2019 Case of the Year
Clearing the Way for NRFPs

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About the Author

Paul Emanuelli is the General Counsel and Managing Director of the Procurement Office. He was recognized by *Who’s Who Legal* as one of the top ten public procurement lawyers in the world. His portfolio focuses on strategic governance in public purchasing and on negotiating high-profile major procurement projects. Paul has an extensive track record of public speaking, publishing and training. He is the author of *Government Procurement*, *The Laws of Precision Drafting*, *Accelerating the Tendering Cycle* and *The Art of Tendering*. Paul hosts a monthly webinar series and has trained and presented to thousands of procurement professionals from hundreds of institutions across North America through the Procurement Office and in collaboration with leading industry organizations, including NIGP, SCMA, the University of the West Indies, and Osgoode Hall Law School.
Global Case of the Year
An Annual Tradition

Every year, we review late breaking cases from around the world to select a Case of the Year that best reflects global trends impacting local procurement practices. Two years ago we selected the 2016 UK decision *Energy Solutions EU Limited v. Nuclear Decommissioning Authority*, where the court awarded £200 million in lost profits against the government body. This case served as an excellent case study highlighting the pitfalls of managing group evaluations in major projects and of exposing major projects to lost profit claims.
Global Case of the Year
An Annual Tradition

Last year’s top case was the 2017 South African decision *Passenger Rail Agency of South Africa v. Swifambo Rail Agency (Pty) Ltd.*. This case served as a cautionary tale about the risks of evaluation irregularities and biased specifications. It also highlighted the global rise of judicial review remedies which, as recent South African case law shows, can include re-draft and re-evaluation orders, and can also include rescission orders that strike down improperly awarded contracts and, in some cases, require the government to redirect those contracts to the complainant.
Global Case of the Year
An Annual Tradition

For our 2019 selection, we continued exploring global trends relating to commercial lost profit claims and judicial review remedies. Turning to the jurisdiction that first recognized lost profit remedies for losing bidders, we short-listed five recent Canadian cases that reflect the long-term decline of Contract A and the rise of judicial review as the means of regulating negotiated RFPs outside the Contract-A operating system. We put those short-listed cases to a vote. These were your choices:
Global Case of the Year
You Be the Judge: Three-Way Tie For the Bronze

Based on your votes, the following cases were in a three-way tie for third place as Case of the Year:

- The January 2018 decision of the Ontario Court of Appeal in *Kaymar Rehabilitation Inc. v. Champlain Community Care Access Centre*, which left the winning defendant to pay over $1 million of its own legal costs even though it won the decade-long lawsuit, since the case is a good example of what winning looks like for purchasing institutions that get sued using Contract A formats.
Global Case of the Year
You Be the Judge: Three-Way Tie For the Bronze

The June 2018 Yukon Court of Appeal decision in *Mega Reporting Inc. v. Yukon*, because it illustrates the increasing uncertainty in the enforcement of Contract A liability disclaimers, which forces public institutions to spend tax dollars defending lawsuits and exposes them to paying contractors lost profit damages.
Global Case of the Year
You Be the Judge: Three-Way Tie For the Bronze

The September 2017 decision of the Saskatchewan Court of Queen’s Bench in *Saskatoon Surgicentre Inc. v. Saskatoon Regional Health Authority*, since that decision shows how properly drafted non-Contract A RFPs shield purchasing institutions from Contract A lost profit remedies and enable the speedy summary dismissal of lost profit court claims.
Global Case of the Year
This Year’s Runner Up

Based on your votes, the following case was this year’s runner-up for Case of the Year:

- The October 2018 Ontario Superior Court of Justice decision in *CG Acquisition Inc. v. P1 Consulting Inc.*, which summarily dismissed a $150 million damages claim against a non-Contract A negotiated RFP process, while also rejecting the argument that purchasing institutions owe proponents “free-standing” fairness duties outside of Contract A that allow lost profit claims.
Court Dismisses $150 Million Claim Against Negotiated RFP

CG Acquisition Inc. v. P1 Consulting Inc.
Ontario Superior Court of Justice

In its October 2018 decision in CG Acquisition Inc. v. P1 Consulting Inc., the Ontario Superior Court of Justice summarily dismissed a $150 million damages claim brought by a losing bidder in a negotiated RFP process. As the Court noted, the case dealt with an RFP for the Liquor Control Board of Ontario (LCBO) to “negotiate with the LCBO and, if successful in negotiations, finalize an agreement related to the proposed sale and subsequent redevelopment of land located along the Toronto waterfront”.

