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Public Sector

Procurement Law Newsletter

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IN THIS ISSUE —

Court confirms no discretion to waive non-compliance

In *Admiral Roofing Ltd. v. Prince George School District No. 57*, [2010] B.C.J. No. 1949, the British Columbia Supreme Court dismissed the plaintiff's claim that its bid was rejected contrary to the terms and conditions of the defendant School Board's invitation to tender.

The case dealt with a tender call issued by the defendant Board for roofing of two buildings - Central Fort George School and Central Fort George Family Resource Centre. The invitation to tender included the following clause: *"A mandatory site tour for general contractors will be held on May 14, 2009 at 8:00 a.m. beginning at South Fort George Family Resource Centre located at 1200 Lasalle Avenue and immediately followed by Central Fort George School located at 2955 Third Avenue. Agents must register their presence with the owner of the site tour stating the name of the contractor they represent. Failure to attend and register will lead to the non-acceptance of the tender by the owner."* On the scheduled date for the mandatory site meeting, the plaintiff company arrived late and as a result missed the first site meeting. The defendant Board later advised the plaintiff company that it would be unable to bid. The following day, the plaintiff company went to the first site and completed their inspection. The plaintiff company delivered its bid prior to the deadline for submissions, but the defendant did not consider it, and although the plaintiff's bid was the lowest, the bid went to another contractor.

The plaintiff argued that a clause in the tendering document determined the Board's scope of discretion to waive defects. Clause 9.4 read: *"the owner retains a separate right to waive irregularities in the tender form if in the owner's discretion such irregularities are of a minor or technical nature"*. The Court held that the breach in this case was not a technical breach and therefore the issue of waiver was not applicable. The Court noted that had the plaintiff arrived a mere 5 minutes late for the inspection, his failure to attend the first 5 minutes could have been considered a technical breach. The Court dismissed the plaintiff's claim and reasoned: *"there was not a discretion available to the defendant to waive a defect of non-compliance of the mandatory site meeting clause."* The Court adopted the reasoning of *Chandos Construction Ltd. v. Alberta (Alberta Infrastructure)* A.J. No. 1483, as quoted in *North American Construction (1993) Ltd. v. York (Municipality)*: *"A restrictive interpretation of the discretion clause is necessary in order to respect the mandatory requirements of the instructions to tenderers and to protect the tendering process."*

This decision reaffirms the requirement to respect the bidding conditions, which are said to be mandatory in the bidding documents. Accordingly, care should be exercised by an owner when crafting mandatory requirements because if a mandatory requirement is not met by a bidder, the owner must be prepared to disqualify such bidder from the bidding competition.

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Court applies fairness principle

In *CMH Construction Ltd. v. Victoria (Town)*, [2010] N.J. No. 290, the Newfoundland and Labrador Supreme Court held the defendant Town liable for breaching its duty of fairness.

This case involved a call for tenders by the defendant, Town of Victoria ("Victoria"), for renovations to Victoria's Municipal

Centre. The Tender Notice required sealed tenders to be submitted by 2:00 p.m. on October 5, 2006, at which time the tenders would be opened. Furthermore, the Tender Notice contained the following privilege clause: *"The owner does not bind itself to accept the lowest or any tender for the project."* The plaintiff's bid was the only bid received by Victoria. After opening the plaintiff's bid, Victoria saw that it exceeded the project budget considerably and realized that bids compliant with the specifications would be unable to fall within the budget. As a result, Victoria made substantial changes to the specifications included in the tender call, using cheaper materials and cutting out some of the work. Victoria proceeded to re-scope the work and divided it into smaller projects. At this time, Victoria did not cancel the tender, did not reject the plaintiff's bid, and did not advise the plaintiff of the revised specifications and plan to divide the work into smaller projects. Eventually Victoria awarded the work to three different companies.

The Court held: *"Victoria breached its implied duty of fairness owed to CMH (the plaintiff) by causing it to expend time, effort and money on a hopeless bid, then completely ignoring CMH's interest, which it was contractually bound to consider, in devising and carrying out a remedial scheme, and ultimately awarding something other than contract B to other contractors."* The Court held that while Victoria had the right to set the terms of its tender call and the right to reject the plaintiff's bid in reliance on the privilege clause, it was required to treat compliant bidders fairly. Victoria had an obligation to cancel the tender and notify the plaintiff that its bid had been rejected and that the project was being reconfigured on new specifications.

