tender 09-11 was three separate tenders since *"the Town authorized one tender"* and the tender itself *"[a]uthorized contractors to bid in whole or in part with respect to the tender"*. However, the Court was satisfied that *"a contract was formed between Provincial Fence and the Town when Provincial Fence submitted its irrevocable bid in response to the tender call"*.

Provincial Fence argued that *"as a result of this Contract 'A', the Town was obligated to enter*

into Contract 'B' to perform the work, because it had the lowest compliant bid". The Town countered that its *"privilege clause"* stating that *"[t]he lowest or any tender will not necessarily be accepted"* removed them from being *"under a legal obligation to enter into Contract 'B'."*

The Court noted that *"a privilege clause enables a public body to decline to enter into a contract for the performance of the tender"*, but that such a decision had to be *"based upon bona fide considerations, such as budgetary limits, 'intervening events' or a decision 'to substantially change the work'."*. Such a clause *"does not … provide the public body with the right to 'arbitrarily and without giving a reason reject all bidders'."*. What is required is *"[a]n examination of the reasons for the cancellation of a tender"* to decide *"whether the termination was conducted in good faith"*. The Court reviewed a number of cases that held it was acceptable to cancel a tender for budgetary reasons and that doing so did not constitute a lack of good faith.

As to the allegation of bid shopping, the Court noted that this *"will depend upon the Court's assessment of the owner's conduct in the circumstances of a particular tendering process"*. As the Court noted,

"the Town acted in good faith in its call for tenders for playground equipment. The testimony of both Mr. Tibbo and Mr. Freake and the documentary record relating to their email exchanges and Town and Committee meeting minutes all support the overriding budgetary considerations. They were accountable to the Town Council for appropriate spending in the context of the Town's budget".

Accordingly, the Court found that the Town was not bid shopping, had cancelled the tender for valid budget concerns, and was not under an obligation to award the contract to Provincial Fence. In the result, Provincial Fence's claim against the Town was dismissed.

This decision is consistent with other procurement decisions relating to budget issues.

Court dismisses contractor's claims of misrepresentation, breach of contract, because of contractor's delay

In *Envireen Construction (1997) Ltd. v. Canada*, [2013] FC 856, the Federal Court (Court) considered the claim of a contractor for the removal of hazardous material who alleged the tendering party misrepresented the nature of the hazard and had breached the contract through premature termination, retention of a security deposit, and the retention of equipment.

Public Works & Government Services (PWGSC) issued an RFP, which was awarded to Envireen Construction Ltd., to *"perform hazardous material abatement and demolition work on a decommissioned heating plant building"*. PWGSC's tender documents included contract specifications as well as a hazardous material survey. Envireen also visited the site before bidding. The project began in February 2002 with Envireen initially subcontracting out responsibility for the hazardous material abatement.

In June, 2002, Envireen informed PWGSC that its workers *"had encountered a white powered substance in a maintenance room and fallen ill"*. PWGSC *"suspected the Substance was caustic soda, a corrosive substance often used to clean boilers and pipes as part of regular maintenance in heating plants"*. The subcontractor then informed Envireen that *"the work site was shut down pending identification of the substance"*. Envireen denied responsibility under the contract for identifying the hazardous substances on site, a position PWGSC contested.

Testing showed the substance was *"likely to be a form of caustic soda"*, following which, Envireen informed PWGSC that it was developing a plan of removal. Envireen then sent PWGSC a letter stating that the test results were incomplete, as

were the tender documents, and that *"work would not resume until a site meeting was held"*.

A site meeting was held, attended by an independent safety consultant retained by PWGSC. The consultant suggested that *"a worst-case scenario"* approach be adopted, which required using *"safety equipment appropriate for removing caustic soda"*. Subsequent testing performed by the consultant *"indicated that the characteristics of the Substance were consistent with caustic soda"*.

During the site meeting, Envireen suggested that the survey provided in the tender documents was incomplete and that *"workers would not be sent into the building until a new survey was completed by PWGSC"*. PWGSC took the position that *"it was the contractor's responsibility to do ongoing hazardous material surveys"*.

