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Court of Appeal confirms application of exclusion of liability clause

In *Rankin Construction Inc. v. Ontario*, 2014 ONCA 636, the Ontario Court of Appeal (Court of Appeal) had to decide whether or not the lowest bid for a contract complied with the terms of an invitation to tender.

In this case, the Ministry of Transportation (MTO) had issued an invitation to tender for a highway widening project. Rankin Construction Ltd. (Rankin) submitted a bid, which was the lowest amount of all the bids. The MTO determined that Rankin's bid was non-compliant and awarded the contract to the second-lowest bidder. Rankin brought an Action against the Province of Ontario, claiming for $5 million in lost profits, because the MTO acted improperly in failing to accept Rankin's tender. At trial, the Trial Judge dismissed the Action. Rankin appealed this Decision to the Ontario Court of Appeal. Though the Court of Appeal disagreed with the Trial Judge's reasons, it reached the same conclusion and dismissed the Appeal.

The Court of Appeal reviewed the factual background to the tender. The MTO had required bidders to declare the value of any imported steel that they proposed to use in the project. Tenders were to be ranked based on the lowest "Adjusted Tender Amount". In calculating this amount, bidders received a 10% discount for domestically supplied steel; however, the tender document specifically provided that H-Piles – one of the steel components required for the project – were not eligible for the 10% price preference for Canadian content. Rankin mistakenly believed that H-Piles were available domestically and failed to declare the value of the H-Piles as imported steel (the value being approximately $500,000). This failure allowed Rankin to obtain the 10% price preference for the H-Piles, contrary to the terms of the tender, and its Adjusted Tender Amount was therefore $50,000 less than it should have been. Rankin's tender was the lowest overall. It is interesting to note that had Rankin accurately calculated its Adjusted Tender Amount, it still would have been $1.7 million lower than the next lowest tender. Hard Rock Paving, the next lowest bidder, complained that regardless of the corrected amount still being lowest, Rankin's bid was non-compliant and the contract should be awarded to Hard Rock Paving. The MTO sought legal advice and concurred that as a non-compliant bidder, the contract could not be awarded to Rankin, and subsequently awarded it to Hard Rock Paving.

The Court of Appeal reviewed the law of tender, and the Contract A/Contract B analysis, whereby the tender call creates Contract A between the parties and sets the terms for entering into Contract B, which is the performance of the subject matter of the tender. Contract A is generally formed when one party requests a tender on specific terms and the second party submits a tender. Breach of Contract A may, depending on its terms, give rise to contractual remedies for non-performance even if Contract B is never entered into or, as in this case, it is awarded to a competitor. This legal approach to tenders then provides unsuccessful bidders with a contractual remedy against an owner who departs from its own bidding rules.

The Trial Judge had concluded that the failure to declare the value of the H-Piles as imported steel constituted material non-compliance with the tender documents; and the non-compliance prevented Rankin from accepting the MTO's invitation to tender. Accordingly, no Contract A was formed, and Rankin could not sue for its breach.

The Court of Appeal disagreed with the Trial Judge. It found that Contract A was formed when Rankin submitted its bid. Material non-compliance did not prevent the formation of Contract A; however, it did mean that pursuant to the express or implied terms of that Contract A, Rankin could not be awarded Contract B, even though it was the lowest bidder. The Court of Appeal found evidence in the MTO's Instruction to Bidders that it intended that a Contract A would come into effect, even if the tender submitted was non-compliant. The Court of Appeal implied a term that the MTO would not award Contract B to a non-compliant bidder, if the non-compliance were otherwise more than a "formality". The Court of Appeal concluded that:

"…where an owner has the discretion to waive formalities and exercises that discretion reasonably and in good faith, it cannot be sued for failing to waive a 'formality' and entering into a Contract B with a non-compliant bidder. Here, the MTO acted in good faith, and its conclusion that the appellant's non-compliance was more than a formality – whether or not correct – was reasonable."

Rankin also argued that the MTO could not investigate its bid for non-compliance. The Court of Appeal determined that though the MTO did not have an implied duty to investigate allegations of non-compliance, it did not follow that the MTO did not have the right to investigate allegations of non-compliance, unless the tender documents precluded it from doing such. The Court of Appeal declined to

imply a term into the document that precluded the MTO from doing so.

A further issue raised in the appeal was whether Rankin's claim was barred due to a provision in the MTO's Instructions to Bidders. The Instructions to Bidders contained a clause which read:

"The Ministry shall not be liable for any costs, expenses, loss or damage incurred, sustained or suffered by any bidder prior, or subsequent to, or by reason of the acceptance or the non-acceptance by the Ministry of any Tender, or by reason of any delay in acceptance of a Tender, except as provided in the tender documents."

The Trial Judge and the Court of Appeal both concluded that Rankin's claim for damages arose out of the MTO's acceptance of Hard Rock Paving's bid, and the non-acceptance of Rankin's bid. It was therefore clearly covered by the wording of this provision; even if the MTO had erred in considering that Rankin's bid was materially non-compliant, it was not liable to Rankin.

