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Court confirms owner can investigate capability of bidder to fulfill material terms

In *Rankin Construction Inc. v Ontario*, 2013 ONSC 139, the Ontario Superior Court of Justice dealt with an action by Rankin Construction Inc. (Rankin) for damages for lost profits on a contract. The action arose out of a tendering process for a contract for the widening of a portion of Highway 406 in the Niagara region in 2005.

Rankin, an experienced contractor with a long track-record of performing large public and private sector projects, was the lowest bidder. However, its tender was ruled by the Ministry of Transportation (MTO or Crown) to be non-compliant with the tender requirements. The contract was therefore awarded to the second-lowest bidder.

Rankin brought the action against the Crown on the basis that it had breached its obligations by improperly disqualifying Rankin's tender and awarding the contract

to a competitor with a higher bid price. In response, the Crown asserted it was entitled and obligated, in order to maintain the integrity of the tender process, to disqualify Rankin's bid on the basis that it failed to properly declare the value of imported steel that it proposed to utilize on the project. The MTO submitted that this was a key requirement of the tendering process as it was a critical factor in determining the lowest bidder. Bidders were provided a competitive advantage commensurate with the proportion of Canadian-produced domestic steel they proposed to use on the project. Each bidder was required to include a Declared Value of Imported Steel (DVIS) in respect of various listed items. Rankin was only able to secure one price for rolled steel H-Piles from a supplier in Quebec. This supplier advised Rankin that the steel it would supply would be domestic. Rankin relied on this in deciding to not include the cost of the H-Piles in its DVIS. It was later revealed the H-Piles were manufactured in the United States, and that there were no manufacturers of H-Piles in Canada. The DVIS of each of the other three competing bidders were considerably higher than that of Rankin, as each included the cost of the specified H-Piles in their calculations.

The MTO received a complaint from the second-lowest bidder that Rankin had failed to comply with the terms of the tender process and that its bid was too low. The MTO investigated the matter and declared Rankin's bid as being non-compliant.

In its Decision, the Court stated that the two main issues under consideration were:

(1) whether the MTO was entitled to look behind the face of the Rankin tender and carry out an investigation with respect to the accuracy of the DVIS; and,

(2) whether Rankin's failure to properly disclose the value of its imported steel constituted material non-compliance.

With respect to the first issue, Rankin argued that the MTO was prohibited from investigating its bid. In support of this argument, Rankin relied on an SCC Decision where that Court declined to impose a duty on tender-calling authorities to investigate to see whether bids are compliant. However, in approaching the first issue, the Court in this case reviewed the jurisprudence and reiterated that the overall objective should be to protect and promote the integrity of the bidding process.

The Court further held that, while there is no obligation to investigate the material compliance of a tender, nothing precludes a tender-calling authority from engaging in such an investigation.

As stated by the Court in its Reasons:

"*to impose a blanket prohibition on the right of a tender-calling authority to investigate whether it is possible for a bidder to fulfil the terms of its tender would threaten the integrity of the bidding process by encouraging the submission of bids which, while compliant on their face, may give bidders an unfair advantage over other bidders. To maintain an entitlement, but not an obligation, for an owner to investigate whether compliance is possible, would encourage bidders to rigorously prepare and scrutinize their bids to achieve compliance or run the risk of having their bids ruled to be non-compliant*."

In approaching the second issue, the Court held that the declaration of the source of materials clearly formed an integral part of the tender package, and was linked to the Instructions to Bidders. Submission of the

DVIS was mandatory for each bidder, and its accuracy was crucial to the determination of the lowest bidder. Since it formed an integral and fundamental element of the tender scheme, the Court held that by failing to provide an accurate DVIS, Rankin's bid was *prima facie* materially non-compliant.

Relying on *Cambridge Plumbing Systems Ltd v Strata Plan VR 1632*, the Court stated that:

"*materiality is to be determined objectively having regard to the impact of the defect on the tendering process and the principles and policy goals underlying the process. The focus is not on the impact of the defect on the outcome of the particular tender process, but on the impact on the process itself, including the reasonable expectations of the parties involved in the process, including rival bidders.*"

As noted by the Court, the three elements to be considered on an assessment of materiality are:

(1) whether the non-compliance undermines the fairness of the procurement process;

(2) whether it impacts the cost of the bid or performance of Contract B (from the Contract A/Contract B analysis); and,

(3) whether it creates a risk of action by other bidders.

Not all three are required for a finding of material non-compliance.