Envireen removed the substance, but refused to carry out further work unless PWGSC conducted air quality sampling. PWGSC then changed the locks on the site, retained Envireen's equipment and materials, and advised Envireen that the balance of work would be taken out of its hands. Representatives of both parties met to discuss *"the terms under which Envireen could continue work"*, but could not reach an agreement.

In August, 2002, PWGSC formally advised Envireen that its work to date was unsatisfactory, and issued a written notice that it would *"take steps to take work out of the [Envireen's] hands in six days"*, following which they terminated the contract, withheld the security deposit for both *"the cost of re-tendering the contract"* and as monies for Envireen's creditors. They also kept some of Envireen's materials and equipment *"to be used by the subsequent hazardous material abatement and demolition contractor"* after re-tendering the contract.

Envireen sued PWGSC for negligent misrepresentation, breach of contract, improper retention of security deposit, lost profits, and punitive damages. Envireen claimed that the failure to identify the white powdery substance through the hazardous material survey constituted negligent misrepresentation. The Court disagreed, stating the following:

"the hazardous material survey provided with the tendering documents was only meant to serve as a guide. The correspondence between PWGSC and Envireen also made it clear that it was Envireen's responsibility to ensure, after two site visits, that Envireen understood the full scope of the project, including the provisions of Addendum Five, which specified caustics/corrosive materials could be present. Thus, there is no evidence that PWGSC negligently made representations that were untrue, inaccurate or misleading, nor was there any negligence in making representations to Envireen in respect of the caustic soda".

The Court determined that Envireen was responsible for the continued delays by insisting on greater safety precautions than necessary before recommencing work, ordering safety equipment from a distant supplier without even looking for a local supplier, and delaying the pickup of the safety equipment. As such, PWGSC was justified in taking work away from Envireen.

The Court also determined that the retention of the security deposit to cover re-tender costs and monies due to Envireen's creditors, as well as the retention of Envireen's materials for PWGSC's use after taking work out of their hands was permissible under the terms of the contract.

Envireen also claimed PWGSC's refusal to pay invoices for delays, standby costs and expenses constituted a breach of contract. The Court ruled that Envireen was not entitled to any of these amounts, since *"[t]he contract specifically states … that Envireen is responsible for all such delay costs, and Envireen was primarily responsible for such delays in any event".*

The Court also determined that, although no progress claim was technically made, Envireen was entitled to payment for its work done in

removing the caustic soda in the amount of $5,500.00, plus tax and interest.

The Court thus dismissed the claims against PWGSC finding that there was no misrepresentation and that they were within their rights to terminate the contract and retain the security deposit and materials. Envireen was awarded only a modest amount for their removal of the substance.

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Failure to include relevant report in RFP leads to damages award against engineering firm

In *North Pacific Roadbuilders Ltd. v. Aecom Canada Ltd*., [2013] SKQB 148, as heard in the Saskatchewan Court of Queen's Bench (Court), the plaintiff contractor, North Pacific, sought damages against an engineering firm for negligent misrepresentation in the specifications and technical information provided in tender documents.

North Pacific was successful in its bid to build a 57-kilometer haul road for the Cameco Corporation between two of its mines. The engineering firm, UMA Engineering Ltd. (UMA), was retained by Cameco as a consultant to *"advise [Cameco] with respect to the proposed haul road"*. UMA provided advice concerning route selection and design, and prepared reports for regulatory approval.

North Pacific claimed that UMA deliberately or negligently *"misrepresented the soil and terrain conditions which would be encountered on the project"*. As a consequence, *"the more difficult soil conditions encountered caused the plaintiff substantial financial loss"*, which North Pacific valued at approximately $6.5 million. UMA denied the allegations of misrepresentation, and argued that North Pacific did not rely on the soil information, the soil did not cause the loss, and that North Pacific was negligent.

