Keel Cottrelle LLP
www.keelcottrelle.com

Toronto —
36 Toronto St. Suite 920 Toronto ON M5C 2C5
416-367-2900 fax: 416-367-2791

Mississauga —
100 Matheson Blvd. E. Suite 104 Mississauga ON L4Z 2G7
905-890-7700 fax: 905-890-8006

Public Sector

Procurement Law Newsletter

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Court confirms the principle of good faith as a requirement in tendering

In *Elan Construction Limited v South Fish Creek Recreational Association* (2015 ABQB 330), the Alberta Court of Queen's Bench found that the owner's tender evaluation criteria was unfair and did not reflect the terms of the tender.

In 2007, the South Fish Creek Recreational Association (SFCRA) decided that the South Fish Creek Recreation Complex (Complex) would be expanded, by adding two more ice surfaces, as well as multi-purpose rooms and other spaces to the facility (Project).

SFCRA organized a building committee (Building Committee) to help facilitate the project, which consisted of a number of employees and volunteers with a budget of approximately $19 million, inclusive of all costs related to the Project. Funding for the Project came from the City of Calgary contributing approximately $14 million; the Province of Alberta contributed approximately $3.2 million; and the federal government contributing approximately $1 million. SFCRA also raised approximately $800,000 for the Project.

In July 2010, SFCRA issued an invitation for tenders for the General Contract for the Project. The Quinn Young Architects (QYA) prepared the Invitation to Bid and the Instructions to Bidder (collectively referred to as the Bid Documents). The City of Calgary required that the invited bidders to have been prequalified for the category of general contractor by the City of Calgary supply management. Prequalification consisted of mainly financial capacity and Occupational Health and Safety requirements. Elan Construction Limited (Elan) had been a prequalified bidder for several years.

The Bid Documents set out the evaluation criteria, which were based on a matrix, to be scored out of 100, with 35 points allocated to "Price", 35 to "Date of Completion", 20 to "Previous community and arena experience", and 10 points for "References for above projects." The problems for SFCRA arose with the implementation of these seemingly reasonable criteria.

Out of eleven bids that were received, the General Contract was awarded to Chandos Construction Ltd. (Chandos), which was on the prequalified list. As a result, Elan was not awarded the contract and brought an action for damages.

The parties agreed that a tendering Contract A, as described by the Supreme Court of Canada in *R v Ron Engineering and Construction (Eastern) Ltd.* (1987 1 SCR 111), arose between Elan and SFCRA. Elan alleged that SFCRA breached Contract A, including an improper awarding of Contract B, negotiating with another bidder during the bid evaluation process and evaluating the bids on the basis of several undisclosed criteria. Elan further argued that if the bids had been evaluated fairly and in accordance with the matrix, it would have been the successful bidder, since Elan's bid price was the lowest, and showed a substantial completion date of August 1, 2011, that matched the one provided in the bid documents.

SFCRA denied that it breached Contract A and relied on the exclusionary language in Article 5 of the Invitation to Bidders as "a complete defence to Elan's claim", which stated:

5.1 The Owner reserves the right to reject any or all Bids received and also reserves the right, if it is in its interest to do so, to waive informalities in the Bid or failure to comply with all bidding requirements. The lowest Bid will not necessarily be accepted.

5.2 By submitting a Bid, the bidder acknowledges and agrees that the Owner has, and is hereby entitled to exercise, the sole and unfettered discretion to award the points for the evaluation of the criteria noted below.

5.3 By submitting a Bid, each bidder acknowledges and agrees that it waives any right to contest any legal proceedings regarding the decision of the Owner to award points under the criteria noted below.

Elan asserted that, similar to all contractual provisions, the exclusion clauses must be interpreted in the context of the entire agreement. Elan argued that the Bid Documents clearly indicated the fact that the bids would be evaluated in accordance with the matrix, which did not occur. Moreover, Elan raised the fact that discretion must be exercised in good faith and on the basis of pertinent considerations, in order to ensure fairness to all bidders and to protect the integrity of the tendering process.

The court agreed with Elan's position that SFCRA's tender scoring method was contrary to the reasonable expectations created by the bid documents and that it is contrary to the principle of fairness to invite parties to prepare bids only to decide how those bids will be scored after they have been opened.