Rankin could not deliver on its representation that the rolled steel H-Piles included in its bid price would be domestic, since there was no domestic manufacturer of such H-Piles. This failure by Rankin meant its bid was materially non-compliant with the tender requirements. Therefore, once the material non-compliance in the Rankin bid was discovered, the MTO was bound to rule it to be non-compliant and therefore not capable of acceptance.

This case is significant because it analyzes what constitutes material non-compliance, and confirms that tender-calling authorities have the right to investigate bids for non-compliance.

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Court confirms right of owner not to accept any bid, but awards damages on second project for failure to specify mandatory requirements

In *Olympic Construction Ltd. v. Eastern Regional Integrated Health Authority*, 2013 NLTD 4, the Newfoundland and Labrador Supreme Court reviewed two separate tender projects submitted by Olympic Construction Limited (Olympic) to Eastern Regional Integrated Health Authority (Eastern Health), both of which were rejected.

In the first project, Eastern Health issued a Call for Tenders for the construction of an extension to the Caribou Memorial Pavilion. Olympic's tender, while not the lowest bid, was the only compliant bid. Eastern Health disqualified all other bidders for non-compliance, and cancelled the tender as there were no qualified bids that met the budget allocated for the project. Eastern Health determined that the project would be re-tendered. Thereafter, Olympic brought an action for damages for breach of contract claiming that it complied with the terms of the first tender call and completed its tender documents as required by Eastern

Health. It submitted the lowest qualified bid and was the preferred bidder in accordance with the Newfoundland *Public Tender Act*. Olympic argued that Eastern Health was obligated by the *Public Tender Act*, its Regulations and industry standards, to award it the contract. Olympic further argued that, by re-tendering the contract, Eastern Health engaged in bad-faith conduct that was unfair to Olympic.

Eastern Health argued that it had no legal obligation to accept Olympic's bid, as it had reserved the right to accept or reject any or all offers. Furthermore, Eastern Health claimed that since the project was being undertaken with public money, it had the right to cancel the project if it could not be completed within budget.

With respect to the first tender project, the Court noted that there were two competing interests:

(1) the duty to act in good faith and in a manner that maintains and promotes the integrity of the public tendering system; and,

(2) the right, when spending public money, to be able to obtain a fair price for the work being tendered at the reasonable market value.

The Court emphasized that the second principle should not be at the expense of a breach of the first principle.

In reaching its Decision that Eastern Health was not obligated to accept Olympic's bid, the Court relied upon case law which held that one must act fairly and in good faith when exercising the right under a privilege clause not to award a contract at all. However, this obligation cannot be turned into a positive obligation to award a contract to some bidder, assuming that the bid is compliant. As noted in the case law, the standard of conduct demanded by good faith, at a minimum, requires a party not act in bad faith.

The Court held that, in this case, the decision to re-tender the first project was not based on the prices of the non-compliant bids, but rather on the budget for the project. Had Eastern Health not re-tendered the contract and awarded it to Olympic, it could have been accused of acting irresponsibly with public monies, knowing at the tender opening that the market value for the project was much less than Olympic's bid. Furthermore, the Court emphasized the privilege clause in the tender documents. That clause meant that even if Olympic was the only bidder and not just the preferred bidder, Eastern Health would have still been able to re-tender the project if Olympic's bid was over budget. The re-tender allowed all previous bidders to re-tender for the same contract and put everyone on a level playing field. Olympic was in no different position than were the other non-compliant bidders on the first tender. As a result, there was no finding of bad faith.

In the second tender project, Olympic submitted a tender for a Gynecology Extension to the Janeway Hospital. Olympic was the lowest bidder, however the contract was awarded to the next-lowest bidder, Redwood Construction. Eastern Health had found Olympic to be a non-compliant bidder because the tender documents included a mandatory site meeting for June 11, 2009, which Olympic failed to attend. However, Olympic brought an action for breach of contract because Eastern Health had decided to extend the tender closing date in order to set up another site meeting for

June 22, 2009. Both Olympic and Redwood Construction attended this later meeting.

Olympic submitted that by the time it had become aware of the Call for Tenders, the earlier mandatory site meeting had already passed. Therefore, it requested that Eastern Health hold another site meeting as well as extend the tender deadline. Olympic took the position that the purpose of the second meeting was to allow others to visit the site and bid on the project. Olympic therefore argued that to allow Eastern Health to claim that attendance at the second site meeting, where the first mandatory meeting date had already passed, was not sufficient compliance with the tender call, would result in unfairness in the bidding process.

Eastern Health took the position that a strict interpretation of the contract wording meant that any contractor who did not attend the earlier meeting was non-compliant with the tender documents. Eastern Health claimed that the second site meeting was not the same as the original site meeting.