No Contract A, No Lost Profit Remedy
As the Court further elaborated, “the successful company would purchase the land, complete a development which would include a new LCBO head office and flagship retail location and lease back to the LCBO both the office and retail space”. P1 Consulting Inc. was hired as a fairness monitor on the project, which was also sponsored by Infrastructure Ontario.
The plaintiff, CG Acquisition Inc., was an unsuccessful proponent that was disqualified during that RFP process. It brought the claim for damages against the LCBO, Infrastructure Ontario, and P1 Consulting Inc., arguing that they breached their duty of fairness by not including P1 Consulting Inc. in the disqualification decision and by refusing to reconsider that decision. However, the Court dismissed the claim, finding that the fairness monitor was a consultant for the purchasing institutions and owed no duty to the proponents.
Court Dismisses $150 Million Claim Against Negotiated RFP
CG Acquisition Inc. v. P1 Consulting Inc.
Ontario Superior Court of Justice

With regards to the fairness monitor’s oversight, the Court stated:

I do not accept CG’s submission that the defendants acted negligently in performing a service or caring out an investigation…P1 sought to be in engaged from the very beginning of the reconsideration. After being told that the decision was made, P1 reached a reasonable conclusion concerning the issue of fairness.
Court Dismisses $150 Million Claim Against Negotiated RFP

**CG Acquisition Inc. v. P1 Consulting Inc.**

Ontario Superior Court of Justice

Furthermore, the Court found that the RFP in question did not give rise to a Contract A tendering process and therefore could not be subject to a lost profit damages claim. The Court also found that the LCBO and Infrastructure Ontario did not owe any “free standing” commercial duty of fairness outside of Contract A under either contract law or tort law, and that proponent did not have the right to bring a lost profit claim outside of Contract A:
Did the Sponsors and/or P1 owe CG a duty of fairness?
I do not find that any of the defendants owed CG a duty of fairness. By way of a starting point CG does not bring any claims against the defendants in contract, but rather in tort. Nevertheless, it frames its tort claims in the context of a duty of fairness. The tort claims flow from the ‘principle of fairness,’ says CG, with the result that said principle informs the other duties owed by the defendants. Further, as noted, CG concedes that the Sponsors reasonably disqualified it as per the terms of the RFP. CG only takes issue with the way in which the Sponsors and P1 dealt with the reconsideration.
Insofar as the duty of fairness is concerned, I agree with the defendants that no such freestanding duty exists independent of a contractual duty unless the RFP documents explicitly provide to the contrary: *Coco Paving (1990) Inc. v. Ontario (Transportation)*, 2009 ONCA 503, 79 C.L.R. (3d) 166 [Coco]. Unless and until ‘contract A’ is formed by the submission of a compliant bid, there will be no duty of fairness between a proponent and a sponsor. CG, by its own admission, never submitted a compliant bid.

In my view this observation is further supported by the decision of the British Columbia Court of Appeal in *Hub Excavating Ltd. v. Orca Estates Ltd.*, 2009 BCCA 167 at para. 39, 92 B.C.L.R. (4th) 286, where it stated:
The contractual duty of fairness is an implied term of Contract A, and thus only comes into existence when that contract is formed. There is no free-standing duty of fairness in the bidding process independent of that contractual duty: *Midwest Management (1987) Ltd./Monad Contractors Ltd. v. BC Gas Utility Ltd.*, 2000 BCCA 589, 82 B.C.L.R. (3d) 79, at para. 13. While the trial judge’s comment might support a duty of care in the context of tortious misrepresentation, it cannot form the basis for a finding of breach of contract arising from an owner’s decision to go to tender.