Notwithstanding that there was no finding of dishonesty or act of malice on the part of SFCRA, the court stated that a duty of good faith requires more than honesty. It specifically requires, "honest, candid, forthright or reasonable contractual performance" in the tendering context, and that SFCRA had an obligation to evaluate all of the bids fairly and consistently. That obligation required it to assess the bids in accordance with the reasonable and legitimate contractual expectations of the bidders. The Court held that to evaluate the bids and award points in a significantly different manner than that expressly stated was contrary to the duty of

honesty and good faith, which was set out in the *Bhasin v Hrynew (2014 SCC 71) decision.*

In the procurement context, where a party has breached Contract A, a bidder who would have been awarded Contract B, but for the breach, is entitled to either damages for lost profit or damages for the costs incurred in the preparation of the bid. A bidder cannot recover under both categories. Having found that SFCRA breached its Contract A obligations, *the court then had to determine the damages award*.

Elan presented its lost profits claim based on a 5% profit margin, which was calculated after showing its historical range with an average of 13%. The court agreed this was a reasonable starting point, but then discounted it by specific factors it took into considerations.

The court looked at the actual construction project to determine the measure of Elan's lost profits. There were a number of challenges that the Project faced, such as having to replace two subcontractors at significant cost; experiencing an unusually cold winter, which resulted in delays; and, design and engineering issues also causing major delays, which all amounted to the Project being unprofitable. It was the court's view that Elan would have also faced the same complications, had it been awarded the contract. Additionally, SFCRA found an error in Elan's bid, whereby one of its subcontractors had submitted an incorrect low bid. Accordingly, the court found that given site conditions and the unprofitability of the actual Project, the lost profits amounted to zero. However, the court did award $1,000 in damages as a result of SFCRA's breach of Contract A.

This case illustrates the courts' willingness to scrutinize owners for failing to apply the criteria it sets out for bid contracts and the application of the principle of good faith in the tendering process. The lost profits of zero is a cautionary outcome for bidders to be realistic about damages before embarking on such claims. ■

Court dismissed action for alleged intentional interference with economic interest and bad faith on the part of an owner in a tendering contract

The Ontario Superior Court recently dismissed an action for intentional interference with economic interest and damages for acts of bad faith on the part of the owner in *Weinmann Electric Ltd. v Niagara (Regional Municipality)* (2016 ONSC 2201).

In 2010, Weinmann Electric Ltd. (Weinmann), which operates as an electrical contracting company and has provided service for various municipalities and institutions in Ontario, was asked to provide a tender quote on a subcontract with the general contractor Rankin Construction for the defendant, the Regional Municipality of Niagara (Region), for road lighting needs on a construction project on Highway 20 in the Region.

The tender documents were received and reviewed by Mr. Troppazini, who was the majority shareholder of Weinmann, including all of the Region's specifications, which required the supply and installation of 47 streetlight poles on a per unit cost basis. He then submitted Weinmann's quote which was accepted by Rankin. Mr. Troppazini admitted that upon his review of the tender documents, Weinmann agreed to supply poles manufactured by a company called Pole-Fab as he knew they were the only supplier approved by the Region for the 47 poles required under the tender. He testified that he knew that these Pole-Fab poles met the specifications in the Region's tender documents and that no other pole manufacturer was on the Region's approved list of suppliers. He further stated that he was aware of the fact that all materials supplied by Weinmann through the general contractor Rankin had to be approved by the Region before they were used on-site. Furthermore, Mr. Troppazini acknowledged that there was no contract between Weinmann and the Region, and that all the specifications required for the tender had to be met,

otherwise its tender would not be in compliance with the tender requirements.

Mr. Troppazini gave evidence that in September or October of 2010, "someone" from his company contacted "someone" from Pole-Fab regarding the poles. He claimed that he was told that the poles on order for this job were not available and had been sold to another contractor. As a result, he stated that he approached another pole manufacturer AMG Metals (AMG), which had recently began manufacturing lighting poles for municipalities, and was told that its poles met provincial standards, which had been installed in other municipalities and were available. Without informing Rankin or the Region, Mr. Troppazini ordered the lighting poles on December 18, 2010.

At trial, Mr. Troppazini admitted that he did not comply with the terms of the Region's tender document, which required Weinmann to provide drawings and to obtain pre-approval of the submitted poles from the Region before ordering or installing them. Furthermore, Mr. Troppazini took the risk that the Region would not approve the substituted poles despite the terms of the tender conditions. Nevertheless, he stated that the Region was "obliged" after installation of the non-approved poles to give Weinmann a proper review of the drawings and determine if it would approve these replacement poles. In addition, Mr. Troppazini insisted that the Region owed Weinmann a duty to review the replacement pole drawings, notwithstanding Weinmann's breach of the conditions of the tender terms.