Another engineering firm, J.D. Mollard and Associates Limited (Mollard), had previously done work for Cameco and had selected the best route between the mines. Cameco made Mollard's reports available to UMA and *"were of considerable assistance to UMA in selecting the route for the road, and in informing it on the terrain that would be encountered along the way"*. UMA and Cameco finally selected the same route recommended by Mollard.

Cameco released the tender for the road contract. UMA suggested Cameco organize a pre-bid site meeting for the bidders, but Cameco declined to do so. Furthermore, UMA did not include the results of photogrammetry done by Mollard in the tender documents. There were six bidders in total, none of whom visited the site prior to tendering a bid. North Pacific was the successful bidder.

During the course of the project, Mr. Burek, President of North Pacific, sent a letter to UMA complaining of difficulties encountered with the amount of rock boulders on the project. Mr. Burek stated that *"[i]t had not been possible to investigate the site in advance of tendering the contracts, that the terrain encountered was completely different than what was indicated in the tender package, and that the additional costs were approximately $2,000,000"*. UMA denied the claim, following which North Pacific sued UMA for negligent misrepresentation.

A finding of negligent misrepresentation requires there to be a *"special relationship"* between the party making the representation and the representee that creates a *"duty of care"* from the former to the latter. The representor must have *"acted negligently"* in making a representation that is *"untrue, inaccurate, or misleading"*, while the representee must have relied on the representation to its detriment.

The Court found that there was *"a 'special relationship' between UMA and the potential bidders on the ore haul road … sufficient to impose a duty of care on UMA that the information it supplied to bidders was accurate*

and not misleading in any respect". The Court found that:

"UMA's failure to disclose the Mollard terrain mapping information to bidders, which was the only information on the terrain to be encountered along the route that was available, and was information that UMA had relied on extensively itself, fell below the standard of a reasonable and prudent engineer and resulted in a breach of its duty of care to bidders on the project, including the plaintiff".

This failure resulted in *"an expressly misleading representation to bidders".*

The Judge also considered it *"reasonable for Mr. Burek and North Pacific to rely on the tender documents"*, as UMA officials themselves admitted they could foresee that *"bidders would rely on the information contained in the tender documents"* and that *"such reliance would be reasonable"*. The Judge also found that *"had the Mollard terrain mapping information been disclosed, [Mr. Burek] would have increased his unit price for earth excavation substantially"*, given his previous experience working the materials identified by Mollard's work. This misrepresentation was detrimental to North Pacific who *"incurred expense over and above what it anticipated".*

The Court concluded that *"UMA negligently represented the terrain conditions in the tender documents that would likely be encountered...and the plaintiff is entitled to damages that flow from the misrepresentation".*

UMA argued that North Pacific *"should have investigated the terrain itself, reviewed publicly available information about the geological terrain in northern Saskatchewan"*, and failed to inquire with Cameco or UMA prior to submitting its bid. The Court rejected these arguments, finding that *"all bidders assumed they had been supplied with the terrain information that was available",* and thus the Court was *"not able to find that North Pacific was contributorily negligent in failing to make inquiries on whether there was additional terrain information available".*

The Court encountered some difficulty in the amount to award as damages, since North Pacific's bid amount was not realistic given the fact that it was not an *"informed bid"*. However, the Court was also *"not able to say what a correct bid would have been"*. However, Mr. Burek twice advanced a claim for *"approximately $2,000,000"* over a three month period, *"based on the fact 'the terrain encountered was completely different than what was indicated in the tender package'."*. The Court said this *"amounts to an admission against interest, and is the best evidence available on the losses incurred by North Pacific"*. As a result, North Pacific was awarded $2,000,000 in damages.

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Owner has duty to re-negotiate with contractor where scope of contract changes

In *Homewood Development Inc. v. 2010999 Ontario Inc.,* [2013] ONSC 4441, the Ontario Superior Court of Justice (Court) considered claims between a contractor and owner where the scope of the contracted work continually changed rendering the contract *"milestones",* which triggered payment, impossible to achieve.