This decision highlights the importance of fairness. In this instance, simple notification would have constituted fairness and would have avoided legal ramifications. Fairness would have been quite easy to achieve.

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Court confirms fairness in process

In *Bank of Montreal v. Sportsclick Inc.*, [2010] N.S.J. No. 442, the Nova Scotia Supreme Court approved a motion from the Court appointed Receiver to approve the sale of shares owned by the defendant.

In this case, a Court appointed Receiver initiated a public tender of certain assets of the defendant, including the shares of a private US company in which the defendant owned all of the shares. The Receiver reserved the right *"to accept any one of the bids received, or if none of the bids received is deemed worthy of acceptance, no bid."* Furthermore, the sale of the shares was conditional upon Court approval. Upon the close of the tender process, the Receiver did not perceive any of the bids as acceptable and as a result rejected all of the bids. The Receiver then entertained offers from two parties, one of which was an unsuccessful public tender bidder. The two parties made several offers to the Receiver, but none were deemed worthy and so the Receiver initiated a private tender process using the same terms and conditions as the previous public tender. When the tender process closed, only the two aforementioned parties had submitted bids. The Receiver accepted the highest bid, which was $20,000. The winning bidder was the party that had been an unsuccessful bidder in the public tender process.

The defendant claimed that the bidding process was flawed and unfair. The defendant maintained that the winner had a considerable advantage over the other bidder since he knew from his previous bid that $17,500 was not a large enough bid. The

defendant argued that the Receiver did not disclose to the participants relevant facts pertaining to the pre-tender offers that it had considered and rejected. The defendant submitted: *"[T]he lack of a level playing field created by the Receiver deprived the Defendant of a truly competitive tender process which produced an artificial "high-bid" and resulted in less revenue to the Receiver and a lower return for the defendant."*

The Court approved the Receiver's motion to approve the sale of the shares. The Court held that the bidding process was not unfair. Equal treatment was provided to all of the participants of the private tender. The Court found there was a level playing field, as each prospective purchaser was provided with the same information. Furthermore, the Court held that the receiver was not obligated to disclose details of the prior bid history: *"To have done otherwise would have completely altered the process from a private tender to an auction. There was no evidence presented to satisfy the Court that this would have resulted in a higher selling price for the shares."*

This decision stresses the importance of ensuring that all relevant information is provided to all bidders and that no bidder is provided with relevant information to the exclusion of other bidders.

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Court accepts challenge to integrity and efficiency of procurement process

In *Almon Equipment Ltd. v. Canada (Attorney General)*, [2010] F.C.J. No. 948, the Federal Court of Appeal quashed the decision of the Canadian International Trade Tribunal and remitted the matter back to the Tribunal for redetermination.

The case involved a procurement that the federal Department of Public Works and Government Services initiated for aircraft de-icing services and glycol collection services. At Canadian Forces Base Trenton, it was necessary for ice and snow to be removed from aircrafts to enable them to fly safely. To de-ice the aircrafts, glycol was applied to the air surfaces of the aircraft. Some glycol would fall to the ground, so it was necessary that it be collected and be properly managed. Following the evaluations, Almon was wholly unsuccessful. Almon alleged unfairness and deficiencies in the procurement process. The Tribunal accepted Almon's complaint in part, finding that the government evaluators' failed to keep proper records and that it was unclear how their evaluations were executed. The Tribunal had viewed the evaluators' questionable record-keeping and procedures as only being relevant to the credibility of their testimony. The Tribunal granted a remedy with respect to the glycol collection services but not for the de-icing services. The Tribunal reasoned that even if the evaluators had applied the correct criteria to Almon's proposal concerning the de-icing services, it still would not have won. However, in regards to the glycol collection services, Almon could possibly have won if its proposal had been properly evaluated.