The court did not agree with Mr. Troppazini's position that the superseding guidelines SSP 41 and SSP 42 take precedence over the tender documents, which Mr. Troppazini claimed allowed Weinmann to use substitute poles from AMG, instead of the contemplated Pole-Fab poles that were preapproved by the Region. The court further stated that, Mr. Troppazini was familiar with the preapproval requirements of the tender conditions, and in fact asked, through Rankin, for clarification of details of the luminaires being supplied for the poles before he tendered Weinmann's quote. The court also pointed out that Mr. Troppazini sought preapproval from the Region for other materials supplied by Weinmann in earlier contracts with the Region, which he acknowledged was a standard practice and was stipulated in the general conditions of the tender document.

The court found that Weinmann was in violation of the specification terms of the tender, including the approval procedures in the contract with Rankin. The court further noted that the Region, as the municipal owner, properly took the position that it was entitled to insist that Rankin, the general contractor, comply with the provisions of its contract with the Region to install the Pole-Fab poles that it required and had preapproved under the tender contract. It was the court's view that the Region acted appropriately in rejecting the substituted poles installed by Wienmann, prior to advising the Region of its plan.

The court further established that if the Region had not requested that the substituted AMG poles be removed, and had Rankin installed the poles which were required under the tender process, the integrity of its tender process could have been in dispute. The Region may have opened itself up to liability by rejecting the other bidders on the project if the Region allowed unauthorized and unapproved poles to be installed by Weinmann, which did not meet the Region's requirements.

The court also noted that it is not up to the courts to make a policy decision or to rewrite the terms of the tender documents.

The court also reiterated the fact that there was no contract between the Region and Weinmann, as such there is no duty of good faith or honest performance owed by the Region to Weinmann. Moreover, the court noted that the bid was not submitted by Weinmann and Rankin jointly, thus to make a finding that an action by Weinmann against the Region in tort would be appropriate given that commercial parties arrange their affairs as they see fit, would allow for an unjustifiable encroachment of tort law into the realm of contract. Consequently, the court was of the view that a finding of a new duty of care between an owner and subcontractor in the

tendering process cannot be justified and can create unnecessary litigation.

The court then had to address the plaintiff's claim that the Region's intentional disregard of Weinmann's position caused economic loss. The court was of the view that the essential elements for this type of tort are:

(a) a wrongful or unlawful interference by the defendant against a third party in which the plaintiff has an economic interest; and

(b) an intention by the defendant to cause loss to the plaintiff through the use of the unlawful means.

However, the court found that the plaintiff's claim failed on both counts.

The court found that there was no unlawful means or acts against Rankin by the Region. In fact, Rankin was agreeable to insist on compliance with the contract, which meant that Weinmann was also required to comply and adhere to the terms of the tendering contract. There was also no claim by Weinmann against Rankin for breach of its subcontract.

The court stated that the Region must have had the intention to inflict economic harm on Weinmann in order for it to be actionable, as such, an incidental or possible consequence of the Region's conduct is not sufficient to make out the second prong of the test. Consequently, the court dismissed Weinmann's action and found that there were no damages for which the Region was responsible.

This decision makes clear the importance of complying with the terms of a tendering contract. ■

BC Court of Appeal finds that omitting tendering documents can result in substantial non-compliance

In *True Construction Ltd. v Kamloops (City)* (2016 BCCA 173), the British Columbia Court of Appeal (court) upheld the earlier decision of the British Columbia Supreme Court, which dealt with the effect of non-compliance with bidding instructions by a bidder, and errors amounting to a bid being substantially non-compliant with the instructions, making it legally "incapable of acceptance". The decision of the B.C. Supreme Court is reviewed in "Court upholds tenderer's discretion not to award contract to construction company submitting incomplete bid" in the KC LLP Procurement Law Newsletter (November 2015).

In September 2010, the City of Kamloops (City) issued an invitation to tender for the Aberdeen Fire Hall. The invitation included instructions which required bidders to place a completed Bid Form in a sealed envelope and deliver it to the City. It was also stipulated that faxed bids would not be accepted. However, bidders could revise bids by fax using an Appendix 'F' to include a revision of the list of subcontractors and subcontractor pricing.

The bid closing was set for 2:00 p.m. on November 3, 2010. True Construction submitted its Bid Form on November 2, 2010 at 3:18 p.m., but did not include the two pages of Appendix 'A'. True Construction wanted to postpone selecting subcontractors until they had received all of their pricing. The missing submission was provided on November 3 at 1:38pm.

Notwithstanding that True Construction had the lowest bid of approximately $150,000, the City decided to disqualify the bid based on their opinion that choosing True Construction's bid would damage the City's reputation and ability to contract quality bidders for future projects. Their rationale was that subcontractor pricing made up a significant portion of the work on the project, and True Construction's deferral of the inclusion of subcontractor pricing gave them a greater opportunity to gain lower prices from subcontractors to include in their bid. However, in the event they were unsuccessful, they would not have presented a complete bid, thereby not having to perform the contract.