The Court of Appeal dismissed the Appeal and ordered Rankin to pay $10,000 in costs. ■

Court of Appeal confirms indicia of tender

In *Topsail Shipping Co. Ltd. v. Marine Atlantic Inc.*, 2014 NLCA 41, the Newfoundland and Labrador Court of Appeal (the Court of Appeal) heard an Appeal by Marine Atlantic Inc. (MAI) from a Decision awarding Topsail Shipping Co. Ltd. (Topsail) damages for lost profits associated with a tender call.

MAI had, since 1949, contracted for freight and passenger transportation services between Newfoundland and the Labrador coast. MAI had charter parties with Topsail, Canship Limited (Canship), and Puddister Shipping Limited (Puddister). Prior to 1997, MAI charter parties, usually awarded for a five-year term, were allocated by a public call for tenders. However, in the fall of 1996, the federal and provincial governments were debating which level of government would have future responsibility for these transportation services. This uncertainty prevented MAI from entering any new five-year charter parties when its two existing ones with Topsail and Canship expired. MAI, instead, requested proposals for two one-year charter parties with a possible one-year extension. The request was made to the three vessel owners, however, it was made apparent that Canship would get one and Topsail and Puddister would be competing for the second.

Both Topsail and Puddister responded to MAI's request. The original deadline was extended as negotiations between the levels of government were ongoing. During this extension, Topsail was informed that it was likely going to win the second charter party, and based on this, it turned down on an offer to sell its ship for $900,000, expecting that it would be awarded the charter party. However, also during this extension period, Puddister was allowed to submit a revised bid that was lower than Topsail's. In the end, MAI awarded the second charter party to Puddister.

Topsail subsequently brought an Action against MAI. At the Summary Trial, Topsail argued that, in accordance with tender law: (a) the vessel hire rates were the only criterion for selection of a second vessel, and (b) its bid was the lowest and MAI was bound to award the charter party to the lowest cost bidder. It further claimed that MAI engaged in bid shopping or manipulation by allowing Puddister to reduce its rates from those in its original tender by the deletion of a separate rate for handling cargo and lowering its day rate. Topsail sought an award for loss of profits respecting the charter party and loss of opportunity regarding the lower price it ultimately accepted on the sale of its vessel ($822,000). At the Summary Trial, Topsail was only successful on its claim for loss of profits.

MAI appealed the Decision, claiming that the Trial Judge erred in the following four respects: (1) in finding that MAI's procurement process

constituted a call for tenders rather than a request for proposals; (2) in finding that MAI breached a duty of good faith owed to Topsail because MAI had conducted a "Contract A / Contract B course of dealings" with Topsail and Puddister which required MAI to award the charter party to the lowest bidder; (3) in finding that MAI engaged in "bid shopping" or "bid manipulation" with respect to Puddister's quoted rates; and, (4) in holding MAI liable in damages for Topsail's loss of profits.

The first issue for the Court of Appeal was to determine whether MAI's request was for proposals or for tenders. The Court of Appeal found that one of the definitive differences between a request for proposals and a request for tenders is whether the contract is automatically awarded to the lowest bidder. If it is, and absent any privilege clause allowing the owner to select otherwise, then it will likely be a call for tenders. If it is not so automatically awarded, but simply opens the door for further negotiating between the successful party and the owner, then it is more likely to be a request for proposals.

In this case, MAI's procurement process was not complex. The terms of the contract were to essentially remain the same as existed under the former charter parties; in fact, for Canship and Topsail, aside from price, it was going to be merely an extension of their expiring charter parties. The Court of Appeal determined that price was therefore the sole criterion; there was no proposal to be made by either bidder. Topsail and Puddister had effectively been pre-qualified to submit their rates and other surcharges that would be binding if and when MAI confirmed that it was required to continue its operations. MAI did not expressly reserve a right to award the charter party to a bidder other than the lowest bidder. The Court of Appeal agreed with the Trial Judge that MAI's request was a call for tenders. MAI was therefore precluded from discussing the bids with the parties during the tender call as a "*Contract A / Contract B course of dealings*" was in effect.

With regard to the determination that MIA engaged in bid shopping or manipulation, the Court of Appeal also agreed with the Trial Judge. In the circumstances, MAI was prohibited from negotiating the price with Puddister. However, not only did MAI request Puddister to lower its rates by deleting its hourly rate for working cargo but MAI also negotiated a further reduced dayrate which, ultimately, was approximately still ten percent higher than Topsail's original quoted day rate. The Court of Appeal found MAI's negotiations were consistent with a preference for Puddister's vessel, and sought to reduce Puddister's quoted rates without the knowledge of Topsail. The negotiation by MAI of reductions in segments of Puddister's bid price breached its obligation to treat bidders fairly.

The evidence further showed MAI had a clear preference for Puddister's vessel. MAI relied on undisclosed criteria to evaluate the bidders; it preferred Puddister who double-stacked containers on its deck and its deck crane had a higher lifting capacity than Topsails. Relying on such criteria, where they had not been disclosed in the procurement process, constituted a breach of MAI's duty of good faith and also supported Topsail's claim to damages for lost profits.

