Canadian
Law Update

Critical Trends

The Procurement Office

Focus on
Bid Dispute
Regimes

Feature Case Study

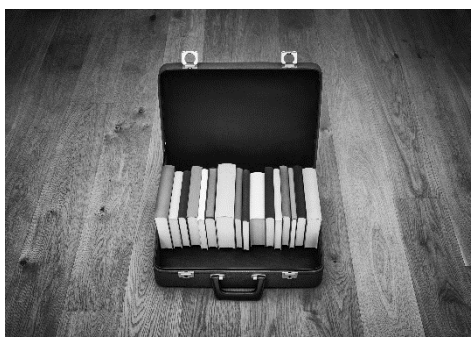
Arbitrations Enforce Trade Treaty Duties

Heightened Scrutiny

In its February 2022 decision in *Ministry of Highways for the Province of Saskatchewan v. West-Can Seal Coating Inc.,* the Saskatchewan Court of Queen's Bench rejected the Saskatchewan government's judicial review application after finding no reason to set aside an arbitration ruling that found the government in breach of the *Canadian Free Trade Agreement*.

The arbitration in question was a March 2021 decision in *New West Partnership Bid Protest Mechanism Arbitration HWY-20126, Saskatchewan,* where an arbiter determined that the Saskatchewan provincial government breached the *Canadian Free Trade Agreement* by improperly evaluating past performance criteria and applying improper local labour requirements. The arbitration was conducted pursuant to the bid protest mechanism established by the four western Canadian provinces for the adjudication of trade treaty bid protests.

As recent cases illustrate, the implementation of bid protest mechanisms in Western Canada puts public institutions in those provinces under heightened scrutiny when it comes to complying with their procurement obligations under the trade treaties. (see Western Canada Implements Bid Protest Mechanism)



Lessons Learned: Recent rulings serve as wake up call for public institutions to bolster their treaty compliance practices.

Treaty Enforcement: When compared to the well-established bid protest mechanisms that have operated for decades at the federal level in Canada under the Canadian International Trade Tribunal, sub-federal bid protest mechanisms remain a relatively new and evolving area under Canada's international and domestic trade treaty rules. This issue summarizes how provincial-level jurisdictions in Western Canada have implemented trade treaty enforcement mechanisms at the sub-federal level and how Montreal's Inspector General is also enforcing those same standards.

Feature Article

Montreal Offers Model for Municipal Enforcement

Montreal's Inspector General Enforces Treaty Rules

The Inspector General of the City of Montreal has the mandate to monitor the contracting processes of the City of Montreal. This issue features case studies of recent examples where procurement-related trade treaty duties and general procurement standards were enforced through this oversight mandate.

For example, 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.

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 concluded that the consulting contract in question should be rescinded, and that the municipality should develop a plan to better ensure that future specifications are prepared in a manner that is compliant with applicable neutrality standards. The Inspector General also prescribed mandatory training for all municipal employees involved in the design and preparation of tender documents and instructed that those employees responsible for managing external technical consultants advise those consultants of applicable neutrality standards at the beginning of each project.

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.

Paul Emanuelli

Transit Agency Engages in Bid-Shopping

Infractions Compounded by Improper Sole-Source to Non-Bidder

In its February 2022 report entitled *Recommendations to Société de transport de Montréal regarding contract management of the Bellechasse Transit Centre construction project*, Montreal's Inspector General found that the Société de transport de Montréal ("STM") engaged in bid-shopping and improper sole-sourcing in relation to a transit centre construction project. The case involved a tendering process where the agency received over-budget bids, extended the bid irrevocability period while it negotiated a direct award for the work with a subcontractor to an existing construction management agreement, and then cancelled the original tendering process. The Inspector General found that STM used information from the bids to negotiate price reductions with the subcontractor.

As the Inspector General further detailed, the original bids significantly exceeded the internal budget estimates for the work and STM was already considering cancelling its tendering process before it extended the bid irrevocability period and entered into parallel negotiations.

The Inspector General determined that STM acted unfairly in asking bidders to extend their bid irrevocability periods while it negotiated to award part of that work to a different subcontractor. The Inspector General also found that the clause in STM's existing construction management contract, which allowed it to direct the work to the subcontractor of its construction management firm, breached the open tendering rules.