I am in agreement with the British Columbia Court of Appeal regarding the application of *Midwest Management*. Support for this conclusion is also found in the recent Ontario Superior Court decision in *Kaymar Rehabilitation Inc. v. Champlain Community Care Access Centre*, 2017 ONSC 1843 at para. 24.
Court Dismisses $150 Million Claim Against Negotiated RFP

CG Acquisition Inc. v. P1 Consulting Inc.
Ontario Superior Court of Justice

The Court also relied on the following analysis of Supreme Court of Canada precedent, which recognizes lost profit claims under Contract A, but rejects monetary claims outside Contract A based on “free-standing” tort-based duties that apply in negotiations:

Additional support for this conclusion is found in the statements of author Paul Emanuelli in his text Government Procurement, 3rd ed.:

D. Future Considerations Regarding Free-standing Fairness Duties

While rumours of a free-standing duty of fairness existing outside of Contract A may ultimately prove to be greatly exaggerated, a lingering uncertainty hovers over the tendering process on account of these reported sightings. The final resolution of this issue has been deferred as a matter for another day.

Non-Contract A RFP – Damages Claim – Summary Dismissal
In the interest of promoting greater certainty and less litigation, when that day comes, it is suggested that this matter be put unequivocally to rest. Fairness calls for certainty. In the final analysis, no claim should stand where no duty lies.

The reliance on vaguely articulated fairness and good faith duties as a means of scrutinizing purchasers’ conduct outside of a formal Contract A process creates unnecessary uncertainty in the procurement process. While a robust and reasonably well-defined regime has evolved to provide predictability within the Contract A paradigm, the application of a free-standing duty undermines the equality of bargaining position and contradicts the free negotiation principles articulated by the Supreme Court of Canada in Martel.
Court Dismisses $150 Million Claim Against Negotiated RFP

*CG Acquisition Inc. v. P1 Consulting Inc.*

Ontario Superior Court of Justice

In this decision, the Court applied long-standing precedent that recognizes no right to bring lost profit claims against purchasing institutions that avoid Contract A by using negotiated RFPs under traditional contract law. In so finding, the Court also rejected the weak authorities presented by the plaintiff that purportedly recognized a “free standing” fairness duty that could give bidders the right to sue for damages outside of Contract A.
In applying the governing precedents, the Court shut down the plaintiff’s attempt to sidestep the Contract A analysis by bringing a lost profit claims under a tort-based duty of care in a situation where no Contract A duty of fairness was created by the negotiated RFP. In so finding, the Court summarily dismissed the disqualified proponent’s $150 million lost profit claim and awarded court costs against that losing proponent. As this case illustrates, properly structured negotiated RFPs that operate under traditional contract law rather than under Contract A tendering law serve as a useful risk mitigation measure that significantly reduces the risk of successful damages claims by losing bidders.
Global Case of the Year
As Selected by Our Readers

The following late-entrant from British Columbia was voted the 2019 Case of the Year:

- The January 2019 decision of the British Columbia Court of Appeal in *Murray Purcha & Son Ltd. v. Barriere (District)*, which recognized that a non-Contract A RFP was not subject to lost profit claims, but remained subject to due process rules under administrative law, thereby proving that public institutions can run legally defensible competitions under strict procedural correctness standards outside of Contract A rules.

Case of the Year Survey
Court Recognizes Non-Contract A RFP, Rejects Challenge

*Murray Purcha & Son Ltd. v. Barriere (District)*

British Columbia Court of Appeal

In its January 2019 decision in *Murray Purcha & Son Ltd. v. Barriere (District)*, the British Columbia Court of Appeal determined that the District of Barriere did not breach its tendering duties in the evaluation and award of a contract. The case dealt with a non-Contract A RFP for winter road maintenance services. A losing bidder brought an application for judicial review, challenging the validity of the evaluation and award process.
The Court ruled that the RFP did not create a Contract A contractual duty of fairness that would give rise to a commercial lost profit remedy claim by a proponent:

Whether a Request for Proposal creates a contractual duty of fairness under a Contract A analysis is determined by whether the parties intended to initiate contractual relations by the submission of a response to the RFP. If such a contract arises, its terms are governed by the terms and conditions of the RFP: *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 at para. 19.
In this case, the terms of the RFP make it clear that the parties did not intend that a response to the RFP would create contractual obligations in the nature of a Contract A or otherwise...[T]here is nothing in the record before us to mitigate this clear language in the RFP. Accordingly, I conclude that no Contract A was formed by the responses to the RFP, and no contractual duty of fairness arises in this case.
Court Recognizes Non-Contract A RFP, Rejects Challenge

