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Public Sector

Procurement Law Newsletter

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IN THIS ISSUE —

Court explores content of procedural fairness and how defects are cured with respect to excluding bidders with litigation history

In *Interpaving Limited v City of Greater Sudbury*, (2018 ONSC 3005) the Ontario Superior Court of Justice (Court) reviewed the City of Greater Sudbury's (City) decision to debar Interpaving Limited (Interpaving) from bidding on City contracts for four years.

The City's decision to debar Interpaving was made pursuant to a City By-Law. The basis for the City's decision was that Interpaving had been involved in litigation against the City, that there was evidence of poor performance in regards to Interpaving's contractual obligations, and that Interpaving personnel had demonstrated threatening conduct toward City employees. These three reasons were all justifications for debarment pursuant to the City By-Law.

The initial decision to debar Interpaving (Initial Decision) was made without providing Interpaving formal notice that the City was considering debarment, identifying what the grounds for debarment were, and what penalty was proposed. Consequently, Interpaving was not given an opportunity to respond and to be heard before the Initial Decision was made. However, Interpaving was afforded the right to request a reconsideration of the decision. In the interim period between the initial decision to debar and the final decision, Interpaving and the City met multiple times to discuss the issues and Interpaving provided written submissions defending itself against debarment. The City's reconsideration of its Initial Decision did not alter the final decision to debar Interpaving from bidding on City contracts.

The Court dealt with multiple issues in its decision. First, the Court determined whether the City's decision constituted a breach of procedural fairness, and subsequently whether the breach was cured by the City's reconsideration of its Initial Decision. Second, the Court reviewed whether the City's decision was reasonable.

In regards to the issue of whether Interpaving was provided sufficient procedural fairness, the Court determined that the City's Initial Decision resulted in a breach of procedural fairness. The Court found Interpaving should have been provided notice of the City's intention to debar and the proposed penalty, a summary of the grounds for the proposed decision, an opportunity to respond, and reasons for the City's decision. In the course of its decision, the Court cited the importance of the matter to Interpaving, and the fact that there was no means to appeal the City's decision, even though it was an administrative decision.

The next question was whether the procedural defects were cured by the City's reconsideration process. The issue was whether the City engaged in a *bona fide* reconsideration of its decision to debar. The court found that the reconsideration did cure the prior procedural defects by engaging in a fresh consideration of the events. The Court considered the fact that Interpaving had notice of the principal matters, was able to put forward evidence and submissions for discussion, and that there was no evidence that the City acted in bad faith.

The Court determined that the appropriate standard of review for the City's decision was reasonableness, and the question to be decided was whether the City's decision fell within a range of acceptable

outcomes. The court found that there were ample reasons to support each ground for debarring Interpaving. As a result, the application was dismissed and the City's decision to debar Interpaving from bidding on City contracts for four years was upheld.

Accordingly, this case confirms that Boards can continue to exclude vendors that have been involved in litigation with the Board provided that it is set up properly.

Court enforces waiver of liability clause despite issues in procurement process

In *Mega Reporting Inc. v Yukon* (2018 YKCA 10), the Yukon Territory Court of Appeal (Court) reversed the trial judge's decision to award Mega Reporting Inc. (Mega) damages. The Court found that the trial judge was incorrect in finding the exclusion of liability clause did not apply due to public policy grounds.

The issue arose from a Request for Proposals (RFP) the Government of Yukon (Yukon) issued for court transcription services. The RFP required bidders to submit two sealed envelopes, one would contain information about the bidder's experience and performance, and the other would contain the bid price. The second envelope containing the bid price would only be opened if the bidder received a minimum score for the information contained in the first envelope. The RFP also contained a clause that waived Yukon's liability "for any costs associated with unfairness in the RFP process."

Yukon assessed Mega's bid and decided that it did not obtain the minimal score required to open the second envelope. Therefore Mega was not awarded the contract, even though they had the lowest bid price. In the course of its review, Yukon did not take notes on how Mega's bid was assessed and did not provide a score. Yukon brought an application to the Supreme Court of Yukon, alleging Yukon breached its obligation to conduct a fair, accountable, and transparent bidding process.

