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## Public Sector

# Procurement Law Newsletter

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### Court determines privilege clauses to be read in the context of tender documents as a whole

In *Winbridge Construction Ltd. v. Halifax Regional Water Commission* (2015 NSSC 275), Halifax Regional Water Commission (HWC) issued a call for tenders to upgrade secondary clarifiers at its waste water treatment facility and three contractors submitted bids – L&R Construction Limited (L&R) with the lowest bid, Winbridge Construction Limited (Winbridge) with the second lowest bid, and Amber Contracting Limited (Amber). HWC accepted the lowest bid from L&R and the work was

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completed. Winbridge sued HWC for accepting a non-compliant bid and for breaching its duty of fairness to Winbridge. Winbridge argued that if L&R's non-compliant bid was not accepted, that its bid, being the second lowest, would have been accepted.

The tender documents stated that there was a mandatory site meeting, which was held on March 25, 2010. Representatives from Winbridge and Amber attended, but L&R did not attend. HWC provided an alternative site meeting for L&R, and it did not give notice to those who attended the March 25<sup>th</sup> meeting that another site meeting had been arranged. Winbridge argued that L&R's failure to attend the March 25<sup>th</sup> mandatory site meeting made its bid non-compliant.

The tender documents included a privilege clause stating that HWC had a right to accept or reject any or all tenders, including the lowest tender, and to award the contract to whomever it deemed appropriate. Furthermore, if HWC did not receive any tender which was satisfactory, it reserved the right to re-tender the project. HWC also reserved the right to accept or reject any tender which was "incomplete, obscure, or irregular." However, in procurement law, there is an implied contractual obligation to treat all bidders fairly and equally, and not to give any bidder an unfair advantage over others.

Winbridge claimed that the clear language of the tender documents made attendance at the site meeting on March 25<sup>th</sup> mandatory. Winbridge argued that where compliance with a condition is declared to be mandatory, there is no discretion to waive compliance with that condition. Any bidder who fails to attend should have their bid rejected. By attending the site meeting, potential bidders knew who their competitors would be and this information was relevant in a bidder's determination of whether and what it would bid.

HWC argued that failure to attend the March 25<sup>th</sup> site meeting was an irregularity. It was an informality that did not materially affect the price or performance of the contract. The

purpose of the site meeting was to require all bidders to familiarize themselves with the site and working conditions for the project. This purpose was fulfilled since L&R attended a site meeting on March 30<sup>th</sup>. HWC argued that as a result of L&R's attendance at a substitute meeting, L&R's bid was substantially compliant.

The Nova Scotia (N.S.) Supreme Court held that determining whether non-compliance with a tender requirement is material depends upon the interpretation of the privilege or exclusion clause in the context of the tender documents as a whole. After examining the plain words of the tender, the N.S. Supreme Court held that the site meeting was mandatory, and failure to attend the site meeting on March 25<sup>th</sup> made L&R's bid materially non-compliant.

The N.S. Supreme Court also analyzed whether Winbridge lost a reasonable expectation of receiving the contract as the second lowest bidder. The Court stated that pursuant to the tender documents, HWC reserved the right to retender the project or negotiate a contract with a party if it did not receive a satisfactory tender. The Court found that Winbridge's bid was 25% more than the amount approved for the project. The Court stated that HWC would not have awarded the contract to Winbridge since its bid was significantly over the budget, rather it would have re-tendered. Winbridge did not lose a reasonable expectation of receiving the contract.

The Court emphasized that when determining whether non-compliance with a tender is material, it must interpret the privilege or exclusion clauses in the context of the tender documents as a whole.

This case illustrates the importance of analyzing each case on all of the facts, because although the Court found that the lowest bid should have been disqualified as a result of not meeting a mandatory requirement, at the end of the day, there was "no harm no foul" as a result of Winbridge's bid exceeding the project budget by 25%. ■

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## Appeal Court clarifies test for determining compliant bid

*Newfoundland and Labrador v. Marine Contractors Ltd.* (2015 NLCA 45) was a case dealing with a declaration of substantial compliance issued in respect of a public works contract tender.

The Province, Newfoundland and Labrador, had issued a tender for a municipal sewer project. The lowest tender was submitted by Marine Contractors Ltd. (MCL). MCL inadvertently failed to use the form directed by the tender specifications. MCL had submitted its bid using the original tender document form rather than the required form. The forms were the same, however, there was a revision of the schedule of quantities and prices (SQP) to clarify a drafting error. The tender specifications included a sequential numbering of items in a list. The sequential numbering was followed by a comma and it was thought to be potentially confusing for a bidder. The form was reissued and the sequential numbering with the comma was deleted. Apart from the deletion of the numbering, the new document set out identical specifications and quantities as the original form.

The Appellant, Cougar Engineering and Construction (Cougar), used the correct revised form and was the second lowest bidder. Cougar argued that compliance meant following the formal rules of the specifications, and that MCL had failed to meet the terms of the call for tenders. The terms of the instructions to bidders stated: "Tenders not submitted on the Tender Form provided will not be considered" and "Incorrectly prepared tenders may be rejected." The Province postponed awarding the tender and sought a declaration as to whether MCL's bid was compliant.