The Court noted that the issue before it was whether the second site meeting was intended to be a substitute for the earlier mandatory site meeting attended by only Redwood Construction. The Court reiterated that it was entitled to look at the whole contract to determine the intent of the parties. If there is any ambiguity in the contract itself the Court can also look at the context and the circumstances surrounding the preparation of the contract to determine the intention of the parties.

Looking at Eastern Health's intent, the Court found that after the earlier site meeting, Eastern Health was concerned that there might only be one bid on the project. Steps were taken by Eastern Health before the tender call closed to encourage others to participate. Looking at the correspondences between the parties, the Court found that they both intended the second site meeting to be held to comply with the tender requirements. The purpose of the site meeting was for the benefit of Eastern Health to explain the project and what it expected of contractors who intended to bid. Regardless of whether the meeting was called a mandatory meeting or a site meeting, it was intended to be a meeting to allow other bidders to bid. The fact that Olympic's bid was accepted, opened, and reviewed, further supported this conclusion. In this case, the Court held that to find otherwise would result in unfairness to Olympic, which prepared its bid on the basis that it complied with the site meeting requirements.

In finding that Eastern Health breached its good faith performance of contractual obligations, the Court Awarded Olympic the full projected profit lost according to its bid.

This case illustrates that a Court will not rely on the strict interpretation of tender documents in determining material compliance with their terms when the intentions and conduct of the parties clearly intended something else to be expected or acceptable.

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Court confirms RFP and negotiations did not result in binding contract

The case of *Everything Kosher Inc. v Joseph and Wolf Lebovic Jewish Community Campus*, [2013] O.J. No. 1588 (Sup. Ct. J.) dealt with the issue of whether an RFP which specifically stated that it did not form

a binding contract nevertheless did form a binding contract.

In 2006, the Defendant, Joseph and Wolf Lebovic Jewish Community Campus (Lebovic Community Campus) issued an RFP for the provision of food services and the lease of a kitchen at a new community campus that was under development. At the time that the 2006 RFP was issued, Lebovic Community Campus was still in the design phase, and construction had not yet begun. Accordingly, although the RFP contained detailed information on the food services that the Lebovic Community Campus sought to engage, numerous specifics regarding the service contract and lease of the kitchen were noted as being subject to design changes. Among other things, the 2006 RFP contained a clause, highlighted in bold, which expressly stated that Lebovic Community Campus might reject any proposal submitted, or might negotiate with more than one party responding to it. The RFP also specifically stated that it did not in itself form an offer for a valid contract.

The Plaintiff, Everything Kosher Inc., (Everything Kosher), a Kosher catering services company, submitted a proposal in response to the 2006 RFP that was favoured by Lebovic Community Campus. As called for under the RFP, the parties then entered into an exclusive 90-day negotiation period. At this point, Lebovic Community Campus sent a letter to Everything Kosher which again made it clear that this was not an acceptance of Everything Kosher's proposal, but that Lebovic Community Campus wished to begin working with Everything Kosher in order to develop and finalize an agreement. The parties negotiated for 90 days without reaching a final agreement. After the expiry of the 90-day period, they continued to negotiate with each other for over a year, exchanging draft contracts up until October 2007, but they never achieved a final agreement or signed any contract. The parties did, however, continue to stay in touch after their final October 2007 exchange of draft contracts.

In the meantime, in May of 2007, Everything Kosher entered into a one-year service agreement with a private Jewish high school situated on the campus of Lebovic Community Campus. This agreement was renewed annually but was not renewed for the 2012-2013 school year.

Given the fact that the parties never reached a final agreement following the 2006 RFP, Lebovic Community Campus decided to issue a fresh RFP in 2011. The 2011 RFP contained significant differences from the 2006 RFP including, among other things, downsized food service requirements and kitchen facilities. Everything Kosher submitted a proposal in response to the 2011 RFP, but was not awarded the contract. Following the 2011 RFP, Everything Kosher commenced an action claiming damages for breach of what it alleged was a 10-year exclusive contract with the Defendant under the 2006 RFP. Everything Kosher contended that this contract resulted from its response to the 2006 RFP together with the subsequent course of conduct engaged in by the parties. Everything Kosher claimed that its relationship with the high school was part and parcel of the relationship with the Defendant. Everything Kosher also submitted that Lebovic Community Campus acted in bad faith in denying the promised contract. In response, Lebovic Community Campus sought Summary Judgment and argued that no such contract ever existed and that there was no question of bad faith.

