December 2023

Quarterly Report

The Procurement Office

Issue #5
2023
Year in Review

Feature Case Study

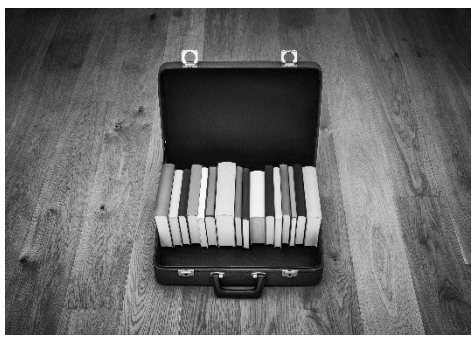
Equivalency Processes Required for Unbiased Bidding

Mandatory Training Required

In its June 2023 report entitled *Report on the Rehabilitation of the Roussin Centre (Calls for Tenders IMM.SP20-05, IMM22-01 and IMM22-08)*, Montreal's Inspector General found that two municipal tender calls for a community centre upgrade project included biased specifications and that those tender calls did not include a required clause allowing potential bidders to submit equivalency requests during the pre-bid tender posting period.

As the Inspector General noted, the applicable legal standards required the municipality to prepare specifications that were described in terms of neutral performance or functional requirements rather than descriptive characteristics and, if that was not possible, required that bidders be permitted to propose equivalencies.

However, the Inspector General found no evidence that the consultant retained by the municipality to draft the requirements had attempted to prepare neutral specifications before adopting specific brands and models into those specifications.



The Inspector General prescribed mandatory training for all municipal employees involved in the design and preparation of tender documents and instructed that those employees advise external consultants of applicable neutrality standards at the beginning of each project.

Senior-Level Infractions: Winnipeg's Chief Administrative Officer was found liable for accepting bribes in connection with the award of a contract to build the City's new police station.

Case of the Year

Former Winnipeg CAO Liable for Bribery in Civil Case

In its July 2023 decision in *Winnipeg (City) v. Caspian Projects Inc.*, the Manitoba Court of Appeal dismissed the appeal of a former municipal chief administrative officer who was found liable for accepting bribes in relation to a major contract award. The conflict of interest dispute dealt with a civil claim brought by the City of Winnipeg for the tort of bribery. As the Court of Appeal detailed, the case dealt with a municipal construction project for a new police headquarters that involved construction delays, cost overruns, bribery allegations, and a lengthy criminal investigation. While the police investigation did not result in criminal charges, the municipality brought a civil claim against its former chief administrative officer for financial compensation based on the tort of bribery.

As the Court of Appeal summarized, the trial court granted the City's summary judgment application after rejecting the defendant's argument that the payments in question from the contractor related to a separate real estate transaction and were not a bribe connected to the award of the police headquarters project.

As this case illustrates, public institutions do not have to rely on the criminal law as the only regulatory mechanism for dealing with procurement-related bribery. The tort of bribery offers a civil law avenue to seek financial remedies against parties who engage in bribery in relation to an institution's contracting activities. (see Former Winnipeg CAO Liable for Bribery)

Training Retreats

Leveraging Lessons Learned

Procurement Training Office

We will be hosting our in-person Strategic Procurement Retreats each October and May at our new training centre.

Governance 2.0

Policy-Protocols-Templates

Procurement Law Office

We are pleased to announce our new 2.0 Policy and Protocols and 5.0 Annotated RFx Templates.

RFx Drafter v. Training

Software or Deeper Learning

Procurement Advisory Office

Orbidder 2.0 goes head-to-head with our 5.0 Annotated RFx Templates and Platinum Training Program.

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Paul Emanuelli

Design Defects Lead to Legal Dispute

General Contractor Not Liable for Municipality's Design Defects

In its June 2023 decision in *Seagate Construction v. Halifax (Regional Municipality)*, the Nova Scotia Supreme Court found the Region of Halifax liable for breach of contract for failing to pay a contractor for work completed under a tendering contract and for also failing to pay the contractor for the additional out-of-scope work that was required due to design defects in the original specifications. The dispute dealt with a boiler room project at the Emera Oval, an ice rink in Halifax, Nova Scotia. During contract performance, the contractor raised concerns that the boiler room was too small to accommodate the boilers required in the contract specifications.