The Court of Appeal dismissed MAI's Appeal and upheld the award for loss of profits. MAI was also ordered to pay for Topsail's costs in the matter. ■

Court confirms indicia of non-compliant tender

In *Cobalt Construction Inc. v. Kluane First Nation*, 2014 YKSC 40, the Yukon Territory Supreme Court (Court) held a Summary Trial to determine an Application by Cobalt Construction Inc. (Cobalt) for a Declaration that the Kluane First Nation (KFN) breached its tender contract, and that Cobalt was entitled to damages for breach of contract.

In this case, KFN issued a public invitation to tender for the construction of road upgrades. The tender required the bidders to submit bid security with their bids. 19145 Yukon Corp., which was KFN's development corporation (Kluane Corp), Cobalt and a third company submitted tenders. Cobalt submitted the lowest bid and a bid security. Kluane Corp was the second lowest bidder but did not provide a bid security. The tender document required bidders to submit a bid bond as bid security. However, after the close of the bids, KFN asked for, and permitted, Kluane Corp to submit its bid security. KFN subsequently ranked Cobalt's bid in second place and awarded the project contract to Kluane Corp. Following this decision, Cobalt brought its Application before the Court.

KFN defended its decision to award the contract to Kluane Corp, arguing that Cobalt's bid was non-compliant because it failed to include a full list of subcontractors and falsely certified that Cobalt had made its best efforts to invite subcontract bids from businesses in the area. However, it was not until KFN submitted its twice-amended statement of defence that it first claimed Cobalt's bid was non-compliant.

The Court reviewed the law surrounding tenders. When a contractor bids in response to an invitation to tender, Contract A arises between the owner and every contractor that submits a materially compliant bid with the terms of the tender. It is therefore an implied term of Contract A that Contract B, the contract to complete the project, will only be awarded to a materially compliant bidder. If Contract B is awarded to a non-compliant bidder, there has been a breach of Contract A. Further, the breach of Contract A entitles the compliant bidder, who would have otherwise been awarded Contract B, to damages for the lost profits it otherwise would have received.

The Court found that Kluane Corp's bid was materially non-compliant; it failed to submit a bid security, which was a material requirement in the tender. KFN did not attempt to prove otherwise. KFN argued, instead, that Cobalt's bid was also materially non-compliant and that it could not be faulted for rejecting it. In the tender document, bidders were required to list "*all subcontractors proposed for the Work, including the use of Own Forces for the trades, if any*." KFN claimed that Cobalt had failed to include a full list of subcontractors and own forces for the trades because it did not include its employees who operated road construction machinery. The Court rejected this argument. The use of the word "including" meant that Cobalt was only required to list any employees working in a trade, if those employees were also acting as subcontractors. There was no evidence that Cobalt failed to include employees working in a trade who were also acting as subcontractors. Further, the Court found that employees operating road construction machinery were not "*Own Forces for the trades.*" The inclusion of "*if any*" at the end of the requirement meant that KFN contemplated there would be employees who were not "*for the trades*", otherwise the "*if any*" would be redundant if every employee working on the project was "*for the trades*". The Court concluded that the absence of any of Cobalt's own forces from the list did not render the bid non-compliant.

KFN also claimed that Cobalt falsely certified that it had made its best efforts to invite subcontract bids from businesses in the area. The requirement to do so was an effort to create an employment opportunity for local youth, unemployed and underemployed. Cobalt had not invited any such bids. The Court found that Cobalt had not made a false statement though; it simply had no need to rely on any such individuals. The only subcontractor Cobalt met with was Yukon Engineering Services for assistance with the engineering portion of the work. The fact that Cobalt had no need to invite any subcontract bids from anyone else did not mean that it had falsely certified it had made best efforts to do so; the need to do so simply did not arise.

The Court concluded that Cobalt had submitted the highest-ranked, materially compliant bid and it should have been awarded the construction contract for the project. Cobalt

was entitled to damages equal to the amount of profit it would have received had KFN not breached its contract. The Court awarded Cobalt $318,251 and its costs in the matter. ■

Court confirms duty to consult First Nations re proposal

In *Da'naxda'xw/Awaetlala First Nation v. British Columbia Hydro and Power Authority*, 2015 BCSC 16, the British Columbia Supreme Court (the Court) heard an Application for Judicial Review brought by the Kleana Power Corporation (Kleana) and the Da'naxda'xw/Awaetlala First Nation (the DAFN) (collectively referred to as the Applicants).

By way of background, Kleana was an independent developer and operator of hydro-electric projects. It proposed a run-of-the-river hydro-electric project on the Klinaklini River (the Project) which was within the DAFN's asserted traditional territory. Kleana wished to submit a proposal to a Clean Power Call, issued by the British Columbia Hydro and Power Authority (BC Hydro), for an energy purchase agreement for the sale of electricity generated from the Project to BC Hydro. The DAFN considered the Project to be an economic opportunity consistent with its cultural and ecological interests. However, the proposed boundary of a protected conservancy area that was within the DAFN's traditional territory created a barrier to the Project. The DAFN undertook to amend the boundary line so that the Applicants could proceed with the Project.