The applications judge held that the MCL tender was substantially compliant for a number of reasons: the new tender form did not change the addendum in any substantive way, and the form continued to be responsive to the tender call. Furthermore, there was no prejudice or unfairness to anyone from MCL's failure to use

the amended form, since it amounted to a "mere irregularity". Finally, the applications judge found that turning down bids for frivolous reasons would be harmful to the public tendering process. Cougar appealed the decision and argued that the test for compliance is strict compliance in accordance with the express language of the tender call, that MCL's bid was complaint for using the wrong tender form, and that the Province did not reserve a discretion to consider non-complaint bids. The Province submitted that clause 5(g) of the tender states: "Incorrectly prepared tenders may be rejected" (emphasis added). However, this argument was not raised before the applications judge.

The Provincial government disagreed with Cougar on the key point that strict compliance is the test used to determine that a bid has met the tender requirements. The test for compliance is substantial compliance, which requires that all material conditions be strictly complied with except mere irregularities, which are not to be treated as material.

The Newfoundland and Labrador Court of Appeal dismissed the appeal and held that the applications judge did not err in concluding that the amended SQP was akin to the correction of a clerical error, and the absence of the amended form did not impair the validity of MCL's tender. The applications judge did not err in applying a substantial compliance test given the non-materiality of the revision. The Court of Appeal held that Canadian courts have recognized that few tender calls are free from errors and omissions and that a bid should not be declared defective unless the error or omission is material. The Court of Appeal agreed with the finding of the applications judge that the amended SQP would not have affected the quantities or pricing respecting the sewage piping to be removed and replaced. The Court of Appeal stated:

*The fact that a typographical error was made [...] putting commas instead of periods beside the three numbers forming the list of pipe diameters constituted an obvious clerical*

*mistake that could have been ignored. The error was not objectively misleading.*

All of the requisite information in the tender was set out properly in MCL's bid. As the lowest bidder, MCL was entitled to an award of the public works contract by the Province.

The Court clarified that the correct test to determine whether a bid submitted for a tender is valid is substantial compliance – not strict compliance. The Court also upheld the notion that bids should not be disqualified for minor, non-material errors and omissions. ■

## Court finds bid non-compliant due to qualifying comments

In *Eastern Regional Health Authority v. Kannegiesser Canada Inc.* (2015 NLTD(G) 28), the Applicant, Eastern Regional Health Authority (Eastern Health), sought a declaration regarding Kannegiesser Canada Inc.'s (Kannegiesser) bid in response to a public tender for the supply of central laundry equipment. Eastern Health has an obligation under section 10.2 of the *Public Tender Act* (R.S.N.L. 1990, c. P-45) to provide a confirmation to the Chief Operating Officer of the Government Purchasing Agency that the contract was awarded in accordance with the *Public Tender Act*. The *Public Tender Act* does not define "compliant bid" but does define "qualified bid" as "a bid that meets the specifications of the tender."

Eastern Health received three bids. The lowest bidder was the first Respondent, Kannegiesser, with an all-inclusive amount of \$1,495,000, and the next lowest bid was made by the second Respondent, Harco Co. Ltd., at an all-inclusive amount of \$1,711,449. Although Kannegiesser was the lowest bidder, there were issues raised with respect to the bid's compliance with the tender requirements.

Eastern Health had concerns with two sections of Kannegiesser's bid in response to the metering equipment and access hatches. The tender stated:

*Vendor to provide metering equipment and proper signal from the metering device [...] that can be transferred to third party utility management software/program to measure water, electrical and steam usage for the tunnel washer.*

The Kannegiesser bid stated "Yes", however, it included additional comments:

*The control system of the powertrans tunnel washer does monitor water. As for electrical and steam usage monitoring requires special meters and have to be supplied by eastern health.*

Eastern Health alleged that the comments added made Kannegiesser's bid non-compliant because it was not supplying metering equipment that could measure electrical and steam usage. Kannegiesser stated that the additional comments were made due to a lack of specifications in the tender. Alternatively, Kannegiesser suggested that if the comments led to an irregularity in the bid, it was a minor irregularity that did not affect the price or performance of the contract. Kannegiesser also believed that the details would be worked out if it was the successful bidder.

The tender specifications with regard to the access hatches stated: "Tunnel washer must have a minimum of one access hatch for every two chambers/modules."

Kannegiesser responded "Yes", however, added additional comments stating: "The powertrans tunnel washer submitted will have 4 hatches plus all double drums can be opened for ventilation. The total top of the drum is removable."

Eastern Health argued that these comments made Kannegiesser's bid non-compliant. At least 7 or 8 access hatches were required, and according to Kannegiesser's proposal, there were only 4. Kannegiesser argued that in addition to the 4 hinged hatches, there are 6 removable drum tops, for a total of 10 access hatches.

The Court declared Kannegiesser's bid to be non-compliant with the terms of the tender. The Court found that both the metering and access hatch portions of the tender were mandatory and material components. Furthermore, Kannegiesser's responses to both the metering and access hatch portions of the tender requirements differed in quantity and quality to the tender requirements and attempted to qualify or modify the terms of the tender. The Court held that they were counter-offers which rendered the bid non-compliant. Finally, Kannegiesser's bid, if accepted, would give it an advantage over other bidders who did not impose on Eastern Health a similar obligation to supply the metering equipment.