The City awarded the contract to the second lowest bidder, Tri-City, which also had an irregularity in their bid. Their faxed revision (which had increased their bid price by $122,600) came in 11 minutes before it had hand delivered its completed sealed bid, and the City decided that they were entitled to waive this error given that their standard form

documents contained a "discretion" clause allowing them to waive irregularities that were technical in nature.

The decision of the court of appeal to dismiss True Construction's application was based on whether Appendix 'A' formed part of the Bid Form, which needed to be included in the original sealed bid, and whether True Construction's failure to include the Appendix in the Bid Form created an opportunity for them to gain a competitive advantage in the bidding process.

The court first had to determine whether there was a completed bid "capable of acceptance at law." If it was found that there is no completed bid, then there would be no legal relationship established between the parties. The threshold to determine whether a bid is capable of acceptance is "material non-compliance", given that the invitation to tender included a "discretion clause", which entitled the City to take into account more factors than just price in deciding to award a tender contract.

True Construction took the position that the Instructions to Bidders was not clear in setting out whether Appendix 'A' had to be included and that its bid should be accepted without the Appendix. They further argued that the necessary information required for the bid was included on time, with the total price also included in the sealed bid.

The court, however, did not agree with True Construction and noted that when the bid was reviewed, all the documents were read in their entirety, and Appendix 'A' was part of the Bid Form that was left out. Furthermore, the court pointed to a clause in the tender documents which dealt with subcontractors, referencing the British Columbia Construction Association Bid Depository Rules of Procedure (Rules) and how they applied to certain sub-trades "As per Appendix A of the Bid Form." The court found that the Rules made it clear that Appendix 'A' was to form part of the Bid Form, and the fact that bidders were required to "… list the name of a Subcontractor on the Bid Form" (of which there was only a place to do so on Appendix 'A') made the requirement of Appendix 'A' to be included with the bid unambiguous. The court also noted that such information is found to be consistent with expectations of tendering, which generally is a stringent and formal process.

Having found that Appendix 'A' formed part of the Bid Form, the court then had to determine whether the bid was "substantially compliant", despite not having included Appendix 'A'. In assessing whether the bid was substantially non-compliant, the court had to determine if True Construction gained a competitive advantage for not complying with the bid instructions. The court noted that the list of subcontractors was required to be included in order to allow the City to consider which subcontractors were listed as one of the factors for accepting or rejecting the bid. The Invitation to Bid stated that the City could reject a bid based on the bidder's "bid price, qualifications, previous experience on similar work, and ability to meet schedule." As such, the list of subcontractors was one of the material factors for determining whether the bid contract would be awarded to True Construction.

It was the court's position that in circumstances where specific information is required from bidders, but is omitted or withheld, the onus is on the party who has omitted the information to establish that the information is immaterial or insignificant. The court did not find any evidence provided by True Construction to support its position for why Appendix 'A' was not included as part of the tender documents.

The court then had to look at whether the substantially non-compliant bid could be later "cured" by faxing Appendix 'A' before the deadline. The court found that by allowing bidders to submit sealed bids that are incapable of acceptance and then completing them under a mechanism intended to permit revisions to a bid that can be accepted would undermine the scheme. This in the court's view would potentially create a competitive advantage for True Construction.

The court upheld the lower court's finding, and rejected True Construction's appeal, concluding that the City was entitled to disqualify True Construction's bid.

The court made clear that the contractual interpretation, specifically with respect to the tendering process, will be scrutinized in determining the requirements and expectation of parties for bid contracts. The court also made it clear that if "non-compliance" gives a bidder a competitive advantage, then such non-compliance is material, and the bid should be rejected. This case also highlights the importance of ensuring that the instructions with respect to tender documents are clearly and unambiguously drafted. ■

Appeal Court finds information contained in tender contract not exempt from disclosure

The Newfoundland and Labrador Court of Appeal in *Corporate Express Canada Inc. v Memorial University of Newfoundland* (2015 NLCA 52) found that the information contained in the successful tender contract was not confidential and not exempt from disclosure.

In June of 2011, the appellant, Corporate Express Canada Inc., trading as Staples Advantage Canada (Staples), was the successful bidder on a tender for office supplies awarded by Memorial University of Newfoundland (MUN). Staples had been the successful bidder for 30 years previously.