The Applicants claimed that during discussions about amending the boundary, they received an assurance from the Minister of Energy, Mines and Natural Gas (the Energy Minister) that if Kleana lost the opportunity to participate in the Clean Power Call due to any delay in amending the boundary, then, when the Project was in a position to proceed, the Energy Minister would direct BC Hydro to enter into negotiations with Kleana for an energy purchase agreement at a price for power that was linked to the results of the winning bids in the Call. The Applicants claimed that the Energy Minister's assurance was clear, unambiguous and unqualified.

The Applicants legal proceedings to amend the conservancy boundary ultimately required the Applicants to take the Energy Minister to Court. Legislation had been passed during the process which significantly delayed amending the boundary. After resolving the legal issues, the boundary was amended. However, the Energy Minister refused to honour the assurance and commitment given to the Applicants by his predecessor and direct BC Hydro to enter an agreement with them (the Direction). The Applicants brought this Application for Judicial Review, requesting an Order that the Energy Minister give the promised Direction.

The Court first determined that there was a sufficient statutory basis to ground the Energy Minister's power to make the Direction as a statutory power and it was therefore reviewable. However, the scope of the Energy Minister's power was limited, since BC Hydro was, by law, a separate and autonomous legal entity. Thus, the Energy Minister did not exercise supervisory control over BC Hydro. The Energy Minister did not have the power to bind BC Hydro to future contractual terms with a third party such as Kleana. He did not have the power to direct BC Hydro to conclude an energy purchase agreement with Kleana, and he did not have the power to direct BC Hydro to confine any negotiations with Kleana within certain predetermined limits (particularly in relation to price). Of importance, the Court found that the Energy Minister had made it clear to the Applicants just how narrow his authority over BC Hydro was. The Court found that the Energy Minister had not made a clear and unambiguous commitment in the terms asserted by the Applicants. At best, the Energy Minister said that he would direct BC Hydro to negotiate a purchase agreement with them.

The Court did find that the Province of British Columbia had failed in its duty to consult with the DAFN when it passed the legislation that caused the delay to the boundary amendment.

But for that failure to consult, the legislation which ultimately caused the delay may never have been passed; and but for that delay, there may never have been a need for the Direction. Timely and meaningful consultations could have made all the difference, but instead, not only was there no meaningful consultation (until ordered by the Court), but the DAFN (through no fault of their own) were harmed by the delay. There was therefore a causal relationship between the government's conduct and the adverse impacts (both actual and potential).

In the end, the Court found that it could not order the Energy Minister to give the Direction as the Energy Minister did not have authority to do so. It dismissed the Applicant's Application. As for the Province's failure to consult with the DAFN, the Court concluded that the appropriate remedy was a declaration that the Province had failed in its legal duty to consult the DAFN with respect to these matters, and that it had a legal duty to do so, with a view to considering a reasonable accommodation for their interests. ■

Court reviews application of solicitor-client privilege

In *True Construction Ltd. v. Kamloops (City)*, 2014 BCSC 2125, the City of Kamloops (City) had issued a general invitation to bid for the construction of a fire hall. True Construction Ltd. (True Construction) submitted a bid on the project.

After the closing of the bid process, the City's bid process consultant recommended awarding the contract to True Construction. A few days later, one of the unsuccessful bidders, Tri-City Contracting (BC) Ltd. (Tri-City), had its legal counsel contact the City to ask questions about the bid opening. The City, fearing that Tri-City had retained counsel to challenge the procurement, delayed awarding the contract to True Construction and sought legal advice.

At an in-camera meeting of the City Council to determine the awarding of the construction contract, a "Staff Report", prepared by employees of the City, was presented. The Staff Report referenced the content of the legal advice provided to the City in respect of this matter. The result of the meeting was to disqualify True Construction's bid. True Construction sought production of the Staff Report but the City claimed it was subject to legal advice privilege. True Construction brought a Claim before the British Columbia Supreme Court (Court) for damages for breach of contract and/or for breach of the duty of fair and good faith. In this Preliminary Application, the Court had to determine whether or not the Staff Report should be produced.

The Court held that legal advice provided by a solicitor to a client, regularly protected by legal advice privilege, does not lose that protection when one officer or employee of the client passes that advice on to another. The Court reviewed the Staff Report and concluded that the advice contained within was covered by legal advice privilege. On one page of the Staff Report, reference was made to the conclusive legal opinion sought and provided.