In this decision, the Court cautions bidders from qualifying their responses to tenders since they may be rendered non-compliant. ■

## Court upholds tenderer's discretion not to award contract to construction company submitting incomplete bid

*True Construction Ltd. v. Kamloops (City)* (2015 BCSC 1059) involved an action for breach of contract by a construction company for the City's failure to award a construction contract. (In *True Construction Ltd. v. Kamloops (City)* (2014 BCSC 2125), the B.C. Supreme Court had previously reviewed an application, related to this matter, dealing with solicitor-client privilege. A summary of the 2014 decision can be found on page seven of the Keel Cottrelle LLP Procurement Law Newsletter – May 2015.) True Construction submitted a bid to the City of Kamloops for the construction of the Aberdeen Fire Hall. True Construction's bid was the lowest bid submitted, however, the City rejected the bid on the basis that it was non-compliant. True Construction argued that the bid was compliant and should have been accepted. Alternatively, True Construction claimed that if there were omissions in its bid, they were irregularities and its bid was substantially compliant. The contract was awarded to the second lowest bidder.

The tender specifications required a bidder to submit the bid documents, including all addenda and all six appendices – A, B, C, D, E, and F. Appendix F was a document allowing bidders to revise their total price by fax prior to the bid deadline. The bidders were required to submit the bid including completed appendices A to E, in a sealed envelope.

True Construction submitted the bid to the City in a sealed envelope containing a bid form, appendices A, D, and E and two pages relating to the bid bond. Approximately one hour before the closing time for bids, the City received a fax from True Construction including Appendix F. True Construction was reducing its bid price by approximately \$500,000. In addition, True Construction faxed Appendix B and two additional pages of Appendix A, which were not included in its sealed envelope.

The City considered the bid to be materially non-compliant because the completed appendices had not been included in the sealed envelope containing the bid. The British Columbia (B.C.) Supreme Court found that True Construction's bid was materially non-compliant since Appendix B was not included in the initial bid, and Appendix A was incomplete. The revision by fax and the use of Appendix F only allowed for the revision of the final price of the bid; it did not allow for the addition of materials to the bid itself. Submitting Appendix B and part of Appendix A shortly before the closing time for bids allowed True Construction to continue negotiations with its subcontractors and suppliers in order to acquire a better price, and this provided it with a competitive advantage over other bidders.

The Court provided guidance on what constitutes an incomplete and non-compliant bid. The Court highlighted the importance of following specifications in tender documents regarding the manner in which bid documents must be submitted. ■

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## Court rules government's refusal to modify request for proposal specifications does not constitute procedural unfairness or bias

In *Airbus Helicopters Canada Ltd. v. Canada (Attorney General)* (2015 FC 257), Airbus Helicopters Canada (Airbus) made an application for judicial review of a contract award process conducted by the Minister of Public Works and Government Services Canada (PWGSC). The contract was for the purchase of \$172 million worth of light-lift helicopters for use by the Canadian Coast Guard. The government had decided to procure helicopters that already existed, as opposed to having helicopters built based on specifications. The contract was awarded to Bell Helicopter Textron – the only bidder. Airbus participated in the consultation process leading up to the Request For Proposal (RFP), but chose not to submit a bid.

The Applicant, Airbus, argued that the process was procedurally unfair. Airbus sought cancellation of the contract award and the implementation of a new RFP process. Airbus claimed that PWGSC's refusal of its requests to reconsider or modify certain technical requirements in the RFP constituted favouritism, since the Applicant believed that the requirements were modeled on the specifications of the Bell helicopter. Airbus asserted:

*...despite the appearance of an impartial, fair, open and transparent competitive call for proposals process, the Government of Canada had decided from the start to award the contract to Bell, and that the procurement process was conducted in a manner that ensured that the Bell 429 would be the only aircraft that would meet the project's technical specifications.*

The Federal Court found that Airbus knew before the consultation process had even begun that it could not easily meet the original

technical requirements. Furthermore, when examining the alternatives that Airbus proposed, the recommendations by Airbus reduced the technical requirements of the helicopter and decreased the desired performance. For example, the helicopter that Airbus had available did not meet the requirements for payload and range.

During the consultation process, Airbus inquired about the various mission profiles, and for what purposes the helicopter would be used. Airbus attempted to show that the mission profiles did not justify the technical requirements that were being imposed, and that the requirements being too stringent, did not allow it to participate in the RFP process.

The Crown submitted evidence to show that the technical requirements were necessary for the wide variety of missions conducted by the Canadian Coast Guard. Therefore, the decision not to reconsider or modify certain technical requirements in the RFP pursuant to Airbus' recommendations was reasonable. Furthermore, the Crown's evidence showed that many of Airbus' recommendations were accepted and resulted in amendments to the bid requirements. Therefore, the refusal of some of Airbus' recommendations was not unreasonable and did not constitute unfairness.

The Federal Court dismissed the application and held that Airbus failed to establish that the RFP process was procedurally unfair or that the Minister's decision to refuse to reconsider and modify certain technical requirements of the tender constituted an unreasonable exercise of authority. Further, PWGSC had hired a consultant to serve as a "fairness monitor" throughout the process. The Federal Court found that there was no evidence supporting favouritism, and that the Minister provided a fair and impartial process. ■

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## Federal Court dismisses a bidder's \$250 million lost profit claim against the Government of Canada

In *TPG Technology Consulting Ltd. v. Canada* (2014 FC 933), TPG Technology Consulting Ltd. (TPG) brought an action for damages for \$250 million against the Crown for breach of contract arising out of a Request for Proposal (RFP). From 1999 to 2007, TPG provided information technology services, specifically engineering and technical support services, to the Information Technology Services Branch of Public Works and Government Services Canada (PWGSC).