Approximately 15 months following the tender award to Staples, Dicks & Company Ltd. (Dicks), who was the unsuccessful bidder, requested detailed information from MUN regarding the office supplies it purchased from Staples under the tender contract (contract items), as well as supplies that MUN could purchase from any supplier, but purchased from Staples outside of the tender contract (non-contract items), referred to as "usage reports." After consultation with Staples, MUN refused to disclose the requested information regarding the usage reports to Dicks. Consequently, Dicks made a request to the Privacy Commissioner of Newfoundland and Labrador (Commissioner) to have the matter reviewed. The Commissioner found that the information should be disclosed in accordance with the *Access to Information and Protection of Privacy Act* (*Act*).

Staples subsequently appealed the disclosure of information by MUN to the Supreme Court Trial Division, seeking an exemption from disclosure under section 27(1)(b) of the *Act* (confidential commercial information). Additionally, Staples asserted that it would experience significant financial loss and its competitive position would be jeopardized if the information pertaining to the usage reports is disclosed.

The Trial Judge conducted a de novo assessment of Dicks' request for disclosure and placed the burden on Staples to establish on a balance of probabilities, that the requested information was exempt under the *Act*.

The Trial Judge considered the exemptions provided under section 27(1) of the *Act*, which Staples argued were applicable in exempting the information contained in the usage reports from disclosure. In considering whether section 27(1)(b) applied to exempt the requested information from disclosure, the Trial Judge found that the usage reports contained information that was commercial, financial or technical supplied by Staples to MUN. Furthermore, the Trial Judge noted that it was secondary information that was not part of the negotiated contract, which made it eligible for exemption from disclosure. However, the Trial Judge did note that the information was not confidential and thus, not exempt from disclosure. The Trial Judge also did not find that the disclosure of information would cause Staples significant financial loss.

On appeal, Staples argued that the Trial Judge erred in interpreting section 27(1)(b) of the *Act*, as requiring that the supplied information must be objectively determined to be confidential in order to be exempt from disclosure. Staples argued that section 27(1)(b) sets out a two-pronged subjective test. Moreover, Staples argued that the Trial Judge erred in finding that it would not cause harm to the competitive position of Staples as a result of the disclosure.

Staples argued that the test for exemption from disclosure set out in section 20(1)(b) of the *Federal Act,* which requires a determination that the requested information be confidential, does not apply to section 27(1)(b) of the *Act*. Staples further asserted that the two Acts are worded differently, and that the former does

not require a determination that the requested information be confidential. While the court agreed with Staples in finding that the wording of the two Acts differed, nevertheless, the court stated that the confidentiality of the requested information must still be determined.

One of the essential parts of the test for exemption set out in section 27(1)(b) of the *Act* requires a determination of the origin and ownership of the information, as well as, whether the information was supplied by the third party explicitly or implicitly in confidence, and whether it was treated consistently as confidential information by the third party. The court found that the test required a fact-finding exercise, as well as the application of legal principles and interpretation of the legislative provision, which is an objective determination. The court further noted that, Staples subjective actions and beliefs in its supply and treatment of the requested information could not determine the exemption issue, and therefore applied the "confidentiality" test from section 20(1)(b) of the *Federal Act* to address the deficiency.

Next, the court had to determine whether disclosure of the contents in the usage reports would reveal Staples' information. Due to the fact that MUN did not have an efficient system to track usage, Staples compiled and supplied the usage reports at MUN's request, pursuant to a term in the tender contract. The contract usage and non-contract usage reports contained different information. However, this was not information that formed part of the tender bid. Accordingly, the information was found to be the information MUN possessed, as it was what MUN actually paid to purchase those items, and was at liberty to disclose the information without consulting Staples. The court applied the same reasoning to MUN's purchases of the non-contract items, and added that these items came from published catalogues, which were available to other businesses. Consequently, the court concluded that the information for the non-contract items were never Staples' to begin with, and did not find that the Trial Judge erred in concluding that the requested information was not exempt from disclosure.

With respect to the issue of harm, the court relied on the decision of the Supreme Court of Canada (SCC) in *Merck Frosst Canada v Canada* (Health) (2012 SCC 3), stating that, "[a] third party claiming [exemption under this kind of provision] must show that the risk of harm is considerably above mere possibility, although not having to establish on the balance of probabilities that the harm will in fact occur". The test also requires "a clear cause and effect relationship between the disclosure and the alleged harm, that the harm must be more than trivial or inconsequential, that the likelihood of harm must be genuine and conceivable, and that detailed and convincing evidence that shows that results ... [are] more than merely possible or speculative".

The court noted that the impact of the disclosure of the usage reports would potentially improve Dicks' position in competing for the next tender contract and simply expose the bidding strategy of Staples. As such, the disclosure of the contract and non-contract usage reports were not found to be exempt from disclosure. The court dismissed the appeal and affirmed the orders of the Trial Judge.