The Federal Court of Appeal remitted the matter back to the Tribunal for redetermination. The Federal Court of Appeal found that the Tribunal erred by failing to consider whether the evaluators' record-keeping and procedures might have affected the integrity and efficiency of the competitive procurement process. The Tribunal had only used the evidence of the evaluators' questionable record-keeping to make credibility assessments about the evaluators' testimony. The Federal Court of Appeal held: *"[T]he Tribunal was obligated to analyze and use this body of evidence for*

another purpose: to consider whether the evaluators' modest record-keeping and the unknowable nature of the procedures they followed fundamentally compromised the integrity and efficiency of the competitive procurement system."

Accordingly, the lesson to be gleaned from this decision is to ensure that evaluators are properly instructed in conducting evaluations and their record-keeping in connection therewith. The Supply Chain Guideline which governs the bidding process for broader public sector agencies mandates evaluation matrices so that scores are auditable and to encourage evaluators to be fair, factual, fully defensible and to withstand public scrutiny.

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Court of Appeal confirms late bid not compliant — computer error not sufficient

In *Coco Paving (1990) Inc. v. Ontario (Minister of Transportation)*, [2009] O.J. No. 2547, the Ontario Court of Appeal found that the winning bidder's late submission was not compliant with the provisions of the tender documents.

The case involved a call for tenders by the Minister of Transportation ("MTO") for a major contract to perform highway roadwork. The procedure for bid submissions required a bid to be submitted online prior to tender closing. The bid submission form contained the following warning: *"This bid must be received by the MTO Servers (through the submit action) before tender opening at 03:00 PM on 29-Apr-2009 to be considered"*. MTO received Coco Paving's bid 30 to 60 minutes past the deadline. Coco Paving purported that the late submission was caused by a computer error. The appellant's, Bot Construction Group ("Bot"), attacked the judgment that the late bid submitted by the respondent, Coco Paving, was compliant with the call for tenders by the MTO.

The Ontario Court of Appeal allowed Bot's appeal. The Court of Appeal found that the tender documents did not provide for consideration of late submissions, and therefore Coco Paving's bid was not compliant. A provision in the tender documents authorized the MTO to exercise its discretion and *"waive formalities as the interests of the Ministry may require"*, but the Court of Appeal held that timing of bid delivery could not be considered a mere formality in the tendering process. Furthermore, while the tender documents provided for alternate bid submission procedures in the event of a computer system failure, bids received by the MTO after tender closing could still not be considered. If a bidder's computer system failed, the bidder was required to contact the MTO's help desk at least 30 minutes before tender opening/closing, and Coco Paving failed to satisfy this requirement. The Court of Appeal noted: *"The timing of bid submissions in public tender processes is critical. Late bids can unfairly advantage the non-compliant bidder over the compliant bidders."*

This decision reinforces the importance of compliance with the deadline for submissions and an owner's inability to waive non-compliance therewith. The bid documents could allow for adjustments to timing of receipt for computer errors due to the fault of the public agency.

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Court of Appeal confirms duty of bidder to seek clarification

In *British Society of Audiology v. B.C. Decker Inc.*, [2010] O.J. No. 3337, the

Ontario Court of Appeal upheld a trial judgment that, before bidding, the onus was on the bidder to review the tender documents and seek clarification of material information.

In this case, three non-profit organizations that promoted hearing care and the audiological profession issued a Request for Proposal (RFP) to a small group of publishers for the production of an academic journal. The three organizations had each published an academic journal on the subject of audiology prior to deciding to combine their efforts into a single publication. The appellant was awarded the contract.

The parties entered into an agreement and the organizations were obliged to provide the plaintiff with complete subscriber lists including no fewer than 1,300 institutional subscribers in the aggregate. The appellant was provided with a consolidated list of 1,346 institutional and individual subscribers, but the lists included some duplicates and as a result only 951 unique subscribers had been identified. The appellant ultimately failed to produce a financially successful product and thereby did not fulfill its obligations under the agreement. The organizations brought an action to recover against the appellant.