In 2006, the Crown issued an RFP with respect to services to be provided following the expiry of TPG's contract. The RFP stated that those who had previously provided services should not assume that their existing capabilities meet the new requirements of the RFP. The RFP provided that the bidder who submitted a compliant bid and had the highest combined technical and financial ratings would be the successful bidder and awarded the contract. Three companies submitted bids, and the contract was awarded to CGI Group Inc. (CGI).

The value of the lost contract was \$428 million, and TPG claimed damages from the Crown in the amount of \$250 million. TPG alleged that PWGSC breached its duty of fairness in the evaluation of its bid. TPG also claimed that the winning bid by CGI was non-compliant.

TPG had originally argued that PPI Consulting Ltd. (PPI), the external consulting firm retained by the government to assist in the evaluation process, had a pre-existing bias against it, based on public remarks made by the President of PPI. The technical evaluation was conducted in two phases. First, the five evaluators evaluated the bids independently. Then, there was a consensus meeting where the five evaluators had to agree on a single consensus score. TPG claimed that the consensus scoring had been

arbitrarily applied by PPI, unjustifiably reducing TPG's scores.

TPG had filed four complaints with the Canadian International Trade Tribunal (CITT) prior to commencing this action, alleging unfairness and reasonable apprehension of bias, alteration of the evaluation methodology after bid closing, as well as failure to conduct the evaluation in accordance with the RFP in relation to reference checks. The CITT rejected three of the complaints. The second complaint was found to be valid – the evaluation methodology had been changed after bidding closed for seven requirements.

The Federal Court declined to exercise its jurisdiction over the matter and dismissed the action, stating that although the Federal Court had concurrent jurisdiction to hear the claim, the CITT was the more appropriate forum. The CITT is a specialized tribunal dealing specifically with government procurement issues and it has wide discretion in terms of remedies. The CITT was capable of recommending the remedy requested by TPG – compensation. Therefore, the Plaintiff had an obligation to exhaust its remedies before the CITT before launching an action in the Federal Court.

The Federal Court held that the appropriate recourse would be judicial review of a decision of the CITT. In obiter, the Federal Court considered TPG's substantive claim and dismissed the claim on its merits. The Federal Court rejected TPG's assertions that the winning bidder was non-compliant. The Federal Court held that although the evaluation committee's consensus scoring was flawed and inconsistent in its scoring process, there was no evidence that the evaluation errors had any impact on the ultimate ranking. Therefore, TPG was not entitled to any lost profits.

This decision highlights the importance of ensuring that evaluative methods implemented in public procurement processes are free from procedural irregularities and the appearance of bias, in order to avoid attacks against the fairness of the competitive process. ■

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## Appeal Court finds Crown procurement process flawed and unreasonable

*Rapiscan Systems Inc. v. Canada (Attorney General)* (2015 FCA 96) involves an appeal from a decision of the Federal Court, which allowed a judicial review of a decision by the Canadian Air Transport Security Authority (CATSA) to award a procurement contract. CATSA, a Crown corporation, oversees passenger and baggage screening at airports across Canada for security purposes. CATSA used a procurement process to purchase the equipment required to conduct such screenings.

In September 2009, CATSA awarded a non-competitive sole-source procurement to Smiths Detection Montreal Inc (Smiths) for the purchase of multi-view x-ray equipment. CATSA's management assured CATSA's Board of Directors (Board) that this was an exception, and future purchases would use an open procurement process. On August 16, 2010, CATSA initiated another procurement process, a Request for Submission (RFS), in order to purchase x-ray screening equipment. CATSA received submissions from four suppliers, including Smiths and Rapiscan Systems Inc. (Rapiscan). On October 4, 2010, CATSA's Board awarded the Standing Offer Agreement (SOA) exclusively to Smiths, based on the recommendation of CATSA's management. The management determined that Smiths was the only supplier that was able to perform the contract and that Rapiscan's equipment did not meet the minimum performance requirements.

Rapiscan filed an application for judicial review of the decision to award the SOA to Smiths. The Federal Court found that CATSA used an unfair and non-competitive procurement process. The RFS did not comply with any of CATSA's authorized procurement processes. Furthermore, the Board was unable to exercise its oversight function since management concealed information regarding the legitimacy of the procurement process, as well as information pertaining to Rapiscan, with the result of favouring Smiths. The Federal Court

held that the procurement decision did not meet the standards of legality, reasonableness and fairness. (A summary of the Federal Court's decision in *Rapiscan Systems Inc. v. Canada (Attorney General)* (2014 FC 68) can be found on page two of the Keel Cottrelle LLP Procurement Law Newsletter - May 2014.)

The Crown appealed the judge's decision and argued that the judge erred in finding that the decision of CATSA's Board was flawed. Rapiscan maintained its position that the procurement process was unfair and anti-competitive, and also sought declaratory relief.