*Murray Purcha & Son Ltd. v. Barriere (District)*

British Columbia Court of Appeal

However, the Court ruled that even if no Contract A was created to give rise to a lost profit claim, government procurement decisions remain subject to two different standards of review under administrative law. As the Court of Appeal determined, procedural decisions are subject to the strict standard of procedural correctness, whereas substantive decisions are subject to a more deferential reasonableness standard. The Court summarized the relevant law as follows:
It was at one time thought that procurement decisions of a municipality were immune from judicial review, but that view was rejected by the Supreme Court of Canada in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 at 239–241 (per McLachlin J. dissenting, but not on this point) and 273–274 (per Sopinka J.).

In my view, the chambers judge was not in error when she concluded that the decision of the District to award the road maintenance contract to another proponent was reviewable on administrative law grounds. The District had an obligation of procedural fairness towards proponents who responded to the RFP.
Court Recognizes Non-Contract A RFP, Rejects Challenge

*Murray Purcha & Son Ltd. v. Barriere (District)*

British Columbia Court of Appeal

The difficulty in this case is not whether the District owed the proponents responding to its RFP a duty of procedural fairness, but what the content of that duty was.

The underlying statute does not assist. The District has the authority through s. 8(2) of the *Community Charter*, S.B.C. 2003, c. 26 to “provide any service that the council considers necessary or desirable, and may do this directly or through another public authority or another person or organization.” No statutory guidelines constrain the manner in which a municipality must award road maintenance contracts. Procedural duties will arise from the manner in which a municipality chooses to carry out these responsibilities.
Court Recognizes Non-Contract A RFP, Rejects Challenge

*Murray Purcha & Son Ltd. v. Barriere (District)*

British Columbia Court of Appeal

The concept of procedural fairness has been described as “eminently variable” and “to be decided in the specific context of each case”: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 682. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Court identified five factors that were relevant to determining the content of the duty. Of these factors, the most significant for this case arises from the legitimate expectations of those parties who responded to the RFP. The application of the doctrine of legitimate expectations to representations of administrative process was summarized by Justice Binnie in *Mavi*:

Non-Contract A RFP – Judicial Review
Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker’s statutory duty. … Justice Binnie went on to explain the meaning of “clear, unambiguous and unqualified:

[69] … Generally speaking, government representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement.

Non-Contract A RFP – Judicial Review
Court Recognizes Non-Contract A RFP, Rejects Challenge

*Murray Purcha & Son Ltd. v. Barriere (District)*

British Columbia Court of Appeal

The doctrine of legitimate expectations cannot give right to substantive rights: *Agraira* at para. 97.

These principles apply to the fairness requirements for procurement decisions to which the Contract A analysis does not apply. In *Government Procurement*, 4th ed. (Toronto: LexisNexis Canada, 2017) at 112, Paul Emanuelli expressed the principle in this way:

… a government procurement decision can be compromised by procedural irregularities when pre-established process rules are not properly followed or where those process rules were inherently flawed due to unlawful or hidden requirements, conditions, criteria or procedures.
In assessing the non-Contract A RFP, the Court determined that “there is no suggestion that the procedures set out in the RFP were inherently flawed or unfair to the proponents”. Rather, the Court found that “the general procedure to be adopted by the District in reviewing the proposals has elements that are clear, unambiguous and unqualified” and that proponents “could legitimately expect that the District would follow these general procedures before making a decision on the road maintenance contract”.
In other words, the municipality was subject to procedural correctness in how it administered its RFP process. The Court also stated that if “this process was followed equally for all proponents, the District’s duty of procedural fairness would be met” and that any “remaining questions relating to the substantive fairness of the decisions made by the District would be reviewable on the deferential standard of reasonableness”. The Court concluded that the municipality followed the procedures set out in the RFP.
Court Recognizes Non-Contract A RFP, Rejects Challenge