The contractor proposed different solutions to address the space limitations, but those recommendations were rejected by the external design consultants retained by the municipality to prepare the specifications and manage the contract. The contractor performed the boiler installation in accordance with the original specifications but was then required to perform additional work to bring the installation into compliance with applicable technical standards. The municipality held back outstanding payments on the original work, as well as payment for the additional work, maintaining that the contractor was in breach of contract for failing to perform the work in accordance with the applicable technical code.

The contractor counter-claimed, arguing that it had followed the specifications provided by the municipality's design consultants, and maintaining that the installation issues were the result of design defects attributable to those consultants. The court agreed, finding that the contractor was not responsible for the design flaws in the design consultant's specifications.

The court ordered the municipality to pay the contractor for the outstanding amounts owed for the original work as well as the additional amounts for the subsequent out-of-scope work that was required to address the issues arising out of the defects in the original specifications.

Repeat Offenders: As recent reports from Montreal's Inspector General reveal, public institutions need to guard against the circumvention of their debarment decisions by unscrupulous suppliers who continue to win government work by using third-party fronting schemes.

Paul Emanuelli

Inspector General Uncovers Fronting Schemes

Suppliers Circumvent Debarment Rules

In its June 2022 report entitled *Report on Contract Award and Performance Related to Calls for Tenders 16-15062, 18-16618 and 21-18750*, Montreal's Inspector General found that a company that bid on and was awarded two municipal snow-hauling contracts allowed the awarded work to be performed by a person that was barred by the municipality.

The Inspector General found that the parties in question knowingly entered into a fronting agreement and used a subcontracting company to enable the arrangement and circumvent the municipal debarment rules. The Inspector General concluded that the parties should be barred from any future municipal contract work for a period of five years.

Paul Emanuelli

Municipal Councillor Breaches Confidentiality Code

Improper Disclosures

In its October 2022 decision in *Fallis v. Orillia (City)*, the Ontario Superior Court of Justice – Divisional Court dismissed a municipal councillor's judicial review application which sought to overturn an integrity commissioner's ruling.

That prior ruling found the councillor in breach of a municipal code of conduct for disclosing closed session documents and internal legal advice relating to a waterfront development RFP when the councillor sought personal legal advice about the process. The integrity commissioner recommended that the city council suspend the councillor's pay for 30 to 44 days. The court agreed that the disclosures breached the code of conduct.

As this case illustrates, public officials, including elected officials, should avoid disclosing confidential information relating to a public procurement process. While elected officials may exercise an oversight function in relation to a public institution, that oversight role typically remains subject to confidentiality and due process duties.

Paul Emanuelli

Court Reviews Municipality's *CFTA* Compliance

Increased Scrutiny

Case Dismissed: While the court dismissed the judicial review application for lack of evidence, this case reflects a broader trend that sees the Canadian courts increasingly willing to scrutinize government procurement decisions.

In its January 2023 decision in *Transdev Canada Inc. v. York (Regional Municipality)*, the Ontario Divisional Court dismissed a judicial review application.

The court found that the applicant failed to provide evidence in support of its arguments. The case dealt with the award of a contract pursuant to a competitive bidding process for the operation of a public transit system in the Region of York. The second-ranked bidder challenged that award, arguing that the winning bidder should have been disqualified due to the inclusion of a subcontractor in its bid.