The Federal Court of Appeal dismissed the appeal and held that CATSA had a statutory duty to establish policies and procedures applicable to its procurement process that "promote transparency, openness, fairness and value for money in purchasing." Rapiscan argued that CATSA did not adhere to its contracting procedures. The RFS was not included among the list of authorized procurement processes. The Crown argued that although the RFS was not specifically referred to in the contracting procedures, that it was a proper procurement process. The Court of Appeal found that the Crown did not provide an explanation as to why the RFS procurement process was used, or on what basis it was authorized.

The Court of Appeal found that the lack of information conveyed to the Board by CATSA's management could reasonably have led it to believe that management ran an open procurement process, when management held a non-competitive process by way of directed contract. The Court of Appeal found that CATSA's management failed to inform the Board that Smiths' equipment costs were substantially higher than Rapiscan's equipment. Therefore, the Court of Appeal upheld the finding of the judge that the Board could not come to a reasonable conclusion. Since the Court of Appeal found that CATSA's decision was reached through a flawed process, it held that the decision to award the SOA exclusively to Smiths was equally flawed and unreasonable. ■

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## Appeal Court rules fair competition in tender process a matter of public interest

In *Canadian Financial Wellness Group v. Resolve Business Outsourcing* (2014 NSCA 98), the Nova Scotia Court of Appeal considered fair competition in the tendering process to be a matter of public interest in the context of a denial of a confidentiality order.

The Defendant, D+H Limited (D+H), administered the Canada Student Loan Program under a contract with the Canadian government. The contract was originally awarded to the Defendant, Resolve, which was later acquired by D+H, after a public competitive tendering process. Resolve's bid contained detailed submissions on the process proposed to administer the program, including confidential information that was highly commercial and competitively valuable to the Defendants.

In August 2011, the Plaintiff sued the Defendants alleging that it had developed a program designed to address the relationship between student loan borrowers and service providers and that D+H became privy to that information and wrongly used it for profit. The Defendants denied liability.

In 2012, the Government began the re-procurement process for the next contract to service the Canada Student Loan Program.

The Defendants were concerned that the Plaintiff would include confidential documents produced by the Defendants as an exhibit to an Affidavit for a chambers motion, and that these documents would become public. The Defendants sought a confidentiality order to prevent the public disclosure of the documents.

To be granted a confidentiality order, the Defendants had to satisfy the test from *Sierra Club of Canada v. Canada (Minister of Finance)* (*Sierra Club*, [2002] 2 S.C.R. 522). The judge must determine, in the first branch of the test,

whether the confidentiality order is necessary to prevent a serious risk to an important public interest because reasonable, alternative measures would not alleviate the risk. In the second branch of the test, the judge must consider whether the salutary effects of the confidentiality order outweigh its deleterious effects, including a limitation on the constitutionally protected freedom of expression, as well as public access to the courts.

In the first branch of the test, the important public interest must be real, substantial and must involve a general principle of public significance, rather than a merely personal interest. Finally, the judge must consider reasonable alternative measures in order to restrict the confidentiality order as much as possible while preserving the important public interest that requires confidentiality.

The motions judge denied the confidentiality order, stating that the Defendants had not established a public interest in confidentiality beyond their own commercial interest, and therefore, had not satisfied the first branch of the test. The judge stated:

*Although there would be a public interest in fair competition, the interest in this case is clearly specific to Resolve in that it seeks to protect its own commercial interests. However, as stated in Sierra Club there must be a broader public interest at stake in order to defeat the fundamental principle of the open court process.*

On appeal, the Nova Scotia Court of Appeal found that the motions judge erroneously restricted the meaning of public interest in confidentiality under the test. The Court of Appeal held that D+H and Resolve's specific private interest – keeping highly commercial and competitively valuable documents confidential – did not exclude the existence of a concurrent public interest. The Court of Appeal found that the integrity of the tendering process was a matter of public interest. A request for proposal (RFP) for the new contract was expected within a few weeks of the motion and if D+H or Resolve's confidential materials

were made available to its competitors, the competitors could tailor their tenders to that material, while D+H/Resolve would not have access to those competitors' equivalent confidential information. The Court of Appeal also stated that this would contravene the Canadian government's Rules of Engagement for the procurement which included that fairness and equity would govern the process, and that no one person or organization would receive an unfair advantage over the others.

The Court of Appeal held that the first branch of the *Sierra Club* test was satisfied, and that there was a real and substantial risk to an important commercial interest that could be expressed in terms of a public interest. The second branch of the test was also satisfied. The Court of Appeal stated that there was "little discernable public appetite for access to D+H/Resolve's operational manuals and scripts", therefore, the salutary effects of the confidentiality order outweighed its deleterious effects.

The Court of Appeal ordered that if the confidential information were to be included in an Affidavit for a chambers motion, then it should be sealed from the public. However, it would be available for unrestricted use by counsel and the public would have access to the court proceeding. ■

## Court considers the appropriateness of providing declaratory judicial opinions pertaining to bid compliance

In *Yukon (Department of Highways and Public Works) v. P.S. Sidhu Trucking Ltd.* (2015 YKCA 5), the Yukon Government issued tenders for the construction of a bridge replacement. Sidhu Trucking Ltd. (Sidhu) submitted a bid on the project for Yukon and Sidhu's bid was the lowest. The second lowest bidder, CMF Construction (CMF) questioned the timeliness of Sidhu's bid and Yukon brought a petition to the Yukon Territory Supreme Court to determine whether Sidhu's bid had been submitted in time.