The Court of Appeal upheld the Trial Judge's decision and dismissed the appeal. The Trial Judge determined the parties had intended for the organizations to provide a list of 1,300 subscribers, and that these names would include both institutions and individuals. The Trial Judge rectified the contract, noting that there had been no complaint from the appellant regarding the number of subscriber names at the time the list had been provided. In addition, the Trial Judge held that it was the appellant's responsibility to examine the materials provided by the organizations and raise any concerns before bidding.

Note the emphasis on the importance of providing bidders an opportunity to seek clarification of any information in a question-and-answer format, which would be available to all bidders. It is then incumbent on the bidders to seek clarification prior to bidding.

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Tribunal confirms procurement cannot favour specific proprietary design

In *Halkin Tool Ltd. v. Canada (Department of Public Works and Government Services)*, [2010] C.I.T.T. No. 60, the Canadian International Trade Tribunal held that the government used an improper formulation of the mandatory technical standards in a Request for Proposal (RFP) for the provision of a hydraulic press brake. The Tribunal ordered the government to cancel the procurement process and redraft its RFP in accordance with the provisions of the applicable trade agreements.

In this case, an RFP had been issued by the Department of Public Works and Government Services ("PWGSC") on behalf of the Department of National Defence ("DND") for the provision of a hydraulic press brake. The complainant alleged that the RFP contained mandatory technical specifications that were based on a competitor's product, and as a result the procurement was biased in favour of that company.

The Tribunal held that the complaint was valid in part. The Tribunal found that

there was an improper formulation of the mandatory technical specifications in the RFP, but that there was no reasonable indication that the technical specifications were biased in favour of the competitor. The Tribunal found that the requirements set out in the mandatory technical specifications of the RFP referred to a design or to descriptive characteristics for the product being procured, rather than specifying the performance that was being sought. The Tribunal referenced section 11 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*. Under this section, the Tribunal is required to determine whether the RFP was conducted in accordance with the applicable trade agreements. In this case, it was necessary to consider the North American Free Trade Agreement ("NAFTA"). Article 1007 of NAFTA provides: *"Each party shall ensure that any technical specification prescribed by its entities is, where appropriate, specified in terms of performance criteria rather than design or descriptive characteristics."* The Tribunal found that the omission of words such as "or equivalent" in the technical specifications of the RFP, as required by Article 1007 of NAFTA, meant that hydraulic press brakes based on other designs that could potentially satisfy the DND's operation requirements, were precluded from being considered. In regards to the Tribunal's order for the government to redraft its RFP, the Tribunal specified: *"[S]hould PWGSC choose to require or refer to a particular design or type, it shall include words such as "or equivalent" in the requirement, as required by the applicable trade agreements."*

This decision confirms the importance in the planning stages of crafting proper technical specifications.

CITT rejects bidder complaint

In *Forrest Green Resource Management Corp. v. Canada (Border Services Agency)*, [2010] C.I.T.T. No. 97, the Canadian International Trade Tribunal rejected the complaint of an unsuccessful bidder who claimed the government based its evaluation on criteria other than those contained in the RFP.

The case involved a procurement by the Canada Border Services Agency (CBSA) for the provision of credit reporting services. The complainant alleged that its proposal was not evaluated in accordance with the provisions of the tender documents. Specifically, the complainant claimed that the evaluation was based on past work volume data, of which only the incumbent supplier was informed. The complainant alleged that the incumbent's knowledge of historic trending data in relation to initial queries and secondary queries provided an advantage by allowing it to tailor its submission accordingly. The complainant maintained that by not providing the trending data to bidders and by disallowing access to this information, the CBSA created confusion in the procurement process which ultimately forced the complainant to submit a disadvantageous bid. The Tribunal disagreed, holding there was no evidence to indicate the CBSA's evaluation was based on undisclosed criteria. The Tribunal noted: *"[T]he onus is on the bidder to ensure that it understands the requirements."*

Much like the *British Society of Audiology v. B.C. Decker Inc.* case previously noted in this Newsletter, this decision also stresses that it is incumbent on the bidders to seek clarification prior to bidding, but

also notes that owners are obligated to make material disclosures to ensure that all bidders are treated fairly and equally.