The Inspector General noted that if STM wanted to direct work to its construction management firm or to that firm's subcontractors, that work should have been incorporated, with applicable pricing, into the originally awarded construction management contract, rather than being left open-ended as a discretionary direct award option. As this case study illustrates, public institutions should tread with caution prior to cancelling a tendering process due to budgetary constraints since the subsequent steps they take to award that work to other contractors remains subject to after-the-fact scrutiny and legal challenge. Further, those institutions should avoid sole-sourcing work based on open-ended discretionary clauses in their contracts since this practice may not comply with applicable open procurement rules. (see Montreal's Inspector General Enforces Treaty Rules)

No Longer Under the Radar: The mandate of Montreal's Inspector General empowers that office to regulate compliance with trade treaty standards and other applicable public procurement rules. Public institutions that fall within that mandate face heightened scrutiny when it comes to complying with their procurement obligations.

Paul Emanuelli

Contractor Banned Over Kickback Scheme

Conflict of Interest in Change Order Fraud

In its January 2019 report entitled *Recommendation Report Regarding the Expansion and Renovation of the Pierrefonds Library (Call for Tenders 5887)*, Montreal's Inspector General determined that a general contractor arranged to have its subcontractors reduce the fees they charged for change orders but passed through the full costs of the work to the municipality and kept the difference.

The Inspector General concluded that this scheme resulted in the subcontractors increasing the cost of the work that they charged to the municipality as compensation for being required to kickback a portion of their payments to the general contractor. The Inspector General found that the scheme constituted a fraudulent practice and concluded that the general contractor should be barred for five years.

Paul Emanuelli

Enforcing Debarments

In its June 2021 report entitled *Report on the various contracts awarded to 11073192 Canada Inc. and the involvement in the award and performance of these contracts of a person ineligible for public contracts*, Montreal's Inspector General determined that an individual who was previously barred from bidding on or performing contracts for the municipality was able to circumvent the debarment rules and work on three separate contracts through a fronting company. The Inspector General found that the officers of the fronting company knowing allowed the barred individual to work on the contracts and tried to conceal this fact from its investigation. The Inspector General rescinded the three contract awards due to this breach of the debarment rules.

Similarly, 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 circumvent the municipal debarment rules. The Inspector General concluded that the parties in question should be barred for five years.

Paul Emanuelli

BC Bidder Challenges Alberta Local Practice

Arbiter Rules Against School

Treaty Enforcement: As this case illustrates, unfair local preferences breach applicable procurement treaty standards and are subject to legal rulings that can nullify those practices.

In a May 2019 *Canadian Free Trade Agreement* arbitration ruling in the matter of *Parker Johnston Industries Ltd. v. The Calgary Board of Education*, an arbiter struck down The Calgary Board of Education local warranty requirement as unnecessarily restrictive. The dispute involved a roofing replacement project at two Calgary schools.

The complainant challenged the process as being discriminatory against out-of-province suppliers and unfairly favouring Alberta suppliers due to the specification that required an Alberta Roofing Contractor's Association ("ARCA") warranty. The complainant, a British Columbia contractor, attempted to register for certification under the Alberta warranty program but its application was rejected.

As the arbiter noted, the school board failed to respond to the complainant's request for pre-bid consultations to address the issue and this non-responsiveness was not conducive to resolving the issue. The arbiter also ruled that the school board's vague commitment to accepting equivalent warranties was not clear enough to allow potential bidders to assess whether they could meet the requirements before deciding to bid.

The complainant was able to obtain a ruling directing the school board to discontinue the warranty practice moving forward, as well as complaint-related costs. (see Western Canada Implements Bid Protest Mechanism)

Paul Emanuelli

Western Canada Adopts New Bid Protest Mechanism

Binding Commercial Arbitrations

In January 2019 British Columbia, Alberta, Saskatchewan, and Manitoba adopted a new bid protest mechanism that superseded a previous arrangement promulgated under the regional *New West Partnership Trade Agreement*.

Like its predecessor, the new bid protest mechanism allows suppliers to challenge the decisions of procuring entities falling within those jurisdictions.

The new bid protest mechanism serves to enforce the rules flowing from procurement-related international and domestic trade treaties that apply to public institutions in Western Canada. (see Western Canada Implements Bid Protest Mechanism)

Monitoring Emergency Services: An Alberta municipal firefighting agency faced allegations of improper evaluation scoring and biased specifications.