The trial judge found that Yukon had failed to meet its duties of fairness, accountability, and transparency due to evidence that Yukon unfairly penalized Mega for failing to provide letters of reference (which were not required in the RFP), for not outlining the process for how bids would be scored, and for not keeping a record of its decision. As a result, Mega was awarded $335,844.93 in damages.

In regards to the waiver, the trial judge applied the three-prong test from *Tercon Contractors Ltd. v British Columbia* (2010 SCC 4) (*Tercon*), and held that public policy reasons justified not enforcing the waiver. In the course of its reasons, the trial judge found that public policy restricted a government from avoiding duties owed to the public under a statute, when the statute did not permit the government to contract out of its duties. The trial judge relied on the fair procurement principles in the *Contracting and Procurement Directive* (*Directive*) to establish the duty that the trial judge found Yukon could not contract out of.

The Court found that the trial judge had made an error by not considering and applying the high threshold required to establish that public policy outweighs the interest of certainty and stability in contractual relations. The trial judge should have considered whether "the harm to the public is substantially incontestable." Instead, the judge appeared to have simply weighed the right to contract freely against the public

interest in ensuring a fair, accountable, and transparent bid process.

The Court further noted that Mega was free to decline to participate in the bidding process, and that it's not the Courts' role to save them from the consequence of participating. Furthermore, the Court found no evidence that the staff who evaluated Mega's bid had a conflict of interest or acted fraudulently in awarding the contract. Thus the court found there was no public policy that was "substantially incontestable" to outweigh enforcing the waiver.

Finally, the Court concluded the *Tercon* analysis by determining the provision was sufficiently unambiguous and certainly applied to Mega's claim. The final prong of the *Tercon* test - that the clause was unconscionable - was not challenged at the trial level, and thus was not considered. The Court set aside the award of damages and dismissed the claim, with costs to Yukon.

Court finds post-bid conduct cannot be used to determine a bid's compliance

In *C.F. Construction Ltd. v Westville (Town)*, (2018 NSSC 123) the Nova Scotia Supreme Court (Court) found that the Town of Westville (Town) had illegitimately found CF Construction Ltd.'s (CF) bid non-compliant due to post-bid conduct which should not have been used to measure CF's bid's compliance.

The issue arose from a call for tenders sent out by the Town for a sanitary system upgrade. CF's bid had the lowest price, but the Town awarded the contract to the second lowest bidder. The issue was whether CF's bid was compliant. The Town claimed CF's bid was for a cast-in-place concrete wet wall instead of the pre-cast concrete wet wall specified in the tender documents. CF argued that its bid was compliant and seeks damages for breach of contract.

CF's bid price was over $100,000 less than the next lowest bidder, as well as the Town's estimates of what the project would cost. The Town had admitted that the bid appeared compliant on its face, but due to CF's bid price being "significantly lower than the other three bidders," the Town became concerned about whether CF's bid was compliant. After the bid submission deadline had already closed, the Town called CF to review its bid submission. The Town claimed that during the telephone call, CF's representative revealed that the bid price was incorrectly based on a cast-in-place concrete wet wall. CF's agent recalled the conversation differently and maintained that the bid was prepared on the basis of a pre-cast concrete wet wall. The Court accepted CF's recollection of the conversation that the bid was made in contemplation of a pre-cast concrete wet wall.

CF argued that once it had submitted a compliant bid, Contract A had been formed and the post-closing telephone conversation was legally irrelevant. Furthermore, there was no requirement for a bidder to have to demonstrate how they priced the individual components of the bid.

The Court found that compliance is to be measured objectively at the time the bid is submitted and that CF's bid, when measured objectively, was compliant with the terms of the tender. All the tender required was for the bidder to submit a lump sum contract price, and there was no requirement for a bidder to have to demonstrate how they priced the individual components. Therefore, the Court found that when CF submitted its

bid, Contract A arose between the parties and that disqualifying CF's bid breached the Town's "duty to treat all bidders fairly and equally." The Court, relying on a number of cases, found that "taking post-bid conduct and views into account is inconsistent with the requirement that bid compliance is to be measured objectively at the time the bid is submitted."

Once the Court found that CF's bid was compliant, it was admitted by the Town that CF would have been awarded Contract B. In these situations the Court has awarded damages for the full profit that the plaintiff would have earned, if not for the breach of contract. There remained an issue of whether CF would have been awarded the work that was subsequently done due to a change order. The Court determined that the Town and CF would have negotiated and agreed on CF doing the work under the change order if not for the breach.