Deciding to grant Lebovic Community Campus' motion for Summary Judgment,

the Court noted that the 2006 RFP made it clear that it was not an offer that would lead to a firm acceptance. Rather, the 2006 RFP merely created an obligation to negotiate for 90 days, and "*presented to the Plaintiff nothing more than an opportunity to attempt to conclude an agreement*". The Court emphasized that both parties understood that Lebovic Community Campus was undergoing design changes, and so no firm contract could have been reached at that time. The Court further held that while Everything Kosher may have convinced itself that a contract existed by virtue of the protracted negotiations and the annual service contract with the high school, it was clear that Lebovic Community Campus never expressed to Everything Kosher any meeting of the minds. Although Everything Kosher entered into one-year service agreements with the private Jewish high school situated on the Defendant's campus, this did not mean that the Plaintiff had an exclusive 10-year agreement with Lebovic Community Campus. Furthermore, the Court noted that by bidding on the 2011 RFP, the Plaintiff had in effect acknowledged that no contract existed under the old 2006 RFP.

Since there was no contract between the parties, the Court also dismissed Everything Kosher's claim that Lebovic Community Campus acted in bad faith. In essence, Everything Kosher's claim really amounted to a contention that Lebovic Community Campus, as a charitable organization and community institution, should have approached its negotiations with a kinder, gentler touch. However, the Court noted that while "*charitable organizations must comply with all legal forms in their business dealings, they do not need to go above and beyond the standards applicable to everyone else".*

This case demonstrates the significance of the terms of an RFP and the fact that an RFP does not always result in a binding contract.

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Court determines manufacturers do not have advantage over other bidders

In *Acklands-Grainger Inc. v. Canada (Attorney General)*, 2012 FCA 298, the Federal Court of Appeal dealt with an Application by Acklands-Grainger Inc. (Acklands) for Judicial Review of a Decision by the Canadian International Trade Tribunal (CITT). The CITT had dismissed a Complaint filed by Acklands in respect of a solicitation issued by the Department of Public Works and Government Services Canada (PWGSC) for the procurement of fire, safety and rescue equipment pursuant to national standing offers. For the equipment, the PWGSC identified specific manufacturers whose goods could be supplied in each category of equipment. Each eligible manufacturer of products within any of the categories could choose which product or products within that category it was prepared to supply. A bidder could be either an eligible manufacturer of such equipment or a distributor who acquired the products from an eligible manufacturer. In other words, distributors were in competition with all eligible manufacturers, even though those same manufacturers were necessarily the source of the products.

Acklands was a distributor of industrial safety and fastener products and equipment. It acquired fire, safety and rescue equipment products from a variety of manufacturers who would have been entitled to bid on the solicitation at issue in competition with Acklands. In its Complaint

to the CITT, Acklands argued that the solicitation gave manufacturers an unfair advantage over other bidders. Acklands further argued that the solicitation also gave rise to a conflict of interest, in breach of international trade agreements, because of the degree to which manufacturers could influence the bidding process. The CITT determined that the Complaint was not valid, and dismissed it with costs.

Acklands thereafter applied for Judicial Review of that Decision, seeking an Order quashing the Decision and returning the matter back to the CITT with a direction that the Complaint be found valid. The substantive issue in the Application for Judicial Review was whether the CITT was reasonable in concluding that the procurement process at issue did not give manufacturers an unfair competitive advantage over other bidders.

In this case, the Court held that the submissions made by Acklands were substantially the same submissions that had been rejected by the CITT. The Court found no error in the CITT's reasoning and agreed with the CITT's conclusion that any advantage that might accrue to a manufacturer by virtue of its right to set the benchmark price of products is in fact part of its inherent advantage as a manufacturer and supplier of products to bidders who are its distributors. That advantage flows naturally from the knowledge a manufacturer has of the product costs of its distributors, and the degree of control it has over those costs. The Court found it was reasonable for the CITT to conclude that the inherent advantages of manufacturers existed independently of the solicitation in issue, and were not substantially altered or enhanced by any of the requirements set out in the solicitation. The Court further found the CITT acted reasonably in finding that a manufacturer inherently has the advantage of excluding a bidder because it might significantly increase its price to a bidder, offer unfavourable terms to a bidder, or refuse to sell to a bidder. As the Decision of the CITT was reasonable, in that the procurement process of the PWGSC did not give manufacturers an unfair competitive advantage over other bidders, the Application by Acklands was dismissed.

This case is significant because it demonstrates that manufacturers of goods do not necessarily enjoy an unfair advantage over distributions in public procurement processes.