Homewood Development Inc. contracted with 2010999 Ontario Inc. (201) to renovate 201's building. There were conflicts concerning the *"[s]cope of the work, price and payment"*, which arose partway through the project. 201's intention was to renovate the building while causing minimal disruption to the bank which operated as its ground floor tenant. 201 and Homewood contracted for a *"fixed price with installment payments based on performance milestones".* However, *"the scope of the work changed, the design changed, the structural components changed, the front elevation and design changed and the order of work consequently changed"*.

The parties eventually disagreed over the timing of payments, and once 201 refused to pay for a milestone Homewood claimed it achieved, Homewood refused to continue work. Homewood filed a construction lien against the property, while 201 sent a letter terminating Homewood's services. Homewood then sued for materials and services supplied to date, while 201 claimed for *"completion costs, deficiencies and rent"*.

The parties agreed that coreslab would be changed to steal beam and poured concrete, so Homewood could not claim the cost of providing this as an extra, especially when both parties should have known coreslab was not viable in the circumstances. However, when 201 changed the design so that an additional steel beam was required, this extra cost was a valid claim against 201. Homewood was also allowed to claim the building of a foundation on the south wall as an extra since this should have been discovered as a necessity by 201's engineer and included in the contract.

The Court had to determine *"whether Homewood is at fault for leaving the project prior to completion or whether 201 is at fault for refusing to pay"*. The contract *"was structured as a series of fixed price contracts and substantial completion of each milestone contractually triggered payment of the fixed price attached to the milestone"*. However, *"milestones are based on substantial completion of stages of work and the anticipated order of construction"*, but *"201's design and structural changes affected that order"* such that, for example, milestone #4 had to be completed before milestone #3 could be completed.

The Court determined that parties to a construction contract are *"obliged to conduct meaningful negotiations when the scope of work changes"*. Furthermore, in such a case where *"Homewood is a small contractor"* and *"201 is a small property owner ... [t]he law implies payment terms that are reasonable taking into account all of the circumstances of the project"*.

In the present circumstances, *"201 has a duty to be reasonable and renegotiate the payment milestones"*, and if *"201 acted reasonably then the parties would have agreed to adjust the milestones to reflect the changes"*. Thus, the Court found *"that there was an implied amendment to the contract, including the milestones for payment. Homewood was prepared to renegotiate the milestones. 201 was not".*

201 argued that, despite the fact that the scope of the order changed, there had not been technical compliance with the requirements of the milestones. The Court rejected this argument stating that *"[i]t would be unfair to allow an owner who changes the design, causing the order of work to change, to rely on that change to avoid milestone payments that would have been required had the owner not changed the design".*

The Court noted that when the parties entered the contract their intent was to have the work in the milestones carried out in sequential order. However, due to some of the structural design changes *"the parties ought to have reconsidered the order of work reflected in the payment milestones".* Thus, *"[i]t is reasonable to conclude that when the parties agreed to the design changes they impliedly agreed to adjust the payment milestones".*

The Court thus concluded as follows:

"I find that 201 repudiated the contract when it refused to pay Homewood's invoice for $81,112.50...or Homewood's reasonable offer to accept $40,00.00 to continue the work. I further find that 201 had an obligation to act reasonably and renegotiate the milestones for payment when the order of work changed. Homewood, as the innocent party, was entitled to treat the contract as at an end".

As such, Homewood was awarded *"payment for the value of services and materials supplied, plus lost profit on the balance of the contract work that it did not complete"*.

201 claimed to have lost a binding lease with a potential tenant because Homewood's renovation work was not completed in a reasonable time. 201 and a tenant agreed to enter into a lease, as long as construction was completed within a certain time frame. 201 was also required to prepare the lease and forward it to the tenant. 201's claim failed because they failed to prepare the lease, failed to secure the requisite permits, and failed to enter into a renovation agreement until after the time frame to complete renovation under the agreement to lease ended. Thus, Homewood could not be held responsible for any lost rent.

201 also claimed for deficiencies and site cleanup. The Court allowed a small sum for the wood Homewood *"reused for the mezzanine deck after removing nails that had been inserted for the purpose of its temporary use"*. The Court awarded $1,500.00.00 as *"reusing wood that had been nailed in place and removed would compromise the structure"*. The Court denied the claim for site cleanup as *"construction debris is not Homewood's sole responsibility"*.

