Canadian Law Update

Critical Trends

The Procurement Office

Focus on Conflict of Interest

Feature Case Study

Architect Breaches Conflict Rules by Bidding on Client Work

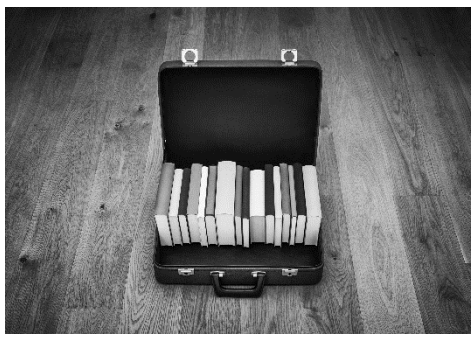
Professional Misconduct Ruling

In its April 2021 decision in *Di Sarra v. Ontario Assn. of Architects*, the Ontario Superior Court of Justice – Divisional Court dismissed an appeal from a decision of the Discipline Committee of the Ontario College of Architects which found an architect guilty of misconduct due to a conflict of interest.

The architect was found to be in a conflict of interest because he provided millwork drawings used by his client to solicit quotes for a home renovation and at the same time acted as the owner of a company that submitted a quote for that same work.

The discipline committee found that this conduct breached the professional regulations that prohibit an architect from submitting bids or tenders on a project when that architect is also providing architectural services for that same project.

This case serves to further underscore the importance of maintaining a clear division between those who work on behalf of an owner on a project and those who work for parties who are bidding on that same project. (see Architect Breaches Conflict Rules by Bidding on Client Work)



Lessons Learned: Recent rulings serve as wake up call for public institutions to bolster their conflict of interest practices.

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.

Feature Article

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.

Paul Emanuelli

Feds Disqualify Bidder for Apparent Conflict

New Employee Worked on RFP While Also Working for Bidder

In its August 2021 determination in *Visiontec (2008) Ltd. v. Canada (Department of Public Works and Government Services)*, the Canadian International Trade Tribunal upheld the federal government's decision to disqualify a bidder due to an apparent conflict of interest. The dispute dealt with an RFP issued by the Department of Public Works and Government Services on behalf of Correctional Service Canada (CSC) for the acquisition of two full-body X-ray scanners used to scan inmates for contraband, including narcotics and weapons.

The complainant, Visiontec, challenged the government's decision to exclude it from the bidding process, arguing that the government took contradictory positions with respect to the complainant's eligibility to submit a bid and failed to implement measures to eliminate or mitigate the apparent conflict.

The Tribunal disagreed, finding that the government was not aware of the potential conflict when, on the recommendation of the complainant, it hired an individual, referred to as "DE" in the ruling, to assist in preparing the RFP, while that individual was concurrently retained by the complainant as a consultant. The Tribunal noted that DE had previously worked for the Ontario provincial government at the Ministry of Community Safety and Correctional Services as a technical advisor on the Ministry's body scanner project until his retirement in 2018. In January 2020, Visiontec recommended DE to CSC to assist CSC in the development of the new RFP. In April 2020, DE was contacted by CSC and provided his resume to the federal government. He was ultimately hired by CSC in September 2020 to work on the RFP. In the interim, in May 2020, DE also entered into a consulting contract with Visiontec.

The evidence showed that DE did not notify CSC of the potential conflict until October 2020, at which point he had already been working on the RFP as a CSC employee for about a month. The Tribunal found that prior to ultimately resigning from CSC in December 2020, DE contributed to the development of the RFP statement of work, evaluation criteria, and scope definition, which gave him access to information that was not available to other bidders. The Tribunal concluded that, at minimum, DE's involvement in the preparation of the RFP for CSC, and his concurrent engagement as a consultant for Visiontec, created the appearance of conflict of interest and unfair advantage which was sufficient to justify the disqualification. (see Canadian Government Disqualifies Bidder for Apparent Conflict)

Undue Influence: The Inspector General found that the activities went beyond general market research and resulted in the distributors influencing the final tender call specifications.