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Court confirms owner can define procurement requirements

In *Almon Equipment Ltd. v. Canada (Attorney General)*, 2012 FCA 318, the Federal Court of Appeal reviewed an Application by Almon Equipment Ltd. (Almon) for Judicial Review of two Decisions by the Canadian International Trade Tribunal (CITT).

In August 2011, Almon bid in response to two Requests for Proposals (RFP) issued by the Department of Public Works and Government Services Canada (PWGSC) for the supply of services at Canadian Forces Base Trenton (CFB Trenton). One RFP concerned the anti-icing and de-icing of aircraft, and snow clearing (the de-icing contract). The other contract concerned the recovery of glycol, the chemical used in de-icing.

On August 19, 2011, Almon complained about the terms of the RFPs to the CITT, pursuant to subsection 30.11(1) of the

International Trade Tribunal Act. PWGSC subsequently advised Almon that it had not been awarded either contract because it did not comply with requirements in the RFPs.

The question addressed by the CITT in respect of the glycol recovery RFP was whether its requirements breached the applicable trade agreements by exceeding what was necessary to ensure that the contract was fulfilled. The issue with the de-icing RFP was whether its terms breached Article 504(3) of the *Agreement on Internal Trade* (*AIT*), which prohibits bias for or against suppliers of services. Almon also alleged a breach of Article 506(5) of the *AIT* because insufficient time was allowed for the preparation of bids, including the acquisition of specified equipment.

The CITT rejected Almon's Complaints and held that, as the purchaser of services, the PWGSC had the right to define its procurement requirements in light of its legitimate operational needs. The circumstances surrounding the services in question justified the stringent requirements in the RFPs. In regards to the de-icing RFP, the CITT noted that aircraft operated from CFB Trenton in bad weather. In regards to the glycol recovery RFP, the CITT noted that CFB Trenton occupied an environmentally sensitive location near the Bay of Quinte. In conclusion, the CITT held that the appropriateness of terms in an RFP cannot be determined by those in previous RFPs. Here, there was insufficient evidence that the terms of the RFPs were discriminatory, impossible to meet, or otherwise unreasonable. In addition, the CITT rejected Almon's argument that, in the circumstances, bidders did not have sufficient time to prepare bids.

In this case, Almon's Application for Judicial Review requested the Court to set aside CITTs Decisions. However, the Court dismissed the Application and held that the CITT had fully set out the relevant facts in its Reasons. Almon failed to satisfy the Court that either Decision was unreasonable, and for the most part, merely repeated the same arguments rejected by the CITT. The Court held that the CITT's thorough Reasons provided sufficient justification for the Decisions, which fell within the range of possible outcomes reasonably open to it on the facts and the applicable law. Furthermore, the Court held that the fact that one bidder is better able than another to meet the specifications of an RFP does not in itself necessarily mean that the requirements of the RFP are biased in favour of that bidder. The purchaser of goods or services has the right to determine the requirements needed for bidders to meet its legitimate operational requirements, subject to the limits imposed by the applicable trade agreements, to ensure fair competition in public procurement.

This case is significant because it again demonstrates that an owner has the right to define its procurement requirements in light of its legitimate operational needs.

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Court imposes interim injunction pending trial on school bus transportation RFP

In *F.L. Ravin Limited et al. v. Southwestern Ontario Student Transportation Services*, 2013 ONSC 1912, the Court heard a motion brought by the Plaintiffs for an interim and interlocutory injunction (a Court Order to compel or prevent a party from doing certain acts pending the final determination of the case) to restrain Southwestern Ontario Student Transportation Services

(STS) from closing its Request For Proposals (RFP) on April 2, 2013. The RFP was seeking proposals from school bus transportation companies interested in providing student transportation for the area served by STS (a considerably large, mostly rural area).

STS had already engaged in two RFPs, each for one third of the catchment area. The third RFP was issued on January 8, 2013, and at this time, other similar student transportation consortia across the province engaging in similar RFPs for their own catchment areas had begun to temporarily withdraw or suspend their RFPs as some were being challenged by small bus transportation companies. When STS refused to do the same, the Plaintiffs commenced an action in February 2013 for a declaration that STS breached certain common law duties, and acted in a manner that contravened mandatory procurement requirements under the *Broader Public Sector Accountability Act, 2010*, (BPSAA). On February 7, 2013 they brought their motion for the interlocutory and interim injunction.