True Construction argued that the City had impliedly waived any privilege over the Staff Report because it had placed its state of mind (the decision not to award the contract) in issue. The Court held that an implied waiver of privilege does not result merely from a party placing its state of mind in issue or disclosing that it has received legal advice. "*The party must actually rely upon the fact that it received legal advice as part of its case.*" While the City disclosed early that it received legal advice, it had not made its state of mind material by either its pleadings or its conduct. It was not actually relying upon the fact that it received legal advice as part of its case. The City's defence (its case) was based on its claim that True Construction's bid was materially non-compliant; that determination was not based upon legal advice. The City's state of mind pertaining to its understanding of the law and the lawful reasons for which a bid may be disqualified were not material to the central issue of whether True Construction's bid was

compliant. True Construction's Application was dismissed and it was ordered to pay the City its costs in the matter. ■

Privacy Commissioner reviews concept of financial or commercial information

The City of New Westminster (the City) had planned to build a new building complex and an office tower in partnership with a private developer. The City and the developer were to share the cost of building the tower, and they agreed upon a price that the developer would pay the City to buy the air space where the office tower would be built. The private developer pulled out of the project and the City built the office tower at its own cost, which it then sold to a new buyer as an air space parcel.

In *Order F14-50; New Westminster (City) (Re)*, 2014 BCIPC 54, the British Columbia Information and Privacy Commissioner (BCIPC) heard an Application requesting information about this project. Prior to the Application, the City, upon request, provided some records to the Applicant, but the Applicant was not satisfied and requested a review from the BCIPC. The City eventually provided all of the requested information, except for the price it originally proposed to sell it to the private developer for, claiming that the City could withhold, under section 17(1)(b) of British Columbia's *Freedom of Information and Protection of Privacy Act* (FIPPA), financial, commercial, scientific or technical information that belongs to a public body and that has, or is reasonably likely to have, monetary value if disclosing it could reasonably be expected to harm the financial or economic interests of a public body. Section 17(1)(f) authorizes a public body to withhold information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

The BCIPC found that the price negotiated between the City and the developer was financial and commercial information. However, this information did not have monetary value; disclosing the information could not reasonably be expected to result in a monetary loss to the City since it had already sold the property to a new purchaser. The price of the sale to the new purchaser had been disclosed to the public; it was therefore unreasonable to expect that disclosing the previous sale price, negotiated before the tower was built, could result in financial loss to the City. The original sale price was set for a specific buyer who was going to share the costs of building the tower with the City. This cost sharing arrangement affected the value of the tower, and since the tower was built solely at the City's expense, the original price no longer accurately reflected the value of the property. Section 17(1)(b) therefore did not apply.

For the same reasons, section 17(1)(f) did not apply as there was no negotiating position to be harmed by the disclosure. The City was no longer negotiating the sale; the sale was complete. The City had built the tower without a partner; it was no longer possible for the City to negotiate a price that reflected building the tower with a partner. The BCIPC rejected the City's argument that disclosing the information was likely to dissuade potential purchasers from negotiating with the City. Further, the BCIPC found that the City's argument that purchasers would not want to engage with the City if it could not assure them that negotiations would remain confidential was speculative.

The BCIPC ordered the City to disclose the original sale price for the project. ■

Court of Appeal reviews role of CITT

In *Saskatchewan Polytechnic Institute v. Canada (Department of Foreign Affairs, Trade Development)*, 2015 FCA 16, the Federal Court of Appeal (the Court of Appeal) heard an Application for Judicial Review brought by the Saskatchewan Polytechnic Institute (SPI). In the Application, SPI asked the Court of Appeal to review the Canadian International Trade Tribunal's (the CITT) Decision that a Complaint filed by SPI, in respect of a

Request for Proposal (RFP) issued by the Department of Foreign Affairs, Trade and Development (DFATD), was valid in part but that, in the circumstances, it was not necessary to recommend DFATD provide SPI with a remedy.

The RFP had sought proposals for professional services relating to the "Vietnam Skills for Employment Project" in Vietnam. SPI's bid was unsuccessful and it filed its Complaint with the CITT alleging that DFATD had not evaluated its proposal in accordance with the criteria provided in the RFP. SPI raised four specific grounds in its Complaint relating to DFATD's evaluation of four of the RFP requirements. Three of the grounds were rejected by the CITT. Though the CITT found that the evaluators' scoring had been reasonable based on the wording of the criteria and the content of SPI's proposal, it accepted SPI's fourth ground, in that the evaluation of certain sub-criterion had been done with reference to factors not disclosed in the RFP and therefore was unreasonable. Nevertheless, the CITT declined to recommend a remedy on the basis that the unreasonable evaluation was insignificant to the outcome of the process. Even if SPI had been awarded the maximum number of points under this component, its bid would not have been successful; SPI was therefore not seriously prejudiced by the result. As well, there were no allegations of bad faith on DFATD's part. The CITT concluded that there was no reason to recommend a remedy.

On Review, SPI argued that the CITT made a number of errors interpreting the RFP documents which lead to the unreasonable Decision that SPI would not have been the successful bidder. SPI argued that had the CITT correctly interpreted the documents, it would have found SPI was the successful bidder. SPI argued that the CITT further failed to find that the evaluators' scoring elsewhere was unreasonable and that it was improper for the CITT to defer to their evaluations.