To determine the value of the change order for damages, the court split the difference between each party's respective expert reports. The total damages awarded to CF were $343,745.00 (plus HST) for its lost profits.

Court finds privilege clause allows for bid price adjustments in appropriate circumstances where bidders are treated fairly and equally

In *Everest Construction Management Ltd v Strathmore (Town)*, (2018 ABCA 74) the Alberta Court of Appeal (Court) determined that a privilege clause allows an owner to assess bids on other grounds than simply the lowest bid, and that it may adjust bid price based on expected additional costs that arise from a bidder submitting a later completion date for a project.

Everest Construction Management Ltd. (Everest) appealed the trial judge's decision to dismiss its claim of breach of contract that arose from a call for tenders by the Town of Strathmore (Town).

Everest had submitted a bid to work on a reservoir and pump station project for the Town. Although Everest had underbid the other supplier its bid was unsuccessful. The successful bidder, Graham Construction Infrastructure (Graham), had provided a later completion date and had identified four completed projects by companies related to Graham as relevant experience, versus one completed project submitted by Everest. The invitation to bid and the bid form contained a "privilege clause" which allowed the Town to choose between bids on some basis other than the lowest bid price.

In coming to its decision to award the contract to Graham, the Town determined that Graham's completion date had complied with the Town's preferred completion date and that Everest's later completion date would have resulted in additional costs that would likely be greater than the difference between the bid prices. In addition, the Town found Graham had more experience with similar projects.

It was agreed that Everest's bid submission resulted in a contract between Everest and the Town which required the Town to treat bids fairly and equally and to only accept compliant bids. Everest argued that the Town breached this contract by evaluating the bid on the basis of experience, scheduled completion, and additional costs. Furthermore, Everest argued that the Town had a duty to investigate Graham's project experience.

The Court found that the Town did not breach its implied duty of fairness by

evaluating bids on the basis of experience, scheduled completion, and additional related costs. In the course of its decision, the Court determined that the Town's request for experience and a completion date indicated that the Town intended to rely on this information to evaluate bids. Furthermore, the language contained in the bid documents clearly stated that the Town would use a bidders experience to "judge" the bidder's "ability to fulfil the contract requirement." Similarly, the language in the bid documents also provided Everest with notice that the provided completion date would be used to assess the bid.

The Court also found that the privilege clause allowed the Town to adjust bid prices based on the expected costs of a later completion date, as long as the scheduled completion date was disclosed as a factor in evaluating the bid. Therefore, the Town was permitted to take into account the expected additional costs.

Finally, the Court determined that the Town had no duty to investigate Graham's project experience. It had been determined at trial that the related companies were at Graham's disposal for the proposed project. Additionally, the Town was aware that the experience of the related companies would be available to Graham. The Court found that it would be wasteful and that it would violate common sense if the Town was required to investigate information about Graham that it was already aware of through past experience.

For the reasons provided, the Court found that the Town did not breach its duty to assess bids fairly and equally and thus dismissed the appeal.

IPC orders disclosure of a successful bidders records

In *Toronto (City) (Re)*, ([2018] OIPC No. 152) the Ontario Information and Privacy Commissioner (IPC) outlined the three part test to determine whether information that was requested was exempt from disclosure due to the third party exemption contained in the *Municipal Freedom of Information and Protection of Privacy Act* (*MFFIPA*).

The City of Toronto (City) received a request from a third party under *MFFIPA* for the release of records relating to a successful bid by the Appellant to do work for the City. Once the City received the request, pursuant to section 21 of *MFIPPA*, they consulted the Appellant for their views about disclosure of the requested records. The Appellant opposed disclosure based on the third-party information exemption contained in section 10(1) of *MFIPPA*. The City decided to grant full access to the records and the Appellant challenged the decision of the City. The only issue was whether the contract is exempt under the third-party information exemption.

The third-party information exemption serves to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Section 10(1) will apply if the Appellant satisfies each part of the three-part test.

The first part of the test is that the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information. The IPC found that the first part of the test was satisfied because the contract contained commercial and financial information. The contract was for the provision of services and payment for

those services and thus had commercial and financial information.

The IPC noted that the definition of Commercial Information can apply to both profit-making enterprises and non-profit organizations. Also, just because a record might have monetary value or potential monetary value does not necessarily mean the record contains commercial information.