The Plaintiffs were relatively small bus transportation companies that had operated since the 1950's, providing student transportation to the Thames Valley District School Board and the London District Catholic School Board (Boards). STS was a student transportation consortium established in 2008 in accordance with the direction of the Ministry of Education (Ministry). It was a non-profit corporation formed to implement and administer competitively determined practices for transportation services for the Boards. The consortia were to replace the practice of having individual school boards negotiate for transportation services with an Association of area school bus operators as there was little competition, no bidding, and the contracts rarely changed.

The Ministry released procurement guidelines and an RFP template after December 2008. Concerns were expressed about the ability of small bus lines which had historically operated in rural areas to be able to compete under the new system. By September 2010, STS had approved a five year operational plan which included procurement by way of RFPs. In January 2011, STS issued its first RFP. When the results were announced in March 2011, the Plaintiffs lost a significant number of bus routes, as did many other companies in the catchment area. The second RFP did not affect either of the Plaintiffs, and at issue in this motion was the third RFP.

In determining whether to grant an injunction, the Court had to apply the following three part test which had been laid out by the Supreme Court of Canada: (1) is there a serious issue to be tried?; (2) does the party requesting the injunction face the risk of irreparable harm if the relief is not granted?; and, (3) does the balance of convenience (or inconvenience) between the parties favour the granting of the injunction?

Turning to the first step of the test, the Court noted that it was only required to engage in a preliminary assessment of the merits of the case and only needed to be satisfied that the issues raised were not frivolous or vexatious. In this case, the Court found that the RFPs were only one available option for competitive procurement, and each organization had flexibility to explore other options to meet their transportation needs. The Court reviewed recent Court hearings involving other transportation consortia and noted that the *BPSAA* did not bar such a claim for

injunctive relief as the issues raised were novel, important and complex and it was not plain and obvious that the Plaintiffs' claims were certain to fail. The Court found that since the facts of this case were essentially the same as those in the other consortia cases, the serious issue to be tried threshold was met.

In determining whether there would be irreparable harm, STS argued that the entire RFP should not be delayed because the Plaintiffs only represented a small portion of the bus routes contracted for by STS. STS further argued that there was no guarantee that the Plaintiffs would not be successful in the RFP. Even if the Plaintiffs were not successful, any damages that might be suffered by the Plaintiffs would then be quantifiable and compensable (pending the Court's determination on whether the RFP process was unfair). The Plaintiffs argued the RFP structure pre-ordained that they would be unsuccessful in light of the results of the first RFP, and would suffer financial ruin as a result. The Court found the disastrous results were more than speculative, that loss of market share could result in irreparable harm, and that it would be unlikely that the Plaintiffs could ever recover from such potential losses if the RFP was allowed to proceed.

In determining the balance of convenience, the Court looked at which of the two parties would suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a Decision of the case on its merits. In this case, STS' position was that if the RFP was enjoined, STS would be in violation of the *BPSAA* and the Minister's Directives and would therefore be in violation of the law. STS would be forced to negotiate or extend existing contracts, requiring it to accept an uncompetitive pricing structure. However, the Court found that STS was the only consortia which had not already withdrawn or suspended its RFP processes, as other consortia had recognized that a final and proper determination of the issues best served the public interest. STS would be in no different position than the other consortia in the province if enjoined. The fact it may be in non-compliance with the law was not a compelling reason to refuse the injunction. Therefore, the Court found the balance of convenience favoured the Plaintiffs and having satisfied all three steps of the test, issued the interim interlocutory injunction. STS was obliged to defer its RFP pending trial, and the Plaintiffs were awarded costs for the proceeding.

This case is significant because it is the first time that an injunction has been issued to stop a student transportation RFP before its closing in a situation where an RFP process was required in order to comply with applicable law and regulations.

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CITT confirms bidders are required to seek clarification of requirements and cannot expect to negotiate after contract awarded

In *Teledyne Dalsa Inc. v Canada (Public Works and Government Services)*, [2012] CITT No 157, the Canadian International Trade Tribunal (CITT) dealt with a Complaint filed by Teledyne Dalsa Inc. (Teledyne) with regards to a Request for Proposals (RFP) issued by the Department of Public Works and Government Services (PWGS) for the development of a short-wave infrared (SWIR) camera for the Department of National Defence.

Teledyne had submitted a proposal but

alleged that PWGS arbitrarily and unfairly disqualified its proposal as being non-responsive. Teledyne further alleged that PWGS failed to exercise due diligence by not requesting that Teledyne clarify its position with respect to certain complex intellectual property rights prior to disqualifying its proposal.

PWGS argued that its actions were justified because Teledyne indicated in its proposal that the software and schematics for the SWIR camera would not be part of the deliverables and would remain the property of Teledyne. However, the requirements of the RFP noted that such intellectual property was to become the lawful property of the Crown as part of the procurement.