Sidhu's agent submitted a bid at 3:59 p.m., but asked for the bid back if there was still time. The agent was told that there was time up to 4:01 p.m., and he took the bid back, made a change and re-submitted it at 4:00 p.m.

The Instructions to Bidders included section 2.5 which stated:

*In order to be considered, tenders must be received before the specified time. Tenders received after this time will not be considered regardless of the reason for their being late... (emphasis added).*

The tender form listed the closing time for bids as 4:00 p.m. The notice of tender was published on Yukon's "Online Tender Management System (TMS)". It included the following:

*Submissions clearly marked with the above project title, will be received up to and including 4:00 p.m. local time, August 15, 2013... (emphasis added).*

However, the TMS Terms and Conditions of Use included a warning at section 5:

*You should not rely on the Site as your only means of obtaining information about bid opportunities or updates to bid opportunities.*

Sections 15 and 16 of the TMS Terms and Conditions of Use also added that the service through the site is provided "as is" – without guarantee, warranty or representation. In addition, the public tender notice was published in a local newspaper stating that tenders would be received up to and including 4:00 p.m.

The Yukon Supreme Court found that the closing time for the tender, as stated in the contract documents, was 4:00 p.m. Therefore, in order for the tender to be timely, it must be received by 3:59 p.m., or else it will not be considered. The Court did not find that the small print on the TMS to be part of the contract documents. Also, the TMS explicitly warned that information included on the site was not warranted, represented or guaranteed as complete or accurate. The Supreme Court

also held that the notice of tender in the newspaper was not a part of the contract.

The Supreme Court declared Sidhu's bid to be out of time. Yukon awarded the contract to CMF. Sidhu appealed and also commenced an action against Yukon for breach of contract.

The Yukon Territory Court of Appeal raised issues of mootness and considered the appropriateness for courts to provide declaratory legal opinions. The Court of Appeal dismissed the appeal as moot because the contract was awarded and the work was undertaken. Furthermore, the Court of Appeal stated that courts are usually reluctant to give merely advisory opinions. The lower court should not have provided an advisory opinion given that further litigation was likely. The Court of Appeal explained that it raised the possibility that Yukon would be exposed to a claim in contract based on the lower court's opinion. The Court of Appeal stated: "In my view, this raised circumstances akin to judicial embarrassment and militates against the appropriateness of the court providing a declaratory opinion in the circumstances of this case."

The Court of Appeal warned against the possibility of inconsistent findings, giving rise to judicial embarrassment, in cases where courts provide declaratory judicial opinions on matters when there is ongoing litigation. ■

## SCC clarifies remedies available to unpaid subcontractors under the Manitoba Builders' Lien Act

In *Stuart Olson Dominion Construction Ltd. v. Structal Heavy Steel* (2015 SCC 43), the Supreme Court of Canada (SCC) clarified the relationship between two remedies available to subcontractors in order to collect payment of monies owed: the right to a statutory trust and the right to file a lien claim against the property.

Dominion Construction Company Inc. (Dominion), now known as Stuart Olson

Dominion Construction Ltd., was hired as a general contractor to construct Investors Group Field, a new football stadium at the University of Manitoba. In April 2011, Dominion entered into a subcontract with Structal Heavy Steel (Structal) under which Structal would supply and install steel for the structure, roof, bleachers, and wall of the stadium for \$44,435,383.

Beginning with the April 2012 billing, Dominion withheld payment from Structal, originally claiming that BBB Stadium Inc. (Owner) delayed paying Dominion. However, in August 2012, Dominion advised that it was using the unpaid amounts for back charges and it claimed that the amounts resulted from delays attributable to Structal.

On September 7, 2012, Structal registered a builder's lien against the property totalling \$15,570,974. On October 22, 2012, Dominion filed a lien bond in the full amount of the builder's lien in the Manitoba Court of Queen's Bench, which provided that if Dominion did not satisfy any lien judgment against it, the surety of the bond would pay, up to a maximum, the amount of the judgment. Structal approved the bond and vacated its lien.

Dominion received further progress payment from the Owner. However, Dominion refused to make further payments to Structal. Structal asserted that Dominion was required to comply with the trust provisions of the Manitoba *Builders' Lien Act* (C.C.S.M., c. B91, *BLA*). Dominion maintained that it had set-off against the monies claimed by Structal, that there was no breach of trust, and that Structal was fully secured by the lien bond. Structal requested that the Owner withhold a payment from Dominion or face an action for violating the trust provisions of the *BLA* and the Owner obliged.

Dominion brought an application in the Manitoba Court of Queen's Bench seeking a declaration that it had satisfied its *BLA* trust obligations to Structal. Structal filed its own motion requiring full payment of its past-due

invoices, without deduction or set-off, upon Dominion receiving funds from the Owner.

The Manitoba Court of Queen's Bench held that Dominion's filing of the lien bond extinguished its statutory trust obligations to Structal under the *BLA*. He stated that the *BLA* did not indicate "that a general contractor in the position of [Dominion] should pay the amount in issue twice, once in vacating the lien and another time in securing the trust."