This decision makes clear that while information pertaining to a third party in a tender contract may be exempt from disclosure, it requires an objective determination as to whether the information is confidential. ■

Tribunal orders re-evaluation of a bid due to vague licensing requirements

The Canadian International Trade Tribunal (Tribunal) ordered a re-evaluation after determining that the government relied on undisclosed factors to reject a bid in *Space2place Design Inc. v Parks Canada Agency* (2015 CITT No 123).

On February 17, 2015, the Parks Canada Agency (Parks Canada) issued the Request for Standing Offer (RFSO) for architectural and engineering services. The deadline for proposals to be submitted was March 31, 2015. Space2place Design Inc. (Space2place) submitted its

proposal on March 27, 2015. However, on May 5, 2015, Space2place was informed that its proposal was rejected for failing to meet the mandatory requirements of the RFSO. Consequently, Space2place filed a complaint with the Tribunal.

On June 24, 2015, the Tribunal issued a notice of inquiry into the complaint. McElhanney Consulting Services Ltd. (McElhanney) was one of the successful bidders who requested intervener status on July 8, 2015, which was granted by the Tribunal.

On August 20, 2015, the Tribunal requested from Parks Canada the responses of all successful bidders to Submission Requirements and Evaluation (SRE) 3.1.2 and 3.1.4 of the RFSO. On August 28, 2015, the Tribunal made a further request from Parks Canada for all evaluation notes and materials relating to the evaluation of the two SREs.

Space2place took the position that Parks Canada improperly evaluated its proposal or used undisclosed criteria in its evaluation. Space2place further contended that the RFSO did not require landscape architects to be licensed in both British Columbia and Alberta, but rather be eligible to be licensed in Alberta. It also argued that all the resources proposed in its bid were properly licensed.

Parks Canada acknowledged that it had incorrectly stated the mandatory requirements of the RFSO in its initial letter, which set out the reasons as to why it rejected Space2place's proposal. However, it argued that Space2place did not meet the requirements of SRE 3.1.2, which required consultants to be licensed in both British Columbia and Alberta. In addition, Parks Canada argued that, while the language in SRE 3.1.2 differed from the language in the RFSO, it asserted that the language of the mandatory criteria must prevail over the non-mandatory provisions in the RFSO.

McElhanney intervened and argued that the mandatory requirements of the RFSO, and SRE 3.1.2 and 3.1.4, were clear and unambiguous and could only be understood with one reasonable meaning.

The *Regulations* under the *Canadian International Trade Tribunal Act* provide that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements. The trade agreements require that a procuring entity provide potential suppliers with all the information necessary to permit them to submit responsive tenders or proposals, including the criteria which will be used for evaluating and, further, awarding the contract.

The Tribunal found that the government had improperly rejected a proposal after applying licensing requirements to individuals named in the bid, which was inconsistent with the RFSO requiring that the licensing criteria be satisfied by the "person or entity" submitting the bids. A definition of "proponent" was provided in the RFSO, as the "person or entity" submitting a proposal. The proponent, as listed in its bid response, was Space2place as a corporate entity.

The Tribunal further found that Parks Canada used undisclosed criteria in evaluating whether Space2place's bid was compliant, which required that the proponent be an architect, licensed, certified or otherwise authorized to provide the necessary professional services in Alberta and British Columbia. Additionally, it was found that Parks Canada had breached the trade agreements, by failing to evaluate Space2place's bid in accordance with the criteria published in the RFSO.

As a remedy, Space2place requested that its proposal be declared compliant and that it be awarded a standing offer. However, the Tribunal found that the most appropriate remedy would be to order the government to re-evaluate all proposals in a manner consistent with its stated evaluation criteria. As such, the Tribunal ordered Parks Canada to re-evaluate all bids in accordance with the published criteria in the RFSO.

This case should serve as a caution to purchasing institutions to ensure that their requirements and criteria set out for prospective bids are clear and unambiguous. ■

Court confirms arbitration take primacy over litigation if stipulated in the contract agreement

In *Alberici Western Constructors Ltd. v Saskatchewan Power Corp.* (2016 SKCA 46), the Saskatchewan Court of Appeal (court) recently considered the appropriate line to be drawn between arbitrations and court proceedings dealing with the same or associated subject matters.

In October of 2012, the appellant, Saskatchewan Power Corporation (SaskPower), entered into an engineering, procurement, construction and related services agreement (Agreement) with Alberici Western Construction and Balzers Canada Inc. (AB Western) for the construction of a specific part of the carbon capture facility at the appellant's Boundary Dam station (Project).