In this case, the CITT held that the main issue was whether PWGS violated article 506(6) of the *Agreement on Internal Trade,* which provides that "*tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria*".

In the CITT's view, the RFP at issue clearly identified certain items, such as technical drawings, descriptions, schematics and the source code of all software developed for the SWIR camera, as required deliverables. There was no indication that bidders could include statements in their proposals implying that the proposals were conditional on the modification of these requirements or that these requirements could be the subject of negotiations after the contract was awarded. As such, bidders could not state that they would retain some of the intellectual property rights associated with the deliverables. The CITT held that the RFP clearly stated that rights to all intellectual property developed or created as part of the work were to belong to the Government and, more importantly, that the Government would be granted a non-exclusive, perpetual, irrevocable, worldwide, fully paid and royalty-free licence to use, disclose or reproduce all previously existing intellectual property that is incorporated into the work. Here, Teledyne's proposal and Complaint both unambiguously and positively stated that certain previously existing intellectual property that would be incorporated into the SWIR camera would not be provided as part of the deliverables.

In its Reasons, the CITT further emphasized that in its previous Decisions, it had made clear that bidders bear the onus to seek clarification of procurement requirements before submitting a proposal. Consequently, if Teledyne had any concerns with the requirements as they pertained to the deliverables, or had any reason to believe that its interpretation of the requirements differed from that of PWGS, it should have raised such issues and sought clarification from PWGS before it submitted its proposal.

This Decision reaffirms that the onus of seeking any clarification is on the bidder. It further demonstrates that the bidder must be diligent in making sure it understands the parameters of the procurement, and that it cannot negotiate mandatory terms after a contract is awarded.

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CITT confirms rejection of bid for failure to provide details of experience as required by RFP

In *Professional Computer Consultants Group v Canada (Environment)*, [2012] CITT No. 159, the Canadian International Trade Tribunal (CITT) heard a Complaint related to

a Request for Proposals (RFP) issued by Environment Canada for business analysts under a Task-based Informatics Professional Services supply arrangement. In particular, the RFP called for the services of six business analysts, three at level 2 and another three at level 3. The Complainant, Professional Computer Consultants Group, responded to the RFP and its proposal contained details of the work experiences and certifications of three level 2 business analysts and another three at level 3, including DH. But its proposal was declared non-responsive by Environment Canada for failing to meet the minimum score under the RFP's point-rated criteria requirement.

The Complainant claimed that its proposal was unfairly evaluated because Environment Canada gave no credit for the work experience of DH on Projects 7 and 8 listed in its proposal, allegedly contrary to the terms of the point-rated criteria in the RFP. Environment Canada argued that DH's work experience was not considered because the Complainant failed to comply with mandatory detail requirements in its proposal with respect to projects worked on by DH. In particular, Environment Canada noted that the RFP required bidders to set out the work experience of each business analyst in detail, including the responsibilities and work performed by each analyst as well as the time period spent on each project. The RFP also provided that Environment Canada was permitted to disregard the experiences of any analyst if a proposal failed to provide the above noted details.

In its proposal, the Complainant presented DH's experience and credentials first, and Environment Canada started with him for its evaluation. In the judgment of the evaluation team, DH's resume and summary experience table did not contain the level of detail required by the RFP. For example, according to the evaluators, it was impossible for them to determine individual projects from the 108-month retainer that DH had claimed on Project 8. No start and stop dates were provided, neither was there a detailed breakdown of the individual tasks he performed. Consequently, DH received a grade of 40.3%, well below the minimum 70%, and the Complainant's proposal was declared non-responsive.

The Complainant took the position that it was improperly disqualified because Environment Canada applied an overly narrow interpretation of "project" not found in the RFP to DH's resume and summary table of experience. The Complainant argued that Environment Canada's narrow approach allegedly impacted the point-rated criteria such that the Complainant failed to receive the benefit of a full and proper evaluation.

It is important to note that before turning to the main issue in the case, the CITT first had to deal with a preliminary issue. Environment Canada sought to introduce additional grounds for why the Complainant's proposal was non-responsive (i.e. missing corporate information), which were discovered subsequent to the evaluation of the proposal. However, the CITT held that it would be improper to inquire into these additional grounds. In particular, the CITT noted that subsection 30.14(1) of the *CITT Act* provides that, in conducting an inquiry, it must limit its considerations to the subject matter of the Complaint.