The second part of the test is that the information must have been supplied to the institution in confidence, either implicitly or explicitly. Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party. Typically the contents of a contract between an institution and a third party will not qualify as having been "supplied" under *MFIPPA*. Rather, contents of a contract have normally been treated as mutually generated. The Appellant was not able to establish that they "supplied" the information, and therefore failed under this part of the test.

There are two exceptions to the general principle that contracts are not "supplied".

■ Inferred Disclosure --- The Appellant did not argue this exemption, so it was not explored in the decision.

■ Immutability --- This applies where the contract contains information provided by the third party, but the information is not subject to negotiation.

The Appellant argued that the contract contained underlying fixed costs and specific product information. The Adjudicator rejected the Appellants argument based on the fact that the pricing information was all-inclusive of all costs, which meant it would not reveal the company's underlying fixed costs. Furthermore, the IPC found that on a plain reading of the contract the only specific product information belonged to the City and not the Appellant.

The third principle is that the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in *MFIPPA* will occur. The third part of the test was not discussed because the adjudicator decided the Appellant failed the second part of the test.

The IPC upheld the City's decision to disclose the record in its entirety.

Tribunal determines jurisdiction is limited to the procurement process as opposed to subsequent contract administration

In *Atlantic Catch Data Ltd. v Department of Public Works and Government Services,* ([2018] CITT No 30) the Canadian International Trade Tribunal (Tribunal) found it did not have the jurisdiction to determine matters of contract administration. The Tribunal's jurisdiction is limited to "any aspect of the procurement process" that relates to a designated contract.

The complaint arose from a Request for Proposals (RFP) by the Department of Public Works and Government Services (PWGSC). Atlantic Catch Data Ltd. (Atlantic Catch) alleged that PWGSC had erred in awarding a contract to AECOM Canada Ltd. (AECOM) because AECOM's bid did not satisfy the certification requirements in the RFP.

The RFP required bidders to certify that the personnel resources proposed in the bid would be available to perform the work

from the outset of the contract. Atlantic Catch claimed AECOM's proposed personnel resources were not available when the contract was awarded. To support its allegations, Atlantic Catch relied on AECOM recruitment advertisements for personnel related to the RFP that were issued after the award of the contract.

AECOM acknowledged that two of its proposed personnel resources, who were members of its working team, were changed subsequent to its bid submission. The second proposed resource was changed due to the employee no longer being available. AECOM admitted that they knew the second proposed resource would not be available on September 16, 2017, which was well before the contract was awarded on October 25, 2017. PWGSC was not notified of the need for a change until after the contract was awarded on October 31, 2017.

The Tribunal recognized that AECOM could have been more forthcoming in notifying PWGSC about the personnel change. However, AECOM was not expressly required to provide notice pursuant to the RFP. Furthermore, PWGSC was not required to verify whether there had been a change after they determined the certification requirement was satisfied. As a result, the Tribunal found that there was no basis to find that PWGSC violated any trade agreements through its procurement process.

The Tribunal found that due to the fact that PWGSC was notified of the personnel changes after the contract had been awarded, the issue became one of contract administration. The Tribunal stated that its authority is limited to the procurement process as it relates to designated contracts. The Tribunal has consistently found that the procurement process begins when an entity has "decided on its requirements and continues up to and including contract award." This position was found to be consistent with Article 1017(1)(a) of the *North American Free Trade Agreement*. As a result, contract administration was found to be outside the scope of the Tribunal.

The Tribunal classified contract administration as a separate phase that takes place after the procurement process is completed. Contract Administration deals with issues that come up as a result of how the contract is performed or managed. The Tribunal affirmed its jurisdiction and found the complaint by Atlantic Catch invalid.

Tribunal determines appropriate remedy when government errs in awarding contract

In *Dynamic Engineering Inc. v Department of Public Works and Government Services,* ([2018] CITT No 49) the Canadian International Trade Tribunal (Tribunal) recommended a new solicitation for the designated contract after it was determined that the successful bidder, Wärtsilä Canada Incorporated (Wärtsilä), and the complainant, Dynamic Engineering Inc. (Dynamic), had both not met the mandatory technical criteria required in the request for proposals (RFP).