AB Western was responsible for project management, and some equipment design, construction, procurement and control management. SaskPower was responsible for the procurement of some equipment and for all of the engineering design and related drawings and specifications. The Agreement between the parties contained a broadly worded arbitration clause with respect to dispute resolution, requiring that any dispute between the parties be resolved exclusively by arbitration, pursuant to the provisions of *The Arbitration Act, 1992* (*Act*) of Saskatchewan.

AB Western contracted with Technical heat Services Ltd. ("Tech Heat"), Safway Services Canada ULC, and Grace Instrumentation and Controls Ltd. ("Grace") to assist with the Project. The agreements AB Western entered into with each of these contractors contained a dispute resolution clause.

The Project was not completed on time or on budget, which led to a dispute between SaskPower and AB Western. As a result, AB Western served a notice of arbitration on Saskpower on April 29, 2014, as well as a statement of claim, in order to preserve its rights in the event arbitration failed. The claim named SaskPower, Tech Heat and Grace as defendants. Both the notice of arbitration and the statement of claim advanced the same claims, raising concerns regarding the propriety of SaskPower claiming against certain letters of credit, and claiming for unpaid services, and damages relating to the delays on the Project.

SaskPower took the position that the dispute that had arisen should be dealt with by way of litigation and not arbitration. Consequently, SaskPower served and filed a statement of defence and counterclaim against AB Western. The counterclaim was with respect to an excess amount of $40,000,000 in connection with alleged damages for overpayment in the contract and change orders, breach of contract, unjust enrichment, negligence, negligent misrepresentation, exaggerated lien claims and delay.

In response, AB Western brought an application to stay the action it had initially commenced, with SaskPower bringing an application to stay the arbitration.

The Chambers judge allowed AB Western's application and stayed the action against SaskPower, which dismissed SaskPower's request to stay the arbitration. The Chambers judge was of the view that, if parties freely contract to resolve disputes through arbitration, their agreement should be given effect. The judge found nothing in the *Act* or the *Queen's Bench Act, 1998* that would preclude that conclusion. Furthermore, the Chambers judge did not agree with SaskPower that the arbitration should be stayed to prevent it from potentially facing multiple proceedings.

With respect to the first issue on appeal, the court had to determine whether the appellant should be allowed to adduce fresh evidence. By way of an affidavit, the appellant contended that from the time it had filed its Queen's Bench application, it had identified other parties that may have contributed to the delay of the Project. The court allowed the affidavit as fresh evidence. However, the court noted that the

contents were not necessary to the disposition of the appeal.

Next, the court dealt with SaskPower's claim, that the Chambers judge erred in failing to appreciate that an arbitration may be stayed in favour of litigation to avoid multiplicity of proceedings. SaskPower argued that the multiplicity of proceedings created an unfairness, which should have been stayed by the Chambers judge.

The court noted that the legislation addresses the issue of procedural fairness, as seen in the administrative law realm. As such, the court provided that judicial intervention would deal with the unequal or unfair treatment in question, rather than ruling in favour of a stay of an arbitration. Furthermore, the court highlighted the fact that the negotiations were undertaken by two sophisticated parties, and could have amended the language of the Agreement to provide for a third party type claim in the same arbitration proceeding. Each party was at liberty then to include a multi-party arbitration clause in any contract signed with a subcontractor. As a result, the court could not make a finding of unfairness in the circumstances.

The court concluded that the Acts, coupled with the case law, illustrate that the risk of parallel or overlapping proceedings is not a basis for refusing to refer a dispute to arbitration, and dismissed the appeal.

This decision makes clear that parties should adhere to the dispute resolution processes set out in their contracts, as courts will uphold and enforce an arbitration clause. ■

Small Claims Court finds bid in compliance with tender requirements

In *3089467 Nova Scotia Ltd. v Bridgewater (Town)* (2016 NSSM 8), the Nova Scotia Small Claims Court found that the *Public Procurement Act*, S.N.S., c. 12, 2011(*Act*) trumped the language of the defendant owner's specification documents.

On September 15, 2015, the defendant, Town of Bridgewater (Town) issued a tender request for a parkade removal. While the claimant's bid was the lowest, it was rejected as it was found not to be in compliance with the tender requirements, in particular, it did not meet the safety certification requirements.

The claimant asserted that it was incorrectly deemed to not have been in compliance with the requirements of the tender bid.

The Town argued that it did not award the tender to the claimant due to the fact that its tender did not include the required Letter of Good Standing issued by the Nova Scotia Construction Safety Association, in accordance with Article 18.1 of the Bridgewater tender.