After dealing with the above noted preliminary issue, the CITT noted that the main issue in the Complaint centered on the meaning of the term "project" as it was used in the RFP. The CITT held that, in drafting

the RFP, it was open to Environment Canada to rely upon the ordinary meaning of project or include a particular definition of the term. In this case, Environment Canada did not include a particular definition of the term in the RFP. Therefore, for the purpose of interpreting the RFP, the ordinary dictionary meaning of the term was applied. In applying the ordinary meaning of the term project, it was clear that the Complainant failed to provide full details regarding the projects which DH had worked on. Therefore, CITT concluded it could not find any reason to disturb Environment Canada's conclusion that DH's experience summary table was not broken down into discrete projects, as required by the RFP.

In conclusion, the CITT noted that once the Complainant failed to comply with the mandatory requirement to present experiential information in a certain form and level of detail, it could not then complain that the experience was not counted and that it suffered the consequences stipulated in the RFP.

This case demonstrates the importance of complying with the detailed information requirements under an RFP, as the failure to do so may result in a proposal being declared non-responsive.

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CITT confirms tender non-compliant for failure to comply with insurance requirements

In *C3 Polymeric Ltd. v National Gallery of Canada*, [2013] CITT No 6, the Canadian International Trade Tribunal (CITT) dealt with a Complaint related to an Invitation to Tender (ITT) issued by the National Gallery of Canada (NGC) for the replacement of the insulating glass units enclosing the Great Hall of the museum and for the reconstruction of 13 small roofs.

The Complainant alleged that the NGC improperly declared its proposal non-compliant with certain mandatory insurance requirements of the ITT. Furthermore, the Complainant also alleged that the NGC treated its proposal unfairly because other submissions did not comply with the mandatory insurance requirements but were not disqualified. As a remedy, the Complainant requested to be awarded compensation for loss of opportunity, its costs incurred in preparing its bid and its Complaint, and an Order postponing the award of the contract.

According to the NGC, the ITT indicated that it was mandatory for bidders to provide proof, in the form of an insurance certificate or letter of undertaking from the bidder's insurance carrier, that the insurance carrier was able to provide the detailed coverage specified in Appendix C of the ITT. The NGC submitted that the Complainant's proposal was properly disqualified, because it did not address broad form completed operations coverage (BFCO) and broad form contractor's equipment coverage, both of which were required in Appendix C. The NGC further noted that, before disqualifying the Complainant, it consulted an insurance expert who advised that the letter from the Complainant's insurer did not meet the requirements of the ITT because it omitted the two elements noted above, and these elements were deemed essential for the contemplated project.

The Complainant argued that the ITT only required bidders to describe their insurance coverage in broad terms and that the specifics of its policy should have been inferred from its insurer's letter and standard practice. The Complainant further argued that BFCO coverage was included in its commercial general liability (CGL) policy which was set out in its proposal, and that it is common knowledge that broad form coverages are standard inclusions in CGL policies issued to Canadian contractors. In this regard, the Complainant filed brochures from various insurers to support its view that a standard CGL policy automatically or implicitly contains the BFCO coverage that was required under the ITT. In addition, the Complainant submitted that it was incumbent on the NGC to follow up with the bidder or the insurer in order to obtain confirmation regarding any questions about insurance coverage. Accordingly, the Complainant submitted that its proposal was wrongly disqualified.

In regards to the Complainant's first allegation, the CITT concluded that the NGC reasonably interpreted the insurance requirements of the ITT. The ITT provided that it was mandatory for bidders to provide proof that their insurance carrier would be able to provide the detailed coverage specified in Appendix C; however, the Complainant failed to provide such proof. Contrary to the Complainant's submissions, it was not clear to the CITT that all CGL policies would also automatically contain the required BFCO and broad form contractor's equipment coverages. The CITT further held that, while it may choose to do so in some circumstances, a procuring entity is under no obligation to seek clarification of a proposal which falls short of demonstrating how it meets the evaluation criteria set out in the solicitation documents.

With regards to the Complainant's second allegation, the CITT held that the NGC did not breach its duty to treat all bidders fairly. While another bidder, Vision, failed to specify its insurance deductible, that was not a material omission. In contrast, the Complainant's proposal was determined to be non-compliant because it omitted mandatory information. Furthermore, Vision was nevertheless disqualified at a later stage of the procurement process and the winning bidder fully complied with the mandatory insurance requirements. Therefore, there was no discrimination or unfair treatment against the Complainant's bid.

This Decision stresses the importance of ensuring that all mandatory information is clearly set out in a proposal. A bidder should not describe its insurance policy in broad terms and assume that the procuring entity will infer the specifics of the policy.

— KC LLP —

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