The complaint arose from a RFP issued by PWGSC for repair and overhaul services for turbochargers. For a bid to comply with the RFP it had to meet a number of mandatory technical criteria. One requirement was for each bidder to have Napier-certified personnel on staff. Two weeks prior to the RFP closing date, Dynamic's only Napier-certified personnel resigned and went to work for Dynamic's

competitor, Wärtsilä. As a result, Dynamic admitted its bid was technically non-compliant, but argued PWGSC should have accepted its bid due to other Dynamic personnel having equivalent experience, and that PWGSC should have taken into account that Dynamic's personnel had been poached by Wärtsilä. Nevertheless, PWGSC awarded the contract to Wärtsilä.

Subsequent to the award of the contract to Wärtsilä, PWGSC independently reviewed Wärtsilä's bid and found that it had inadvertently made an error in finding the bid was compliant. Therefore, PWGSC terminated the contract awarded to Wärtsilä and indicated its intention to retender the procurement as soon as practicable.

Dynamic filed a complaint with the Tribunal, alleging that PWGSC had erred in disqualifying Dynamic's bid and that it had unjustifiably favoured Wärstilä's bid.

The Tribunal found that Dynamic was non-compliant due to it not having any Napier-certified personnel as required in the RFP. The RFP did not allow for the provision of equivalent qualifications or experience, it specifically required Napier certified personnel. Therefore, the Tribunal found that there was no reasonable basis for finding that PWGSC had wrongly interpreted the mandatory criteria of the RFP.

In regards to the argument that the PWGSC should have taken into account that Wärtsilä had poached Dynamic's employee, the Tribunal found that the allegation relates to the behaviour of private actors. Therefore, it had nothing to do with PWGSC or its conduct in the procurement process and was outside the jurisdiction of the Tribunal.

Finally, the Tribunal found that there was no reasonable indication that PWGSC was motivated by bad faith in how it undertook the bid process and assessed the bids. Dynamic's argument that PWGSC was purposefully non-transparent throughout the procurement process was mere speculation and was not supported by the evidence on the record. The Tribunal accepted that the PWGSC's decision to award Wärtsilä a contract was an error, and found that PWGSC had taken the appropriate steps to remedy that error.

In considering the appropriate remedy the Court found that, where practical, rescinding a contract award and retendering is preferable over granting monetary relief. Retendering remedies the prejudice that the violation caused potential suppliers and is consistent with the public interest in avoiding unnecessary double payments for procurements. Due to PWGSC already terminating Wärtsilä's contract, the Tribunal's remedy was to recommend a new solicitation for the designated contract.

Tribunal finds sole sourcing due to the non-existence of a reasonable alternative or substitute due to technical reasons, or because of extreme urgency caused by unforeseeable events is a limited exception to open procurements and not justified in the circumstances

In *ALS Canada Ltd v Statistics Canada*, ([2018] CITT No 47) the Canadian International Trade Tribunal (Tribunal) determined that Statistics Canada had unlawfully departed from the default requirement of open competition for

procurements by issuing an unjustified Advance Contract Award Notice (ACAN).

The basis for the complaint arose from Statistics Canada sending out an ACAN with respect to a procurement for the provision of laboratory services for the analysis of municipal wastewater in Canada regarding evidence of cannabis consumption. Statistics Canada stated that 3Cs Laboratory was the only qualified supplier because of its membership in the SCORE network, which is a group of researchers in Europe that undertake the same analysis of municipal wastewater.

Statistics Canada wanted data prior to the imminent legalization of marijuana and used this deadline to validate limiting the tendering process. Statistics Canada made accreditation by the SCORE network a mandatory requirement for any interested suppliers. ALS Canada Ltd. (ALS) disputed this requirement on the grounds that the SCORE network is not the only existing international standard for wastewater analysis and identified three recognized accrediting bodies in Canada. ALS also disputed that the SCORE network was in fact an accreditation body.

At issue was whether the mandatory criteria of the ACAN requiring SCORE Network accreditation was justified because there was no reasonable alternative or substitute due to technical reasons, or because of "extreme urgency" caused by "unforeseeable events."