The Court reviewed the Decision of the CITT. It did not find that the CITT committed a reviewable error. The Court emphasized that on an Application for Judicial Review, the Court is reviewing the CITT's decision, not the evaluators' scoring of the Applicant's proposal. The Court is not entitled to substitute its judgment for that of the CITT or the evaluators and can only set aside the CITT's decision if it falls outside "*a range of possible, acceptable outcomes which are defensible in respect of the facts and law*."

The gist of SPI's argument was that the CITT failed to properly weigh all of the information in the proposal. However, this was not the CITT's task when investigating the Complaint. Its role was to decide if the evaluation was supported by a reasonable explanation, not to step into the shoes of the evaluators and reassess the unsuccessful proposal.

"*The [CITT] approached the complaint in the correct manner and determined whether the evaluators' conclusions were defensible in light of the published criteria. It gave appropriate deference to the evaluators and its conclusions on each of the complaints fall within the range of acceptable outcomes. While [SPI] is clearly dissatisfied with the [CITT's] findings… its task on this application was to show that the decision was unreasonable given the record before the [CITT]. This it has failed to do*."

The Court dismissed the Application and ordered SPI to pay $2,500 in costs to DFATD. ■

CITT rejects use of extrinsic criteria in evaluation process

In *4Plan Consulting Corp. v. Shared Services Canada*, C.I.T.T. File No. PR-2014-030, the Canadian International Trade Tribunal (CITT) heard a Complaint by 4Plan Consulting Corp. (4Plan). 4Plan alleged that a Request for Proposal (RFP) for professional consulting services offered by Shared Services Canada's (SSC) improperly used references in the evaluation of 4Plan's bid, inconsistently and arbitrarily excluded projects proposed by 4Plan, and used undisclosed criteria to evaluate projects proposed by 4Plan. The RFP required 4Plan to identify past projects it had worked on to measure its prior experience. What constituted a "project" was never actually defined in the RFP documents. 4Plan complained that the evaluation criteria used to

determine its involvement in past-projects was either arbitrary, biased, or undisclosed, and therefore violated the applicable trade agreements, such as the *North American Free Trade Agreement*, the *Agreement on Internal Trade*, or the *Agreement on Government Procurement*, for example (collectively, the Agreements).

The CITT discussed that the Agreements require a procuring entity to provide its potential suppliers with all necessary information to permit them to submit responsive tenders, including the criteria which will be used for evaluating and awarding the contract. The Agreements require a tender to conform to the essential requirements set out in the tender documentation and that procuring entities award contracts in accordance with the criteria and essential requirements specified therein. A procuring entity meets these obligations when it conducts a reasonable evaluation in accordance with the terms of its RFP. The CITT will generally not substitute its decision for the evaluators' unless the evaluators have "*not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement or have based their evaluation on undisclosed criteria*."

Turning to 4Plan's allegations, the CITT found that the evaluators relied on extrinsic criteria, essentially using the references themselves to define what was a project. They accepted the references determination for their final evaluation. "*In doing so, the evaluators improperly abdicated their responsibility to evaluate the bids in favour of the unguided opinions of such references. The evaluators did not apply themselves in determining what constituted a project for the purposes of the RFP, but instead deferred this decision, relying on undisclosed criteria, to the references themselves.*"

The CITT also found that the evaluators randomly selected among the listed references, and used reference checks that were not listed in the relevant rated criteria. The evaluators failed to justify their uneven determination of which reference to contact. They therefore evaluated 4Plan's bid in an inconsistent and arbitrary manner. The CITT also found that there was differential treatment of projects with, at times, identical descriptive language, which demonstrated an unexplained inconsistency in the evaluation of projects that were deemed to involve the development of a costing framework. The evaluation was conducted in an arbitrary manner and undisclosed criteria were used by the evaluators to distinguish between the accepted and non-accepted projects. The RFP stated that points would be awarded for projects "*involving the development and implementation of costing frameworks*"; however, the CITT found that "*the projects were evaluated on the basis of whether or not they were, in their entirety, "costing framework" projects (i.e. and not simply projects involving costing frameworks)*." The CITT found that 4Plan's Complaint was valid.

In determining the appropriate remedy for SSC's violation of the Agreements, the CITT noted that since the contract had been awarded and partially performed, it could not be cancelled and re-awarded to 4Plan. 4Plan proved that it was only 30 points below the winning bidder; however, after correcting for the deficiencies in the evaluation, the CITT could only find 4Plan was entitled to 20 more points. However, the CITT declined to decide the remedy based on this assessment because the scoring/evaluation methodology was so fundamentally flawed. By using evaluation criteria that had no objective basis, and were either not defined or undisclosed, the CITT found that SSC effectively conducted a sole-source procurement under the guise of a competitive process. 4Plan was effectively prevented from having the opportunity to meaningfully participate in the procurement process. The CITT determined that the appropriate remedy was compensation "*for the lost opportunity to earn profit in the amount of the reasonable profit that it would have made, had it been awarded the contract.*" 4Plan was also awarded $2,750 in costs in the matter. ■