The Manitoba Court of Appeal overturned the lower court's decision with respect to the lien bond extinguishing Dominion's trust obligations to Structal. The Court of Appeal held that under the *BLA*, subcontractors have two separate and distinct rights beyond the common law right to sue for breach of contract – the right to a statutory trust and the right to file a lien claim against the property.

On appeal, the SCC held that the application of trust provisions to contractors or subcontractors whose claims are also protected by a lien is a question of statutory interpretation.

Section 13 of the *BLA* sets out the right of lien against the interest of the owner of the land. When a lien is registered, it encumbers the land on which the work was done. Section 55(2) of the *BLA* provides that a lien may be vacated upon payment into court or the filing of security, such as a lien bond, with the court. Section 56(1) provides that any money or security paid into court stands in the place of the land. The motion judge of the Manitoba Court of Queen's Bench had stated that the security paid into court would stand "in place of the lien". However, the SCC clarified the application of section 56(1):

*When a lien is registered against the land and security is paid into court, the registration of the lien may be ordered vacated. The land is freed of the lien encumbrances, but the underlying lien claim remains. The only effect is the security paid into court, rather than the land, is available in the event of a lien judgment in favour of the contractor or subcontractor.*

Furthermore, the trust provisions of the *BLA*, sections 4 to 9, provide that subcontractors, workers and other beneficiaries are to be paid before an owner or contractor can appropriate trust funds for his or her own use.

The legislature did not expressly delineate how lien and trust provisions interact in situations where both remedies are pursued at the same time by a contractor or subcontractor. However, the SCC found that the *BLA* contemplated that the lien and trust remedies may be pursued concurrently. Section 66 of the *BLA* states that "a claim related to a trust fund...may be brought or joined with an action to realize a lien." The SCC held: "The legislature cannot be presumed to enact superfluous or meaningless provisions."

The filing of a lien bond does not extinguish an associated trust claim. The SCC explained that if Dominion were correct that the mere filing of the lien bond extinguished a contractor's or owner's trust obligations, allowing the owner or contractor to appropriate the trust funds for his or her own use, then the claimant would be left with no lien claim and no trust monies if the lien claim failed.

The SCC stated that this is the very problem that the trust provisions in the *BLA* were designed to address. A lien bond merely secures a contractor's or subcontractor's lien claim – it does not satisfy it through payment. Therefore, it does not extinguish the owner's or contractor's obligations under the statutory trust.

The principles enunciated by the SCC can be applied to Ontario contracts and legislation. ■

## Court orders disclosure of records relating to bid proposal

*Order MO-3246, Whitchurch-Stouffville (Town) (Re)* ([2015] O.I.P.C. No. 191) involves an appeal from an order by the Ontario Information and Privacy Commissioner, arising from a decision by the Town of Whitchurch-Stouffville (Town)

to disclose records. The Town received requests under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA, R.S.O. 1990, c. M.56)* to disclose three records relating to the Appellant's proposal in response to the Town's Request for Proposal (RFP) for project management services.

The affected party had objected to the disclosure of any of the records, and appealed the Town's decision to grant the requester access to the records. The sole issue to be determined by the Adjudicator was whether the records were exempt under section 10(1) of the *MFIPPA*, which states that an institution can refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to result in one of the following harms:

- (a) prejudice to the competitive position or interference with the contractual or other negotiations of a person, group of persons or organization;
- (b) similar information no longer being supplied to the institution, where it is in the public interest that similar information continue to be supplied;
- (c) undue loss or gain to any person, group, committee or financial institution or agency.

Section 10(1) of the *MFIPPA* protects confidential information of businesses or organizations that provide this information to government institutions. The provision limits disclosure of such confidential information to third parties, where the information can be exploited by a competitor in the marketplace.

In order for section 10(1) to apply, each part of a three-part test must be satisfied:

- (1) the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

- (2) the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

- (3) the prospect of disclosure of the record must give rise to a reasonable apprehension that one of the harms specified above will occur.

The Appellant claimed that Record 1, its bid proposal, contained commercial, technical, and labour information. The Adjudicator accepted the Appellant's argument that its bid proposal contained commercial information for the purposes of section 10(1). The proposal contained financial information, setting out the costs of the services to be provided. However, the Adjudicator did not find that the proposal contained technical or labour relations information.

The Adjudicator found that Record 2, a two-page email entitled post-bid repairs, did not contain any of the types of information enumerated under section 10(1), therefore, it did not meet the first part of the test. The Adjudicator ordered that the email portion of Record 2 be disclosed.

Record 3, the evaluation scorecard and summary, listed the evaluation criteria and a rating score for each of the proponents to the RFP. It was found that this information did not constitute commercial, financial or technical information for the purposes of section 10(1). The Adjudicator ordered Record 3 to be disclosed to the requester.

The Adjudicator applied part two of the test – the requirement that the information be supplied to the institution in confidence. In order to satisfy the “in confidence” component, the parties must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided, and the expectation must have an objective basis. The Town claimed that while the information in Records 1 and 2 were supplied by the Appellant in response to the call for RFPs, the submission was done so with the knowledge that the

information would be made available to the public.

The Appellant argued that it supplied its bid proposal to the Town in confidence and stated:

It will significantly undermine the whole purpose of confidentiality in the request for proposal process if the industry competitors are asked to compete on a confidential basis and then the information they provide is later exposed to competitors and used against them to their detriment in other business competitions.