Paul Emanuelli

Inspector General Finds Collaboration Between Engineers and Suppliers

Calls for Remedial Measures to Ensure Neutrality

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 determined that there was collaboration between the engineers retained by the municipality to design specifications for building generators for public housing buildings and the distributors of the required products.

The report raised concerns over the biasing of the specifications and the failure of the engineers to meet their contractual duties as independent consultants to the municipality in drafting specifications based on neutral performance or functional requirements. The report directed the municipality to expressly prohibit any person involved in preparing tendering documents from bidding on any resulting contract opportunity.

Paul Emanuelli

Tribunal Dismisses "Convoluted" Bias Allegations

Burden of Proof Not Met

In its June 2020 determination in *SoftSim Technologies Inc. v. Canada (Department of Foreign Affairs, Trade and Development)*, the Canadian International Trade Tribunal rejected a complaint after finding that the complainant failed to substantiate its allegations of bias. The dispute dealt with an RFP for the provision of task-based informatics professional services to contribute to a trade modernization initiative. The Tribunal found that the complainant relied on hearsay and other uncorroborated evidence that was "imprecise, convoluted, and lacking in specifics" and failed to establish actual bias or a reasonable apprehension of bias in relation to the evaluation of its proposal. As this case illustrates, while bidders have the right to raise concerns regarding bias in a government evaluation process, they also bear a burden of proof to substantiate their allegations with compelling evidence. The failure to marshal such evidence will prove fatal to their claims. (see Tribunal Dismissed "Convoluted" Bias Allegations)

Paul Emanuelli

Conflict Case Dismissed for Lack of Financial Interest

Political Statement Not a Conflict

Not a Formal Decision: The court ruled that the Regional Council had no jurisdiction over the proposed labour reforms. The resolution was a symbolic political statement rather than a formal decision that created a financial interest for the purpose of the conflict law.

In its December 2020 decision in *Yorke v. Harris*, the Ontario Superior Court of Justice rejected a conflict of interest claim against a municipal councillor after finding that the councillor had no direct financial interest in the matter in question.

The dispute dealt with a resolution introduced by and voted on by a member of Waterloo Regional Council in support of the Ontario provincial government's proposed labour relations reforms that would terminate the practice of close-shop tendering that favoured specific trade unions to the exclusion of contractors associated with other unions or those who are non-unionized. Members associated with the Carpenters Union, one of the unions favoured under the existing rules, brought a legal challenge against the councillor under Ontario's *Municipal Conflict of Interest Act*, alleging that he was in a conflict of interest in voting on the motion since his wife was employed by a competing union, which meant that he stood to gain financially through the reforms.

However, the court found that any financial interest was too remote since any resulting work awarded under a new open tendering regime would be contingent on the outcome of subsequent competitive bidding processes. (see Conflict Case Dismissed for Lack of Financial Interest)

Paul Emanuelli

Bidders Should Get Their Own Bid-Rigging Advice

In its July 2020 decision in *Facchini v. Canada (Attorney General)*, the Ontario Court of Appeal rejected the appeal of a trial court's decision to summarily dismiss a contractor's negligent misrepresentation claim against the federal government. The dispute involved a federal tender call for the award of multiple contracts for the provision of real estate advisory services. The government advised prospective bidders that subcontractors could appear in more than one bid and that contractors could also appear as consultants on other bids. The plaintiff responded to the bidding opportunity and was then charged with bid-rigging, but those charges were ultimately stayed. The plaintiff sued the government and the government employee involved in the process for misrepresentation and defamation and sought $2 million in damages. The trial court dismissed the claim. The Court of Appeal upheld that dismissal, finding that the government owed no duty of care to the bidder. (see Bidders Should Get Their Own Bid-Rigging Advice)

Screening for Conflicts in Train Tender: The court upheld the agency's right to screen bidders for their conflict of interest and ethical bidding practices.