CITT rejects various complaints re evaluation process

In *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.*, C.I.T.T. File Nos. PR-2014-015 and PR-2014-020, the Canadian International Trade Tribunal (CITT) heard a Complaint brought by CGI Information Systems and Management Consultants Inc. (CGI). CGI alleged that Innovapost Inc., a subsidiary of Canada Post Corporation (together, Canada Post) breached Articles 1013(1) and 1015(4) of the *North American Free Trade Agreement* (NAFTA) by conducting an unreasonable and biased evaluation of CGI's proposal in response to its Request for Proposal (RFP) and breached Article 1017(1)(p) by destroying documents relating to the RFP.

Canada Post initiated the RFP to enter into a market-based contract with a vendor of data centre services. Data centre services were defined as the technology and facility-related components and activities required to support a data centre, which itself is an environment providing processing, storage, networking, management and distribution of data to an organization. CGI was not awarded the contract, and requested a debriefing with Canada Post to discuss why its bid was not selected. After meeting multiple times with Canada Post, CGI still did not understand why it was not successful. It claimed that the debriefing was deficient, and that Canada Post had departed from its published evaluation plan, resulting in a biased evaluation of CGI's bid. CGI's concern was that, *"in addition to failing to assess CGI's proposal in accordance with the rated requirements in an objective and fair manner, Canada Post [had] utilized subjective, non-disclosed and improper criteria*." CGI filed its Complaint with the CITT. It filed a further Complaint when it determined that Canada Post had destroyed the evaluators' individual scoring sheets.

A preliminary issue was whether the CITT had jurisdiction to hear this Complaint. The CITT reviewed the procurement documents and process and was satisfied that the RFP was in respect of a "designated contract" under NAFTA and subsection 30.11(1) of the *Canadian International Trade Tribunal Act* (CITT Act). Accordingly, the Tribunal had jurisdiction to inquire into this complaint.

A second preliminary issue was whether or not CGI's Complaint was timely. Where no objection to an RFP was raised, CGI had 10 working days from the date on which the basis of its Complaint became known (or reasonably should have become known) in order to file its Complaint with the CITT. Where CGI had made an objection to the government institution, it had 10 working days from the date on which its requested relief was denied by that government institution in order to file its Complaint. To determine whether CGI had raised an objection, the CITT had to determine whether CGI's letter to Canada Post, which denounced the debriefing as deficient, "*contained sufficient specificity to enable Canada Post to deal with CGI's concerns*." The CITT held that the letter was sufficient to be an objection; it would be unfair for Canada Post to claim the objection letter lacked sufficient detail when it was Canada Post that had refused to disclose a meaningful explanation for CGI's evaluation. The CITT reinforced though that "*whether or not an objection letter is sufficiently precise will depend on all the facts and circumstances in a given case and, thus, must be assessed on a case-by-case basis*." Looking at the level of detail in CGI's letter, as well as the discussions that had occurred between CGI and Canada Post, the CITT determined that there was sufficient information for Canada Post to understand and respond to CGI's concerns. CGI's complaint was not found to be untimely.

The CITT next dealt with CGI's allegation that Canada Post intentionally destroyed evidence (the evaluators' individual scoring sheets). The CITT found this Complaint was unfounded. Though the documents were destroyed intentionally and they were relevant to the

Complaint, there was no evidence that the destruction occurred at a time when litigation was contemplated or that Canada Post intended to affect such litigation; at the time, they were not yet "evidence". While Canada Post had not intentionally destroyed evidence, it had intentionally destroyed procurement process documents. There was therefore a breach of Article 1017(1)(p) of NAFTA which prohibits destroying procurement process documents. The CITT reinforced that "*proper retention of documents is an integral part of a fair procurement process*."

The CITT turned to CGI's Complaint that Canada Post's evaluation breached Articles 1013(1) and 1014(1) of NAFTA. It argued that: the rating scale used by the evaluators was inconsistent with the terms of the RFP; the evaluators had preferences for certain characteristics over others, which had not been disclosed in the RFP; and, they evaluated several specific aspects of CGI's proposal unreasonably, including an allegation that the evaluation was tainted by improper considerations. The CITT found that none of these Complaints were substantiated.

The rating scale was not disclosed in the RFP. The CITT held though that the relevant question was whether this caused unfairness to bidders because they could not have expected, from reading the RFP documents, that they would be evaluated in the manner set out in the rating scale. The CITT found that the RFP provided Canada Post would evaluate the extent to which a bid met the RFP's requirements, and that Canada Post would do so, in part, "*on the demonstration and evidence provided to show exactly how and why the bid would meet the requirements and the stated evaluation criteria*." The bidders should have drawn the reasonable and necessary implication that, in the context of a competitive RFP, the better they substantiated their solutions and showed how they met the requirements, the better they were likely to score. The CITT concluded, "*while the basis of evaluation announced in the RFP was sufficiently broad to be translated into different variations of rating scales, importantly, the rating scale that Canada Post chose to use [was] entirely consistent with what was indicated in the RFP*." The CITT further commented that it appeared that CGI may have made the decision to not seek further information regarding the allocation of points in the evaluation, which undermined its Complaint. The CITT dismissed this Complaint.