The Adjudicator found that the Appellant had an implicit expectation of confidentiality when it submitted its proposal and accordingly, met part two of the test for the application of section 10(1).

The third part of the test required the supplier of information to show that disclosure would potentially result in harm. The Appellant argued that the disclosure of records could reasonably be expected to result in similar information no longer being supplied to the Town, where it would be in the public interest that this information continues to be supplied. The Adjudicator found that the Appellant did not provide detailed and convincing evidence that other companies would be reluctant, on the basis of this disclosure, to participate in future procurement processes. The Adjudicator held that section 10(1)(b) did not apply to the information contained in Records 1 and 2.

The Appellant argued that pursuant to section 10(1)(a) and (c), disclosure would result in undue loss to it and undue gain to its competitors, since it would eliminate the Appellant's competitive advantage. The Adjudicator found that besides its general argument that competitors will be able to use its proposal to draft future proposals, the Appellant did not provide detailed and convincing evidence that disclosure of its proposal would result in the harms set out in section 10(1)(a) and (c).

The Adjudicator ordered that the Town disclose Records 1, 2 and 3, with the exception of the

Schedule of Personnel and Hourly Rates in Records 1 and 2, since the Schedule disclosed financial information such as the Appellant's pricing breakdown. The Adjudicator stated that disclosure could result in harms outlined in sections 10(1)(a) and (c), as the Appellant's competitors could use the information of the hourly rates and costs breakdown to underbid the Appellant in future RFP processes.

This decision illustrates the need for parties to present detailed and convincing evidence of harm in order to be granted relief from disclosure of records pursuant to section 10(1) of the *MFIPPA*. ■

## Court considers application of the Access to Information Act in the context of a public procurement contract

In *Ucanu Manufacturing Corp. v. Defence Construction Canada* (2015 FC 1001), Ucanu Manufacturing Corp. (Ucanu) brought an application for an order, pursuant to section 41 of the *Access to Information Act* (*ATIA*, RSC 1985, c A-1), directing Defence Construction Canada (DCC) to disclose in full redacted records relating to a contract and joint venture between DCC and Graham Construction and Engineering. The contract dealt with a public procurement for construction of a maintenance hangar in Trenton, Ontario. DCC refused to disclose portions of the joint venture agreement on the basis that it had exempted some information pursuant to sections 19(1) and 20(1)(b) of the *ATIA*. DCC argued that the undisclosed information constituted personal information under the *Privacy Act* (RSC 1985, c. P-21) and confidential commercial information of a third party.

Section 19(1) of the *ATIA* states: "Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*." Subsection (2) outlines when a head of a government may disclose a record that contains personal information, such as

when the individual to whom it relates to consents to the disclosure, when information is publically available, and when the disclosure is in accordance with section 8 of the *Privacy Act*.

Section 20(1)(b) of the *ATIA* states that a head of a government institution shall refuse to disclose a record containing financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party.

The Office of the Information Commissioner of Canada (OIC) decided that DCC had properly applied these exemptions and Ucanu filed this application for judicial review of the matter. Ucanu's position was that the information withheld on the basis that it constituted personal information, specifically the signatures of the two signatories to the joint venture agreement and the name and signature of the witness on the tender form, did not properly fall within the scope of section 19 of the *ATIA*.

Ucanu referenced decisions of the Information and Privacy Commissioner of Ontario, which stated that information associated with an individual in their professional, official or business capacity is generally not considered to be about the individual for the purposes of the definition of "personal information" under Ontario's privacy legislation. Ucanu argued that a substantially similar definition can be found under the *Privacy Act*. In the alternative, Ucanu argued that even if the signatures and names constitute personal information, they ought to be disclosed because such information is publicly available in other business-related documents.

The Federal Court disagreed with Ucanu's reliance on decisions of the Information and Privacy Commissioner of Ontario to argue that personal information should be disclosed since the definition of personal information under the *Privacy Act* and under provincial legislation is "substantially similar". The Federal Court found significant differences between the definitions. Therefore, the decisions were of limited value in interpreting the definition of personal information under the *Privacy Act*.

Ucanu also argued that pursuant to subsection (k) of the definition of personal information under the *Privacy Act*, there is the ability to disclose personal information about an individual who is performing services under contract for a government institution. The Federal Court agreed with the Respondent's position that neither the signing of the joint venture agreement or the witnessing of the tender form can be characterized as related to the services performed under the construction contract with DCC. Therefore, DCC was authorized under section 19(1) of the *ATIA* to refuse to disclose the witness's name and the three signatures at issue.

Furthermore, Ucanu maintained that the withheld information in the joint venture agreement did not fall within the scope of the exemptions under section 20 of the *ATIA*. Not all the information in the agreement and covering letter could be properly characterized as commercial information. The Federal Court considered whether DCC could rely on section 20(1)(b) of the *ATIA* to refuse to disclose a third party's confidential commercial information. The Federal Court found that the evidence fell short of what was required to establish confidentiality on the basis of commercial information.

The Federal Court held that DCC was authorized to refuse to disclose the name and signatures of the parties to the joint venture agreement, as well as the witness' name on the tender form, however, it had to disclose the contents of the joint venture agreement and the covering letter which accompanied the agreement. ■

— KC LLP —

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