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Tribunal confirms steps taken with references were appropriate

In *Adware Promotions Inc. v. Canada (Department of Public Works and Government Services)*, [2010] C.I.T.T. No. 71, the Canadian International Trade Tribunal dismissed a complaint from a disqualified complainant on the grounds that the complainant had failed to provide the required reference information. The case involved a procurement by the Department of Public Works and Government Services ("PWGSC") on behalf of the Treasury Board Secretariat for the management of two employee award program services. The complainant alleged that PWGSC evaluated its proposal improperly in relation to the reference check portion of the evaluation criteria for one of the two programs.

The government evaluators had attempted to contact the complainant's references via email to obtain the required reference information, but the emails bounced back. The evaluators had also attempted, unsuccessfully, to contact the references by telephone. Although the complainant's proposal was compliant with the mandatory requirements, it was not compliant with the minimum requirements for the second stage of the Request for a Standing Offer ("RFSO"), "Point-rated Technical Criteria", and as a result the proposal was disqualified. The complainant alleged that PWGSC did not act appropriately in contacting its company client references and that as a result, PWGSC improperly disqualified its proposal. The complainant maintained that PWGSC acted inappropriately by communicating outside the time period specified in the RFSO. The Tribunal disagreed and found that the RFSO contained no requirement for the reference check to occur within a specified time period. The complainant also argued that it should have been contacted when attempts to communicate with the references failed. The Tribunal disagreed and held that the terms of the RFSO did not require such a follow up.

Accordingly, this decision confirms that bidders are responsible for meeting tender compliance requirements, as same may be specified in the tender documents.

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Tribunal confirms Government cannot change evaluation criteria after RFP issued

In *Valcom Consulting Group Inc. v. Canada (Department of Public Works and Government Services)*, [2010], C.I.T.T. No. 72, the Canadian International Trade Tribunal ordered a re-evaluation of proposals on the grounds that the government unilaterally changed its evaluation criteria after the solicitation closed.

The case involved a Request for Proposal (RFP) issued by the Department of Public Works and Government Services ("PWGSC") on behalf of the Department of National Defence for the provision of informatics professional services. The RFP required bidders to list their work experience and provide detailed addresses when describing their work. The complainant challenged the evaluation process following the introduction of a less stringent standard for the addressing

requirements for government references. The Tribunal found: *"PWGSC unilaterally changed the evaluation criteria and relaxed the addressing requirements for government references. This is contrary to the requirements of the RFP."* The Tribunal noted that the content of the RFP did not enable a bidder to know that a distinction would be made between government and non-government addressing requirements. The Tribunal concluded: *"[T]he use of criteria not stated in the RFP by PWGSC to evaluate Valcom's proposal constitutes a violation of the applicable trade agreements and therefore determines that the complaint is valid."* The Tribunal ordered PWGSC to re-evaluate all proposals, without distinction between the government and non-government addresses.

This decision confirms the importance of developing evaluation criteria in the planning stages of the bid competition, as it is not appropriate to change evaluation criteria once it has been issued, whether or not such change is disclosed to bidders. This is also confirmed in the Supply Chain Guideline.

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Court finds claim statute-barred

In *100251 P.E.I. Inc. (c.o.b. Central Roadways) v. Summerside (City)*, [2010] P.E.I.J. No. 24, the Prince Edward Island Supreme Court granted a motion brought by the City of Summerside ("City") to dismiss the plaintiff's action as statute-barred. The plaintiff's claim was filed after the relevant limitation period.

In this case, the plaintiff had responded to a call for tenders for a paving project issued by the defendant. The plaintiff had the lowest bid but the Summerside City Council awarded the paving contract to another bidder. On June 17, 2008, the plaintiff was advised that the paving contract had been awarded to another bidder. The defendant argued that the cause of action arose on this date, while the plaintiff argued that the cause of action had yet to arise since it had not been made aware of the material facts that gave rise to the City's decision to award the contract to the other bidder.

The Court held that the plaintiff's claim was statute-barred. The Court found that the cause of action arose on June 17, 2008. On this date, the plaintiff was aware of a problem when the City formally notified the plaintiff that the contract had been awarded to another bidder. The plaintiff commenced its action on February 20, 2009, and this was beyond the six month limitation period prescribed by statute.