Thus, Homewood's claim for materials and services supplied succeeded albeit discounted slightly by the amount awarded to 201 for deficiencies.

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CITT denies complaint by bidder who failed to explicitly demonstrate it met RFP's mandatory requirements

In *Tyco Integrated Security Canada, Inc. v The Department of Public Works and Government Services*, CITT PR-2013-006, Tyco Integrated Security Canada, Inc. (TycoIS) filed a complaint with the Canadian International Trade Tribunal (CIIT) against the Department of Public Works and Government Services (PWGSC). TycoIS alleged that PWGSC *"improperly declared its proposal non-compliant with the mandatory requirements"* of their RFP. On September 13, 2013, CIIT determined that the complaint was not valid.

PWGSC, on behalf of the RCMP, issued an RFP, soliciting *"the supply and delivery of closed-circuit video equipment and services related to on-site hardware installation, repair, programming and training to approximately 76 RCMP locations in British Columbia"*. PWGSC advised TycoIS that it failed to be awarded the contract since *"its proposal did not comply with all the mandatory requirements"*. In particular, *"it did not provide sufficient information to demonstrate that the video card had the required dual digital outputs"*, which was required pursuant to mandatory requirement 06. PWGSC informed TycoIS that Johnson Controls Canada LP had been awarded the contract.

TycoIS disputed that its proposal *"did not demonstrate that the proposed monitoring/download workstation had '…a video card with dual digital output interfaces"*. TycoIS claimed that PWGSC *"read-down the functionality of the components"* that had been included in their bid *"in a manner that was not [in] keeping with industry standards"*. As a result, PWGSC had not considered all the information contained in the proposal.

TycoIS sent a letter to PWGSC's, objecting to the decision and provided additional information. PWGSC responded by indicating that the award process would not be revisited, nor would the additional information be considered since *"it was not provided at bid closing"*. TycoIS countered that it was not new information, but *was "further clarification that the equipment and production information sheet originally submitted prior to the closing date does comply with specifications."* PWGSC again reiterated its position that the initial bid lacked sufficient information and would not be reconsidered.

The issue for the Tribunal was *"whether TycoIS's proposal contained sufficient information and technical specifications to substantiate compliance with mandatory requirement 06"*. The Tribunal noted that compliance with all

mandatory requirements of the tender documents is one of the *"'cornerstones' of maintaining the integrity of any procurement system"* (emphasis added). In this case, the RFP explicitly stated that a bid must *"comply with all the requirements of the bid solicitation"* in order to be declared responsive.

While TycoIS argued that the information they provided on the specification sheet *"should have allowed the evaluators to determine that its proposed product met mandatory requirement 06"*, the Tribunal disagreed.

The Tribunal noted that *"[o]n its face, the specification sheet does not conform to the language of [the] mandatory requirement 06"* as the Tribunal could find no evidence to support the argument that TycoIS's proposal addressed the fact that its product had *"a video card with dual digital output interfaces"*. The Tribunal's opinion was expressed as follows:

"[T]his is not a case of form taking precedence over substance, but a case in which the bidder failed to 'connect the dots' by not specifically and completely describing how its proposed product complied with all mandatory requirements. The Tribunal, therefore, sees it as an attempt to hold evaluators responsible for an obligation that falls on each and every bidder in an RFP process, i.e. the responsibility to exercise due diligence in the preparation of a proposal to substantiate compliance with all mandatory requirements in all respects".

TycoIS argued that the evaluator's knowledge of industry standards *"should have enabled them to conclude that the proposed product was indeed compliant with mandatory requirement 06"*. However, the Tribunal was not given any evidence that might allow it to *"authoritatively determine what would be in '…keeping with industry standards'"* and so it could not accept TycoIS's argument.