Biased Evaluation Allegations Rejected

Arbiter Dismisses Biased Evaluation Claim

Spotlight on Transparency

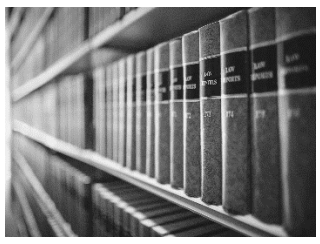
In a July 2021 decision *In the Matter of a Complaint by Commercial Truck Equipment Corporation Against Beaver Emergency Services Commission,* an arbiter dismissed a bid protest filed against an Alberta municipal firefighting agency after rejecting allegations of bias and improper scoring in the evaluation of water tank bids. While the complainant alleged that the purchasing institution used inconsistent scoring criteria, the arbiter rejected the complaint after finding that the evaluators had followed the established scoring criteria.

Further, the arbiter found no evidence of bias in the specifications or in the evaluation process. In fact, the arbiter found that the complainant had breached the single-point-of-contact protocols by circumventing the official contact person and directly lobbying the fire chief to attempt to influence the outcome of the bidding process. While the protest was ultimately rejected, this case illustrates how public entities face the risk of bid protest challenges and must be prepared to defend themselves against allegations of improper evaluations and bias.

Regulating Compliance: In its January 2022 report entitled *Recommendations Regarding Call for Tenders 17- 6146 Involving the Acquisition of a Cloud Solution by Ville de Montréal*, Montreal's Inspector General found that the City of Montreal improperly awarded a $16 million cloud services contract to a non-compliant bidder and concluded that the improperly awarded contract awarded to Onix Networking Canadsa Inc. should be terminated. (see Montreal's Inspector General Enforces Treaty Duties)

Enforcing Open Competition and Neutrality

Procurement Under Scrutiny



Recent case studies reflect an increasing willingness on the part of suppliers to challenge government sole-sourcing, biased specifications, and improper evaluation and award decisions.

For example, in an April 2017 ruling in *PMH Insights Inc. v. Parkland County,* an arbiter found that Parkland County's software sole-source breached the *New West Partnership Trade Agreement*. The dispute dealt with the direct acquisition of management software. The award was challenged by another software provider. The municipality maintained that the acquisition fell under the open tendering thresholds, however, the arbiter ruled that the municipality failed to properly document its expenditure to establish that the award fell below the thresholds. The arbiter found the municipality in breach of the treaty and ordered it to pay the complainant $10,000 in fees and costs.

In a March 2018 ruling in *Parkland Geotechnical Consulting Ltd. v. The City of Red Deer*, an arbiter found that the municipality breached the *New West Partnership Trade Agreement* by introducing unnecessarily restrictive conditions in a pre-qualification process for land development consulting services. The arbiter ruled that reducing the prequalification list to only five consultants and extending the duration of the closed framework arrangement to five years was too restrictive to competition and was therefore in violation of the trade treaty. The arbiter directed the municipality to rectify the breach and ordered it to pay the complainant $28,000 in fees and costs.

In its February 2019 report entitled *Recommendation Report Concerning the Contracting Process for the New Indoor Aquatic Complex at Centre Rosemont*, Montreal's Inspector General determined that a municipal project team's external consultants incorporated biased specifications into its contract requirements for the construction of swimming pools. While the project team planned to allow bidders to propose equivalent products, as required by the applicable regulations, the report found that on prior projects the same external consultants had developed equivalency criteria that were unattainable by other bidders.

> Onix Networking Canada Inc. "should have been found non-compliant, since the company's bid contained major irregularities on key elements of the call for tenders."
>
> - Montreal's Inspector General

The Inspector General ordered the project team to comply with its open competition duties and noted that greater oversight was required to better ensure a strict and impartial equivalency process. Similarly, in its September 2020 report entitled *Recommendation Report on Contract Management Related to Generator Set Calls for Tenders at the Office municipal d'habitation de Montréal*, Montreal's Inspector General found improper collaboration between the engineers retained to design specifications for building generators for public housing buildings and the distributors of the required products. The Inspector General prescribed remedial measures including amendments to the municipality's professional services contracts to include provisions confirming a consultant's legal duty to draft neutral specifications, as well as amendments to the municipality's tendering documents to prohibit any person involved in preparing tendering documents from bidding on any resulting contract opportunity.