The president and sole owner of the claimant provided evidence asserting that his company has followed appropriate safety certification, which was presented in the tender submission. He made reference to the *Act* with respect to the Nova Scotia Construction Safety Association Certificate, specifically section 14, which states that every public tender notice must be consistent with the *Construction Contract Guidelines* (Guidelines). The Guidelines were also included in his Exhibit and in section 17.1 which state that the successful bidder must provide a Certificate of Recognition jointly issued by the Workers' Compensation Board and an occupational health and safety organization approved by the Workers' Compensation Board.

The court found that the claimant did provide a certificate that complied with the requirement of section 17.1.1 of the Guidelines. The court also found that the claimant provided a copy of a certificate issued to the claimant by the Workers' Compensation Board of Nova Scotia and H.S.E. Integrated Limited. It was accepted that H.S.E. Integrated Limited is an "occupational health and safety organization approved by the Workers' Compensation Board." It was the court's view that the claimant did in fact meet the requirements of the Guidelines in respect of the safety requirements.

The claimant argued that since it met the requirements of the Guidelines and given that section 14(2) of the *Act* requires that every public tender notice be consistent with the Guidelines, its tender was, as a matter of law, compliant with the bid request of the Town of Bridgewater in the subject tender call.

The plaintiff took the position that its terms and conditions attached to the tender were consistent with the Guidelines and therefore met the requirements of Section 14(2) of the *Act*. The plaintiff contended that the relevant terms and conditions contained in Article 18.1 of the bid document, which states, "Submit with Tender, a copy of Tenderer's current and valid Letter of Good Standing issued by the Nova Scotia Construction Safety Association" were met. In addition, the submission on behalf of the plaintiff further stated that the terms and conditions only need be "consistent with" and not "identical to" the Guidelines, and a departure from the Guidelines is not inconsistent with the purpose and intent of the Guidelines.

However, the court found that the requirement in Article 18 that a Letter of Good Standing be supplied from the Nova Scotia Construction Safety Association was inconsistent with the Guidelines. The court referred to section 2(a) of the *Act*, which provides that, "the purpose of the Act is to provide for the procurement of goods, services, construction and facilities by public sector entities in a fair, open, consistent and transparent manner resulting in best value." The court also referred to section 9(5) of the *Interpretation Act, R.S.N.S. 1989, c. 235,* as well as a statement from the Provincial website with respect to the *Act* in determining that the intention of the *Act* is to provide for standardization and consistent requirements for public entities that engage in private sector business.

Accordingly, the court found that the claimant should be entitled to rely on the requirements as provided in the Guidelines and that the safety requirements should not vary as between different institutions or entities. Moreover, the court added that Article 18.1 of the Town's tender requirements does not itself require a safety certificate by an organization approved by the Nova Scotia Workers' Compensation Board. All that is required is a Letter of Good Standing issued by the Nova Scotia Construction Safety Association in favour of the tenderer. As a result, the court found that the Town's tender notice did not comply with section 14(2) of the *Act*. On a balance of probabilities the court found that there was no reason to reject the claimant's bid.

The court made a further finding with respect to the exclusion clause in Article 17.1 of the Town's specifications, stating that it was not clearly worded, and as a result, it could not be enforced. The court stated that the owner had intended to reserve two things: the right to accept or reject any tender; and, the right to cancel the tendering process and reject all tenders. The issue with respect to the ambiguity in the bid documents was whether the wording, "without incurring liability to affected tenderer" applied to both of the aforementioned rights. The court was of the view that it was ambiguous, as it could have been interpreted either way, which may result in being interpreted to the detriment of the drafter. The court concluded that the Town was not able to rely on Article 17.1 to protect itself from risk of liability. The court ordered $22,665.40 in damages against the Town.

This case reaffirms the importance of clearly drafted specification documents of a tender. Otherwise, an exclusion clause may not be enforced, which exposes an owner to a risk of liability for ambiguous wording. ■

— KC LLP —

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Bob Keel: 416-219-7716 rkeel@keelcottrelle.on.ca

or

Tony Rosato: 905-501-4433 arosato@keelcottrelle.on.ca

KEEL COTTRELLE LLP

100 Matheson Blvd. E., Suite 104
Mississauga, Ontario L4Z 2G7
Phone: 905-890-7700
Fax: 905-890-8006

36 Toronto St. Suite 920
Toronto, Ontario M5C 2C5
Phone: 416-367-2900
Fax: 416-367-2791

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Robert Keel - Executive Editor
Anthony Rosato - Managing Editor
Patricia Harper – Contributing Editor

Contributors —
The articles in this Newsletter were prepared by Hannah Bahmanpour, who is associated with Keel Cottrelle LLP.