The Tribunal concluded that Statistics Canada failed to properly justify that there was no reasonable alternative to requiring SCORE network accreditation due to technical reasons. In coming to its decision, the Tribunal found that Statistics Canada did not provide sufficient evidence to defend its assertion that alternative laboratories provided insufficient services. In addition, Statistics Canada provided only a one-and-a-half page printout from the SCORE network's website to support its position that the SCORE network's protocols were superior to the alternative laboratories. The Tribunal noted that justifying the limiting of tenders is a narrow exception that must be stringently demonstrated by the government institution.

Additionally, Statistics Canada was not able to demonstrate extreme urgency based on unforeseeable events. The Tribunal found that Statistics Canada was unable to explain why they waited until November 2017 to begin considering research projects when the bill to decriminalize cannabis had already undergone a second reading in the House of Commons in June of 2017. The Tribunal affirmed that government delay or inaction cannot be used to justify sole sourcing due to urgency.

The Tribunal concluded that the mandatory criterion of accreditation by the SCORE network, was not justified. The Tribunal recommended that ALS be compensated for one fourth of the profit it would have earned if it had submitted a bid to perform the work at a price of one dollar lower than the price of the contract awarded. In addition, the Tribunal recommended that a retender be completed as soon as possible but, at the very least, before the expiration of the initial one-year term of the contract with 3Cs Laboratory.

Tribunal finds RFP did not meet definition of designated contract where procuring entity not remunerating vendor

In *Strength Tek Fitness v Department of Employment and Social Development* ([2018] CITT No 35) the Canadian

International Trade Tribunal found that it did not have jurisdiction to hear the complaint. The Tribunal determined that the Department of Employment and Social Development's (ESDC) Request for Proposals (RFP) did not relate to a designated contract as defined in the Canadian trade agreements.

The RFP at issue was for the provision of workplace fitness centre services. Strength Tek Fitness (Strength Tek) was one of two bidders that the ESDC found were compliant in response to its RFP. However, the ESDC determined that Strength Tek's bid did not contain the lowest evaluated price. Therefore the contract was awarded to the other bidder. The successful bidder was entirely responsible for the collection of membership dues from ESDC employees.

The Tribunal determined it did not have jurisdiction due to the fact that the contract was not to provide services to the ESDC itself, and therefore no remuneration was to flow from the ESDC to the successful bidder within the meaning of remuneration contained in the Canadian trade agreements.

The contract was to provide services at a designated location to service ESDC employees. Therefore, the Tribunal found that although the successful bidder would receive remuneration, it would be from ESDC employees and not the ESDC. Due to this arrangement the Tribunal determined that there was no procurement value, and therefore no designated contract. The Tribunals jurisdiction is limited to "any aspect of the procurement process that relates to a designated contract," therefore the Tribunal determined it did not have jurisdiction to inquire into the complaint.

Strength Tek alleged the procurement at issue constituted a circumvention of the trade agreements. The Tribunal stated that the process closely bordered on a finding that the ESDC deliberately circumvented the Canadian trade agreements. However, due to emails that showed that ESDC employees expected to be governed by the Canadian trade agreements, the Tribunal was not convinced that the ESDC intentionally structured the process to avoid obligations under the Canadian trade agreements. However, the Tribunal noted that the result was problematic in that premises that were paid for by the taxpayer are being used free of charge by a supplier for the benefit of a limited group of government employees.

Tribunal warns government institution about problematic bid evaluation

In *AirClean Systems Canada v Department of Public Works and Government Services* ([2018] CITT No 29) the Canadian International Trade Tribunal (Tribunal) found that the Department of Public Works and Government Services (PWGSC) reasonably determined that the winning bidder, HEPAire Products Corporation (HEPAire) was compliant and that the award of the contract to HEPAire did not violate any Canadian trade agreements. However, the Tribunal expressed significant concern over the evaluation method and attempted to influence PWGSC into remedying the Tribunal's concerns.

The PWGSC issued an RFSO on behalf of the Royal Canadian Mounted Police (RCMP) for fume hoods that are required for the safe sampling of fentanyl and other potent synthetic opioids during the sampling of exhibits by law enforcement personnel. AirClean Systems Canada (AirClean) filed a complaint to the Canadian International Trade Tribunal concerning what AirClean deemed to be

an incomplete and inadequate evaluation procedure, and also that the winning bidder did not meet the technical requirements.

AirClean submitted that the evaluation should not have been done solely on the basis of technical documentation. AirClean argued that each product should have been compared on how the product actually performed.