*Murray Purcha & Son Ltd. v. Barriere (District)*

British Columbia Court of Appeal

Although, like the lower court, the Court of Appeal found that the winning proponent’s indirect disclosure of its pricing outside of the sealed price was inappropriate and, had this been a Contract A RFP, could have required the rejection of the bid as non-compliant, it determined that the acceptance of that proposal did not result in a procedural breach on the part of the municipality:
I agree that Defiance should not have included in Envelope #1 the information that made it possible to calculate its proposed price. There are circumstances in which consideration of the Defiance proposal might well be considered procedurally unfair. For example, if the evidence was that the District employees had made the necessary calculation, thereby becoming aware of the Defiance proposed price before scoring their ability to do the work, a reviewing court could reach the conclusion that the process represented to be followed in the RFP was not in fact followed. Additionally, if fairness was being assessed in the context of contractual obligations, a term of a Contract A might be implied that would invalidate consideration of the Defiance proposal. Neither of these considerations apply in the case at bar.
On balance, I do not consider that this error by Defiance leads to the conclusion that the promised procedure was not followed, or that the proposals were not considered equally. There is nothing in the record to suggest that the scoring of Defiance’s proposal was enhanced by this “donation disclosure. Defiance in fact scored third of the five proponents for their work plan (Purcha scored fourth).

I conclude that the District did not breach the duty of procedural fairness it owed to the appellant and the other proponents.
Court Recognizes Non-Contract A RFP, Rejects Challenge

*Murray Purcha & Son Ltd. v. Barriere (District)*

British Columbia Court of Appeal

The Court then turned to the municipality’s substantive evaluation and award decision, which was subject to a more deferential reasonableness standard. While the applicant argued that the evaluation decision fell outside the acceptable bounds of reasonableness, the Court disagreed and deferred to the evaluation decision:
The final argument of the appellant was that the judicial review judge erred in finding that Defiance’s scores were within a range of possible acceptable outcomes that are defensible in respect of the facts and law.” It is more accurate to frame the issue as whether the judge erred in finding that the District’s decision to award the contract to Defiance was within a range of possible acceptable outcomes that were defensible in respect of the facts and the law. It was not the responsibility of the judicial review judge to evaluate Defiance’s scores. The question for the judge on this issue was whether the decision under review met the reasonableness standard.

In my view, the District’s decision meets this standard of review. The District followed the process outlined in the RFP, applied the appropriate formula, and offered a contract to the proponent with the lowest adjusted price, as it said it would.
Court Recognizes Non-Contract A RFP, Rejects Challenge

*Murray Purcha & Son Ltd. v. Barriere (District)*
British Columbia Court of Appeal

The Court therefore dismissed the appeal, stating that “I am satisfied that the proponents were treated fairly in this process. The decision reached is supportable on the facts and the law”.

Non-Contract A RFP – Judicial Review
Court Recognizes Non-Contract A RFP, Rejects Challenge

*Murray Purcha & Son Ltd. v. Barriere (District)*

British Columbia Court of Appeal

As this case illustrates, while public institutions can conduct their competitive bidding processes without creating the Contract A process contract and thereby avoiding exposure to a lost profit claim, those institutions remain subject to potential judicial review challenges whereby losing proponents can seek procedural relief that could include, among other non-monetary remedies, a re-evaluation order or the quashing of a contract award. However, to win an administrative law remedy, an applicant must convince the court that the contract award decision was procedurally or substantively unsound, which it failed to do in this case.
Global Risk Rating Revisited
## 2019 Bid Protest Global Risk Ranking and Rating Guide

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2018 Global Analysis

Government Bid Protests
Litigation Risk Risk Ratings

Administrative Procedural Remedies

Commercial Lost Profit Remedies

Canada
United Kingdom
Australia
New Zealand
European Union
Caribbean
India
United States
South Africa
2019 Global Analysis

Government Bid Protests
Litigation Risk Risk Ratings

Canada (Federal)

New Zealand
Australia
Caribbean

India (NRFP)
United States
South Africa

Canada (Sub-Federal)
(Contract A)

United Kingdom
European Union

Administrative Procedural Remedies

Commercial Lost Profit Remedies
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