This decision reaffirms the significance of limitation periods.

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Court finds no venue in B.C. for Ontario procurement

In *Conor Pacific Group Inc. v. Canada (Attorney General*), [2010] B.C.J. No. 743, the British Columbia Supreme Court found that the Court had no jurisdiction to hear the plaintiff's claim.

In this case, Defence Construction Canada (1951) Ltd. ("DCC"), a federal Crown corporation, invited bids for remedial work of fuel storage sites and hydrocarbon-contaminated groundwater at the Canadian Forces Base airport in North Bay, Ontario. The plaintiff alleged that in seeking bids to perform this work, DCC made misrepresentations. The plaintiff claimed

that in its tender documents, DCC made the following representations: *"(a) that the remediation project would involve treating only organic compounds in soil and groundwater; (b) that no contaminants other than organic compounds were present in the soil to be treated; and (c) that the quantity of soil to be treated was as specified."* The plaintiff claimed that it had relied on these representations to design its treatment systems for the remediation project, as well as to calculate its bid price. The plaintiff maintained that contrary to these representations, the project site contained additional hazardous contaminants as a result of being a former landfill and that the site was comprised of a much greater quantity of contaminated soil than had been represented by the defendant. The plaintiff claimed that it had to revise its remediation program as a direct result of these misrepresentations, and claimed damages for unjust enrichment.

The Court held that it had no jurisdiction to hear the claim. The site meetings the plaintiff referred to occurred in North Bay, Ontario. There was nothing of substance that occurred in British Columbia. Furthermore, the Court found: *"It is clear from the Tender form, Notification of Award and related documents that the contractual obligations under the bid/tender award contract were to be performed in North Bay, Ontario. The bid/tender award contract was by its express terms governed by the laws of Ontario."* The Court concluded that none of the alleged misrepresentations or *quantum meruit* claims arose in British Columbia.

This decision confirms the importance of choosing the correct venue for any claim.

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Decisions of Courts affirm importance of contractual provisions

In *Chippewas of Mnjikaning First Nation v. Ontario (Minister of Native Affairs)*, [2010] O.J. No. 212, the Ontario Court of Appeal dismissed the appeal of the plaintiff, the Chippewas of Mnjikaning First Nation ("MFN"). The case involved a dispute between the Ontario government and MFN in relation to the Casino Rama revenue sharing arrangement.

In this case, an independent panel had initially selected the MFN to host Casino Rama, which was a pilot project involving revenue sharing to the benefit of all Ontario First Nations. MFN argued that the site selection process was tantamount to a tender process with certain features of an RFP process.

The Trial Judge held that the site selection process did not fall within the legal paradigm of a tender contract. The Court of Appeal agreed: *"[T]here is no document coming from MFN that fits comfortably into the concept of a 'tender' (Contract A) which, if accepted by Ontario (or the Selection Panel on behalf of Ontario), could be transformed into a performance contract (Contract B) containing the terms of the tender, as required in tender law."* Furthermore, although the site selection process somewhat resembled an RFP, the Court of Appeal agreed with the Trial Judge: *"[I]t did not constitute a process whereby there was to be a binding agreement on revenue sharing, negotiated with the selection panel, and settled once the selection panel had chosen the host First Nation."*

Leave to Appeal to the Supreme Court of Canada was Dismissed in *Chippewas of*

Mnjikaning First Nation v. Ontario (Minister of Native Affairs), [2010] S.C.C.A. No. 91.

This decision reinforces the need to ensure that all expectations are reflected in the agreement(s) between the parties, and that an owner should be wary in any process it initiates to ensure that such processes are not governed by the laws of tenders if it does not so intend.

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Court confirms right of access

In *Provincial Airlines Ltd. v. Canada (Attorney General)*, [2010] F.C.J. No. 994, the Federal Court dismissed an application by Provincial Airlines Limited ("Provincial") for judicial review of a decision of the Public Works and Government Services Canada ("PWGSC"), to disclose certain records pursuant to a request made under the *Access to Information Act* ("the Act").