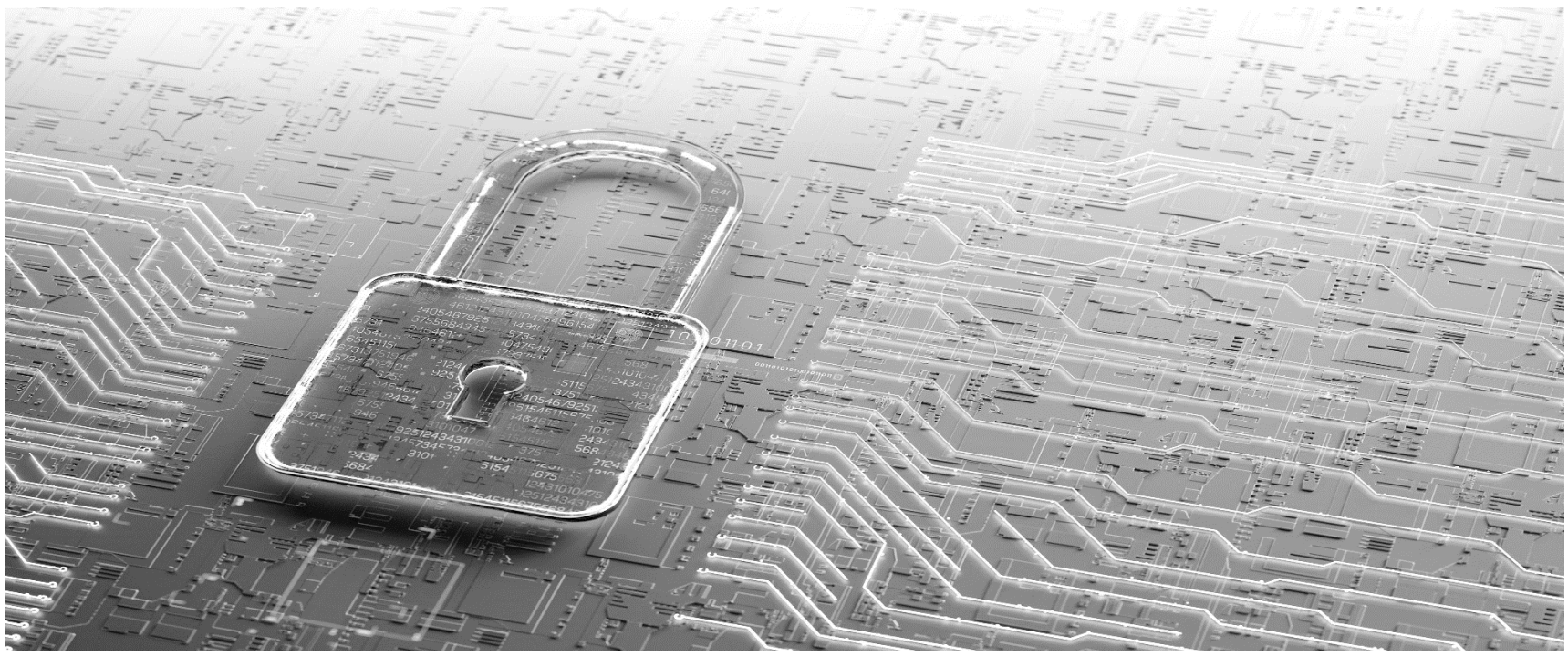
The court disagreed, noting that the applicant's bid would have been disqualified as well had the solicitation rules prohibited the incorporation of subcontractors in the bid documents. While the applicant argued that the procurement process breached the fair process provisions in the *Canadian Free Trade Agreement*, the court found no evidence to support these allegations and found no breaches of the rules set out in the specific tender call document.

The court concluded that the contract award decision was reasonable and dismissed the application. (see Recent Rulings Reflect Increasing Judicial Review Challenges)

Paul Emanuelli

Unsigned Bid Ruled Non-Compliant

In its January 2023 decision in *Redwood Construction Ltd. v. Memorial University of Newfoundland*, the Newfoundland and Labrador Supreme Court - General Division rendered a summary judgment against a non-compliant bidder. The case dealt with a tendering process for the construction of a new building for Memorial University. The university rejected the low bid for non-compliance and awarded to the next-best bidder. The low bidder sued and brought a motion for summary judgment. The court determined that the lower bidder's bid was non-compliant and summarily dismissed the lost profit claim after finding that the bidder failed to submit a signed bid and therefore failed to create Contract A. As this case illustrates, the failure to adhere to the formalities of submitting a compliant bid form can prove fatal to the validity of a bid and to any subsequent claims brought by the rejected bidder. (see Unsigned Bid Leads to Non-Compliance Rejection)