The Tribunal found that AirClean took a "wait-and-see" approach and failed to object to the evaluation procedure in a timely manner and, consequently, its complaint was late. However, the Tribunal found that AirClean raised reasonable questions given that if the equipment failed, human life would be at risk.

The second complaint regarded AirClean challenging whether HEPAire met the technical requirements of the RFSO. The Tribunal held that evaluators are entitled to rely on the information in a potential supplier's bid. The solicitation stated that the bid would be assessed on paper and therefore it was reasonable for the PWGSC to do so. The Tribunal again expressed concern over the RFSO's evaluation method, but stated that it could only confirm that the evaluation was conducted as announced in the RFSO.

Interestingly, due to the serious allegations of AirClean, and the potentially lethal consequences if the successful bidder's product fails, the Tribunal asked PWGSC to address the allegations shortly after they surfaced, prior to this decision. PWGSC referred the Tribunal's questions to the RCMP who responded by stating they would deal with the potential non-compliance of HEPAire through its contractual legal option to terminate the standing offer if necessary. The Tribunal commented that it had hoped that PWGSC and the RCMP would be more assuring in how they would handle the potential significant issues raised by AirClean, but restated that it lacked the ability to intervene because the evaluation did not amount to a violation of Canadian trade agreements. As a result, the Tribunal found AirClean's complaint not valid.

Tribunal decision highlights harsh consequences for late complaints and the importance of raising complaints during the solicitation process rather than after the results thereof

In *Vintage Designing Co v Canadian Museum of History*, ([2018] CITT No 34) the Canadian International Trade Tribunal (Tribunal) found that Vintage Designing Co's (Vintage) complaint that the Canadian Museum of History (CMH) had used a private subscription- based service to post the Request for Standing Offers (RFSO), and that it had discriminated in favour of incumbent bidders was barred due to Vintage not bringing the complaint within the designated time frame.

The complaint arose from alleged defects regarding a RFSO sent out by CMH. The grounds for Vintage's complaint were that the RFSO was posted on a subscription-based website rather than a free government site. In addition, Vintage argued that the RFSO was biased against non-incumbents because the RFSO required bidders to provide information on their prior work and experience, including examples of a bidder's most recent contracts that were relevant to the type of project CMH needed done.

The complaint that CMH had used a subscription service rather than the free government service was barred due to Vintage not submitting its complaint within the timeframe set out in section 6 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* (SOR/93-602). Vintage had ten working days from when they became aware, or reasonably should have become aware, of the grounds for its complaint to either object to CMH or to file a complaint with the Tribunal.

Nevertheless, the Tribunal noted that CMH had a duty under the *Canadian Free Trade Agreement* (*CFTA*) to publish on one of the tendering websites designated (ie. buyandsell.gc.ca – the free government service), to make tender notices available to suppliers free of charge, and to provide all information necessary to permit suppliers to prepare and submit responsive tenders.

The argument that the RFSO discriminated in favour of incumbents was also time barred. The Tribunal stated that according to Tribunal case law, objections to the terms and requirements of solicitation documents must be made within ten workings days of the solicitation's publication. The Tribunal explained that suppliers may not simply wait until the results of a procurement competition are in before raising an objection.

Although time barred, the court still considered the question of bias and determined the complaint not valid. The court considered the *CFTA*, noting that it prohibits "requiring prior experience if not essential to meet the requirements of the procurement." However, the CMH did not require prior experience with CMH projects. Instead, the RFSO stated that experience in projects with a similar scope would be scored higher, which the Tribunal found to be a relevant measure of the ability to meet expected work requirements.

Vintage submitted additional complaints that the evaluation was based on undisclosed criteria or otherwise ignored evidence. Vintage was deducted points because CMH found that Vintage was not proficient in Adobe Creative Suite or Microsoft Office. Vintage argued that the finding was unreasonable because both of the noted software tools were industry standard, and that Vintage had already submitted a certification form that they had the software. The Tribunal dismissed this complaint due to the RFSO specifically requesting the proposals "clearly demonstrate professional skills" in Adobe Creative Suite and Microsoft Office. The Tribunal found that merely stating that a bidder meets a requirement is not enough to demonstrate experience.

For the above reasons the Tribunal found the complaints were not valid.

— KC LLP —

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