The Tribunal concluded that TycoIS' failure to explicitly state how its proposed product complied with the RFP meant it had delivered a non-compliant bid. Furthermore, the Tribunal could not consider the additional information supplied in subsequent correspondence, as such information constitutes *"attempts, after bid closing, to bridge the gaps in the proposal—attempts that are tantamount to bid repair"*. The Tribunal therefore found TycoIS's complaint was not valid.

This is another decision confirming that bidders must comply with all mandatory requirements or will be non-compliant and their bid rejected.

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Privacy Commissioner accepts School Board's decision not to release bidder information

In *Toronto District School Board (Re),* [2012] OIPC No. 249, the Ontario Information and Privacy Commissioner considered the Toronto District School Board's (Board) denial of a request for access to RFP records pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (Act).

The requester sought records of the Board's RFP issued as part of their *"rooftop solar photo-voltaic energy project"* (Project). The successful bidder was to build solar panels on the rooftops of various schools owned by the Board, and *"would derive income from selling power to the provincial electrical power grid"* in accordance with the Ontario Power Authority's 'Feed in Tariff' program. The program was *"a province wide initiative to subsidize the construction of electrical generation projects"*.

Under the Act, the Board could deny the request for information if *"the record or the information contained in the record has been published or is currently available to the public"*. The Board had to establish the records are *"available to the public, through a regularized system of access"*, those available records are responsive to the request, and the cost of access is not prohibitive. The Board responded to the requester with instructions on where the information could be

found on its website. The Adjudicator agreed that the Board's direction was appropriate.

The Board also claimed that, under section 6(1)(b) of the Act, they did not have to disclose a power point presentation about the Project. Section 6(1)(b) allows an institution to refuse to disclose a record *"that reveals the substance of deliberations of a meeting of a council, board, commission or other body or committee of one of them if a statute authorizes holding that meeting in the absence of the public"*.

The Adjudicator found that the power point presentation was viewed during a meeting of a committee of the Board and that the *Education Act* permitted the Board to hold meetings in the absence of the public where the subject of the meeting concerned *"the acquisition or disposal of a school site"*. The Adjudicator determined that *"the subject matter of the records relates to the leasing of a portion of the school sites"*, and this qualified as 'disposal'. Finally, the Adjudicator found that the release of the presentation would *"disclose the substance of the deliberations"*, and thus could be withheld.

The Adjudicator then considered whether the mandatory exemption in section 10(1) applied to the Board's refusal. The section *"is designed to protect the confidential 'informational assets' of businesses or other organizations that provide information to government institutions"*. It serves to *"limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace"*.

The Adjudicator found that *"the bid proposal document and the project agreement contain financial and commercial information"*. Furthermore, *"the list of [school] sites also contains the amount of power to be generated and therefore constitutes commercial and technical information"*. The Adjudicator also determined that the Bid Proposal, the commercial and technical information found on the Project Tracking Sheet, and the list of school sites that broke down the energy output per site, were all supplied in confidence. Thus, the Board could withhold the records.

The Adjudicator also determined that *"the portions of the bid proposal...includes the affected parties' business structure, client project information, methodology, schedules and reports"*, as well as the technical and commercial information. If disclosed, it *"could reasonably be expected to prejudice the competitive position of the affected party as this information relates to its business organization and or methodology for the RFP project"*.

Additionally, the Adjudicator determined that *"the nature of the agreement itself, a complicated negotiated contract containing a unique business structure"* created circumstances that justified the Board's refusal since *"disclosure of the terms of the agreement before the project has been completed could reasonably be expected to prejudice the board's economic interests"*.

While the Adjudicator generally found the course of action chosen by the Board acceptable, the Board failed to demonstrate what, if any, relevant factors the Board considered in exercising its discretion to withhold the records. The Board was thus ordered to reconsider their exercise of discretion regarding the project agreement, power point presentation, and publicly available information, having regards to the protection of privacy, the effect disclosure may have on public confidence in the Board, and that generally information should be made available to the public. If the Board decided to continue to withhold the records after reconsideration, they would have to provide the requesting party and the Adjudicator an explanation of why the material was being withheld.

— KC LLP —

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