CGI's Complaint that the evaluators relied on undisclosed preferential characteristics was based upon the evaluators' scoring sheets containing an additional column which identified certain "*characteristics of an excellent response*" for each evaluated criterion. The CITT found that the identified characteristics of an excellent response were not used as undisclosed evaluation criteria or preferences; they were not allocated points in the rating system. This ground of the Complaint was dismissed.

The CITT turned to CGI's last ground of its Complaint, in that the assessment of its bid was unreasonable or biased. The CITT found that there was no evidence on the record whatsoever that could support a finding of bias or of a reasonable apprehension of bias. Canada Post imposed a procedure whereby bids were evaluated individually by its evaluators, and then the evaluators collectively discussed the bids and determined a score based upon consensus. The fact that CGI's scores tended to be lower after the consensus discussions and that other bidders' scores tended to be higher was not reflective of any prejudice against CGI or in favour of other bidders. The CITT recognized it generally affords considerable deference to evaluators' decisions and it was not prepared to reanalyze those decisions. It dismissed this ground of CGI's Complaint.

As discussed above, the CITT had found that Article 1017(1)(p) of NAFTA was breached when Canada Post destroyed the evaluators' sheets. The CITT found this had caused CGI considerable prejudice. The lack of information led to CGI becoming suspicious and, had the information been provided, the Complaint may have been avoided entirely. However, the

violation occurred after the award of the contract, and the procurement process itself had been reasonable. The parties were all held to have acted in good faith. The violation was therefore inconsequential to the procurement process. The CITT recommended that "*Canada Post Corporation…change its policies and practices regarding the preservation of documents related to a procurement process so that they are consistent with the requirements of Article 1017(1)(p) of NAFTA…*". The CITT did award CGI $4,700 in costs though. ■

CITT rejects complaint re alleged sole sourcing

In *Oracle Canada ULC v. Canada (Department of Public Works and Government Services)*, [2014] C.I.T.T. No. 118, the Canadian International Trade Tribunal (the CITT) heard a Complaint brought by Oracle Canada ULC (Oracle) concerning the Department of Public Works and Government Services' (PWGSC) Request for Proposal (RFP) for the provision of common and shared case management software solutions (CMSSs) within the federal government.

Oracle alleged that PWGSC's actions after the contract was awarded amounted to sole-source procurements and therefore were in violation of trade agreements. Oracle claimed that PWGSC improperly accepted the delivery of software that was not bid and that did not meet the mandatory requirements of the RFP, in that it was not commercially available or publicly announced before the bid closing date. Oracle also argued that PWGSC wrongly issued certain task authorizations to the successful bidder, Sierra Systems Group Inc. (Sierra), and thereby violated the terms of the RFP.

The factual background was that PWGSC had issued an RFP for the CMSS and awarded it to Sierra. A component of the RFP involved the provision of software, including Microsoft Dynamics CRM 2011. However, after the contract was awarded, PWGSC issued amendments to the contract to purchase additional licenses and maintenance and support services. It also authorized Sierra to install the CMSS, among other things. Oracle eventually learned that Sierra actually provided PWGSC with Microsoft Dynamics CRM 2013 instead of the 2011 version, and launched its Complaint.

Oracle alleged that the 2013 version of the software was not bid and did not meet the mandatory requirements of the RFP. It was not "commercially available" or "publicly announced" before the bid closing date (which were both mandatory requirements of software in the RFP) but only became available six months, and publicly announced two months, after the bid closing date. Oracle alleged that PWGSC could not accept the 2013 version because it was a completely different or new product from what Sierra had bid.

The CITT found that the 2013 version was not new or different from what Sierra had bid. It was simply an upgrade or improvement; it was "*Microsoft Dynamics CRM 2011 plus upgrades*." The RFP required the winning bidder to provide all updates, upgrades, versions and improvements of the software throughout the life of the contract. Had Sierra originally delivered the 2011 version to PWGSC, it would have been required to provide any and all upgrades and improvements eventually. "*Stated another way, on the basis of the terms of the RFP, PWGSC was fully entitled to expect and require delivery of Microsoft Dynamics CRM 2011 in its most up-to-date incarnation and, therefore, in the form of Microsoft Dynamics CRM 2013 at the time of contract performance.*" The RFP included a guarantee against obsolescence of what it was procuring for a requisite period. Sierra complied with this obligation. PWGSC therefore accepted precisely what had been requested for in the RFP and there was no basis for this ground of Complaint.

The CITT further concluded that there was no factual basis for Oracle's second Complaint. It dismissed Oracle's Complaint in whole and awarded PWGSC $2,750 for its costs in defending the Complaint. ■

— KC LLP —

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