Pursuant to a contract, Provincial had provided maritime aerial surveillance services to the Department of Fisheries and Oceans ("DFO"). The information was provided to various governmental organizations to assist in the detection of illegal fishing, drug offences and national defence purposes. The contract was subsequently re-tendered by a Request for Proposals (RFP) which required increased security clearance. Provincial was awarded the contract. The PWGSC had commissioned a report ("the Report") from an accounting firm to assess the possibility of security breaches in some of its files. The Report included information regarding Provincial, including its security clearances and an opinion about Provincial's level of security. Provincial objected to the disclosure of the Report.

The Act provides that a Canadian citizen has a right to access records controlled by a governmental institution. Section 4 of the Act provides for the disclosure of information contained in the records of the government. Section 20 of the Act contains some exceptions claimed by Provincial. As the Court noted, Provincial specifically attempted to rely on: *"subsections 20(1)(b) – confidential information, 20(1)(c) – information that could on disclosure cause financial loss or prejudice, and 20(1)(d) – information that could on disclosure interfere with contractual or other negotiations."* The Court noted that the purpose of the Act is to establish that disclosure of records is the rule, not the exception. Therefore, since Provincial sought to exempt records from disclosure, the onus was placed on Provincial. The Court held that Provincial did not satisfy its burden. The Court found that subsection 20(1)(b) did not apply to exempt the information from disclosure. The subsection requires the information to be confidential and commercial and to be supplied to the government by the applicant. The Court held that the disclosed information about Provincial's security clearances did not satisfy these requirements. In regards to subsections 20(1)(c) and (d) of the *Act*, the Court rejected Provincial's submission that the release of information would cause it material financial losses, prejudice its competitive position and interfere with contractual negotiations. Provincial unsuccessfully argued that disclosure of the records would damage its goodwill and reputation in the industry.

This decision reaffirms the significance of access to information legislation.

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Another Court affirms right of access

In *Brainhunter (Ottawa) Inc. v. Canada (Attorney General),* [2009] F.C.J. No. 1445, the Federal Court rejected an application by the successful bidder for an order prohibiting Public Works and Government Services Canada ("PWGSC") from disclosing information contained in its bid that was made in response to an RFP issued by PWGSC to provide IT services at Citizenship and Immigration Canada.

In this case, PWGSC received a request under the *Access to Information Act* ("the *Act*") for the disclosure of all winning proposals for PWGSC (Citizenship and Immigration Canada). PWGSC informed the applicant of the request; the applicant objected to the release of the information on the grounds that the information fell within the exemptions from disclosure listed under paragraph 19(1) and subsections 20(1)(b) and/or 20(1)(c) of the *Act*.

Subsection 19(1) exempts personal information from disclosure. The Court found that the record in question did not contain any personal information that required an exemption from disclosure under subsection 19(1) of the *Act*. The records were redacted, such that it was unlikely the identities of the particular individuals could be discovered simply based on the information provided. However, not all of the names of the individuals were redacted from the bid. Thus, the Court concluded that prior to disclosure, PWGSC was required to make the appropriate redactions. Subsection 20(1)(b) exempts confidential commercial information provided by a third party to a government institution. The Court found that the contents of the record in question could not be classified as confidential commercial information, since the record contained general information not relating to trade or commerce. Furthermore, although a statement of confidentiality was provided in the bid, the Court held that it was not clear that the totality of the information in question was provided to PWGSC with a reasonable expectation of confidence: *"[T]he existence of a confidentiality statement is not, by itself, determinative of the reasonableness of the assertion made here by the applicant, especially in light of the fact that the record was created in the context of a professional bid involving the expenditure of public funds."* Within subsection 20(1)(c) of the Act, an exemption is provided for information which could reasonably be expected to prejudice the competitive position of a third party. The Court held that the applicant failed to show that the disclosure of the information would prejudice its competitive position: *"[T]he applicant's allegations are based on speculation and do not apply to the remaining information contained in the record in question, given its redacted format."* In addition, contrary to the applicant's claim, the Court found there was *"no evidence that the applicant's claimed "know-how" in drafting government bids is unique to their company."*

Again, access to information legislation can have significant implications for bidders. The bid documents should clearly indicate such implications.

— KC LLP —

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