Disqualified Contractor Claimed It Was Not Given Sufficient Time to Comply

Court Upholds Conflict Screening

Spotlight on Conflict of Interest

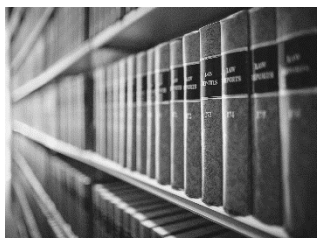
In its September 2017 decision in *Grascan Construction Ltd. v. Metrolinx*, the Ontario Divisional Court rejected a judicial review challenge brought against a prequalification process by a rejected contractor. The case dealt with a $125 million express rail project. The contractor was disqualified for failing to provide the required audit letter confirming that its company had appropriate conflict of interest and ethical bidding practices in place.

The contractor argued that it was provided insufficient time to meet the requirements and that the new audit rules favoured larger contractors. The court disagreed and rejected the challenge after finding that the prequalification process did not give rise to a judicially reviewable duty of fairness and, even if it did, on the merits the decision of Metrolinx to disqualify the applicant was reasonable.

Playing Hardball: The trial court found that the local bidder perceived it had a "home field advantage" so it "played hardball and engaged in brinksmanship" to increase its chances of winning by appealing directly to City Council.

Court of Appeal Upholds Depoliticized RFP

Bidder's Conduct Threatened Credibility and Integrity of the Process



In its March 2021 decision in *Inzola Group Limited v. City of Brampton*, the Ontario Court of Appeal upheld a trial decision that rejected a losing bidder's $25 million lost profit claim after the trial court ruled that the bidder was properly disqualified.

Turning first to the trial decision, in its January 2019 decision in *Inzola Group Limited v. City of Brampton*, the Ontario Superior Court of Justice dismissed a lost profit claim against the City of Brampton in connection with a Competitive Dialogue Request for Proposals ("RFP") process. The case dealt with the construction of an extension to the Brampton City Hall. The plaintiff was disqualified for failing to sign a confidentiality agreement required by the RFP rules and then breaching the RFP communication protocols by raising its concerns over the confidentiality agreement directly with City Council and the media. It sued for lost profit damages in the amount of approximately $25 million. Brampton adopted the "Competitive Dialogue" RFP format for its tendering process due to the complexity of the project and its intention to seek solution-based proposals. While the two other proponents signed the required confidentiality agreement, the plaintiff refused to sign it, arguing that the agreement was too broad and asserting its right to make its final bid submission directly to City Council.

The plaintiff claimed that while the municipality promised an open and fair RFP process, the Mayor, the City Manager, and the RFP evaluation committee were all biased against it. The plaintiff also asserted that its refusal to sign the confidentiality agreement and appeal directly to City Council did not breach the process rules.

The court determined that the fact that the other proponents agreed to sign the same agreement after receiving legal advice was sufficient to establish its reasonableness. Furthermore, the court ruled that the plaintiff's real issue with the confidentiality agreement was not the scope of the agreement but the fact that it would preclude proponents from making direct submissions to City Council.

> … the plaintiff "was disqualified because its conduct not only breached the terms of the RFP, but because it threatened the credibility and integrity of the RFP process."
>
> - Ontario Court of Appeal

The court found that the plaintiff perceived it had a "home field advantage" in Brampton, so it "played hardball, and engaged in brinksmanship" to force the direct involvement of City Council in the process and increase its chances of winning the contract. The losing plaintiff's claim was rejected, and it was ordered to pay legal costs to the municipality. In March 2021 the Ontario Court of Appeal upheld the trial decision. The Court of Appeal noted that the plaintiff had refused to sign the confidentiality agreement since it wanted to directly lobby City Council for the contract award and that it had breached the "no media contact" protocols in the RFP in an attempt to undermine and politicize the bidding process. (see Court of Appeal Upholds Depoliticized Process)