Locking Out Barred Bidders: As this case illustrates, the specific rules that govern a tendering process may be broader than the express terms contained in the solicitation document and may incorporate a broader body of statutory frameworks and procedures, including debarment procedures, that apply more generally to an institution's bidding process.

Court Recognizes Debarment Rules as Implied Terms

Barred Bidder Challenges Disqualification

Spotlight on Debarment

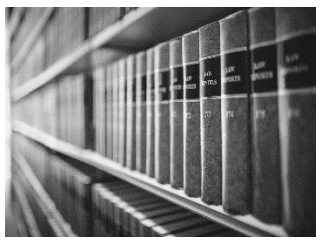
In its September 2022 decision in *Prime Terra Group Inc. v. Thunder Bay (City)*, the Ontario Superior Court of Justice upheld a debarment decision made pursuant to a municipal by-law even though the debarment provisions in the by-law were not expressly incorporated into the specific tender call rules. The dispute dealt with the rejection of a bidder who submitted a bid in response to a tender call for sidewalk repair work.

The bid was rejected since the company was previously disqualified under the provisions of the by-law due to ongoing litigation with the municipality. While the bidder challenged this disqualification, the court ruled that the debarment rules in the municipal by-law could be read in as forming implied terms of the specific tendering process.

Electronic Tendering Traps: In another recent case, in its February 2022 determination in *University of Guelph, Laboratory Services Division v. Canada*, the Tribunal rejected a complaint after finding that the complainant failed to properly follow the electronic bid submission instructions. (see Legal Challenge Rejected After Electronic Bid Imbroglio)

Stripped Links Render Bid Bond Non-Compliant

Canada's Federal Tribunal Rejects Electronic Bid Bond



While most public entities have adopted electronic bidding procedures, recent cases reveal how bidder compliance with these new practices remains a work-in-progress.

For example, in its May 2022 determination in *Gregory Kerr Ltd. v. Canada (Department of Public Works and Government Services)*, the Canadian International Trade Tribunal rejected the complaint of a disqualified low bidder after finding that the bidder failed to submit a valid electronic bid bond. The dispute dealt with an invitation to tender issued by the Department of Public Works and Government Services on behalf of the Department of Fisheries and Oceans for repairs to a wharf structure located in Sambro, Nova Scotia.

The government rejected the low bid after it was unable to verify that bidder's electronic bid bond. The low bidder challenged that rejection, asserting that it had submitted a valid bond. However, the government confirmed that was unable to verify the validity of the bid bond since the digital links contained in the electronic document did not work. Further, the government's subsequent attempts to verify the bond on the bonding company's website returned a "non-verified" result. As the Tribunal noted, the bidder was not allowed to resubmit its bid bond in a valid format after the bid deadline since that would have amount to improper bid repair. The bonding company's post-deadline confirmation of the bid bond's validity was rejected by the government for the same reason.

While the complainant claimed that the technical issues surrounding the bid bond's validity were caused by the government's electronic tendering system, the Tribunal noted that none of the other bidders had any issues with the submission of their electronic bid bonds into the government's tendering system.

> "In "dragging and dropping", it is likely that the software on the computer used by GKL created a copy of the bond without replicating the embedded digital certificates."
>
> - Canadian International Trade Tribunal

The Tribunal concluded that the problem arose when the complainant, contrary to instructions provided by its bonding company, merged the original electronic bid bond with its other bid documents and then submitted a single combined electronic file into the government's tendering system. As the Tribunal concluded, this had the effect of stripping away the electronic links in the original bid bond and rendering the bid bond non-verifiable.