Canadian Law Update

Critical Trends

The Procurement Office

Focus on Municipal Procurement

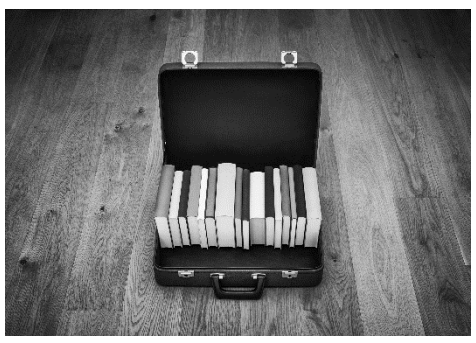
Feature Case Study

Hotline Tip Uncovers Employee Conflicts

Auditor General Investigation

In its February 2024 report entitled *Auditor General's 2023 Annual Report on the Fraud and Waste Hotline*, Toronto's Auditor General released the results of an internal investigation that was prompted by a complaint to the City's fraud hotline which uncovered multiple conflicts of interest involving a now-former City employee. On four separate occasions, while still working for the City, the report found that the former employee provided work as a subcontractor under City-issued contracts through a company that was owned by the employee. The report confirmed that the employee failed to disclose or seek the City's approval prior to any of those engagements.

As a result of the investigation, the Auditor General confirmed that the City was in the process of "making internal control improvements to avoid future conflict of interest situations, which include updating its fraud awareness training and reviewing the existing conflict of interest policies to ensure staff awareness." The report also noted that the City subsequently updated its tendering documents to address these types of potential conflicts in the future. (see Municipal Fraud Hotline Uncovers Employee Conflict)



Lessons Learned: As this case study illustrates, purchasing institutions should update their internal governance rules and tendering documents to ensure that they adequately address potential conflicts of interest, including conflicts involving employees, and should implement internal training programs to ensure compliance with those rules.

Labour Relations Roadblocks: In 2023 and 2024, the Toronto Transit Commission and Edmonton Transit Services were the subject of complex labour relations rulings triggered by the contracting out of TTC's fare collections and by ETS's new on-demand transit services. These recent rulings underscore the importance of considering existing collective bargaining agreements when developing procurement strategies for outsourcing arrangements. (see Unions Challenge Transit Outsourcings)

Feature Article

Toronto and Edmonton Face Transportation Intrigues

Unions Challenge Transit Outsourcings

In two recent labour relations rulings, municipal transit authorities faced legal challenges in connection with the partial outsourcing of their public transit operations. These cases highlight some of the additional risks that should be considered when institutions plan on contracting out services that intersect with work that is currently performed by unionized employees.

While both cases were ultimately dismissed, these rulings highlight how new outsourcing arrangements remain subject to potential labour relations challenges. This underscores the importance of carefully considering existing collective bargaining agreements during the procurement planning process before contracting out services that may overlap with work that is currently being performed by unionized employees.

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

Richmond Hill Protects Tender Confidentiality

City Deals with Bid Access Request

In its September 2023 ruling *The City of Richmond Hill (Order MO-4440)*, Ontario's Information and Privacy Commissioner denied a public access request made pursuant to Ontario's *Municipal Freedom of Information and Protection of Privacy Act* after concluding that a winning bidder's documents were protected by applicable confidentiality rules. The case dealt with a municipal tender call for a storm sewer project. The public access request called for a list of all the bidders "and their total bid price, plus the complete submission document including Schedule of Prices" for the winning bidder.

The City denied the latter request on the grounds that the winning bidder's documents contained confidential business information. The requester appealed to the Commission.

The Commission denied the appeal after concluding that the requested information fell under a municipal public access law exemption that protects against the disclosure of confidential business information when its disclosure could reasonably be expected to result in harm to the business that originally provided the information to the government. The Commission determined that the requested bid documents met that three-part test since: (i) the documents contained financial and commercial information including detailed pricing information and technical information regarding environmental compliance; (ii) the documents were provided by the bidder under a reasonable expectation that the information would be kept confidential under the rules contained in the City's procurement by-law and tendering documents; and

(iii) the disclosure of the winning bid documents could reasonably be expected to cause harm to the winning bidder since "the detailed pricing information contained in the winning submission could reasonably be expected to be used to undercut the prices of the affected party, and potentially prejudice their economic position or cause undue loss." However, while ruling against the disclosure of the winning bid documents, the Commissioner ordered the City to release the internal bid award summary prepared by the City, which contained the final bid price, but did not include the unit prices or other detailed financial information. As this case illustrates, public institutions are under a duty to protect confidential bidder information and must be careful to limit how much of that information they release in response to public access request or disclose as part of the public reporting of contract awards.

Police Investigation: 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.

Paul Emanuelli

City Sues Top Official

Former Winnipeg CAO Liable for Bribery

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.

As this case illustrates, public institutions do not have to rely on 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 contract-related bribery.

Paul Emanuelli

Housing Authority Audited for Conflict

Weak Contracting Oversight

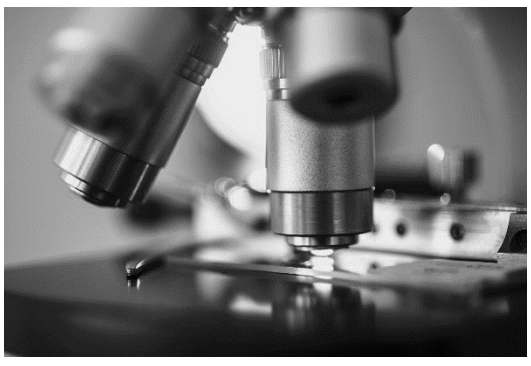
In its January 2023 audit entitled *Metropolitan Regional Housing Authority – Examination of Service Contract Awards*, Nova Scotia's Auditor General concluded that the housing agency ("Metro") needed to improve its conflict of interest practices after finding that Metro's Director failed to properly disclose multiple conflicts in relation to the award of a new security services contract.

While conducting an audit on oversight and management of government owned housing, the Auditor General received a complaint that raised conflict concerns involving Metro's most senior officer, referred to in the report as the "Director", and a bidder that was awarded a $1 million security services contract. In its investigation of the complaint, the Auditor General found that a series of conflict of interest "events" arose when the Director was involved in multiple personal transactions with a contractor while concurrently being involved in Metro's award of a tendered security services contract to that same contractor. The Auditor General's report also raised broader concerns about inadequate conflict controls across the public housing sector. (see Audit Finds Conflicts at Housing Authority)

Paul Emanuelli

Montreal Breaches Neutrality Standards

Inspector General Intervenes



Under the Microscope: Public institutions are increasingly under scrutiny over the use of specifications that unnecessarily limit competition during the tendering process.

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 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.

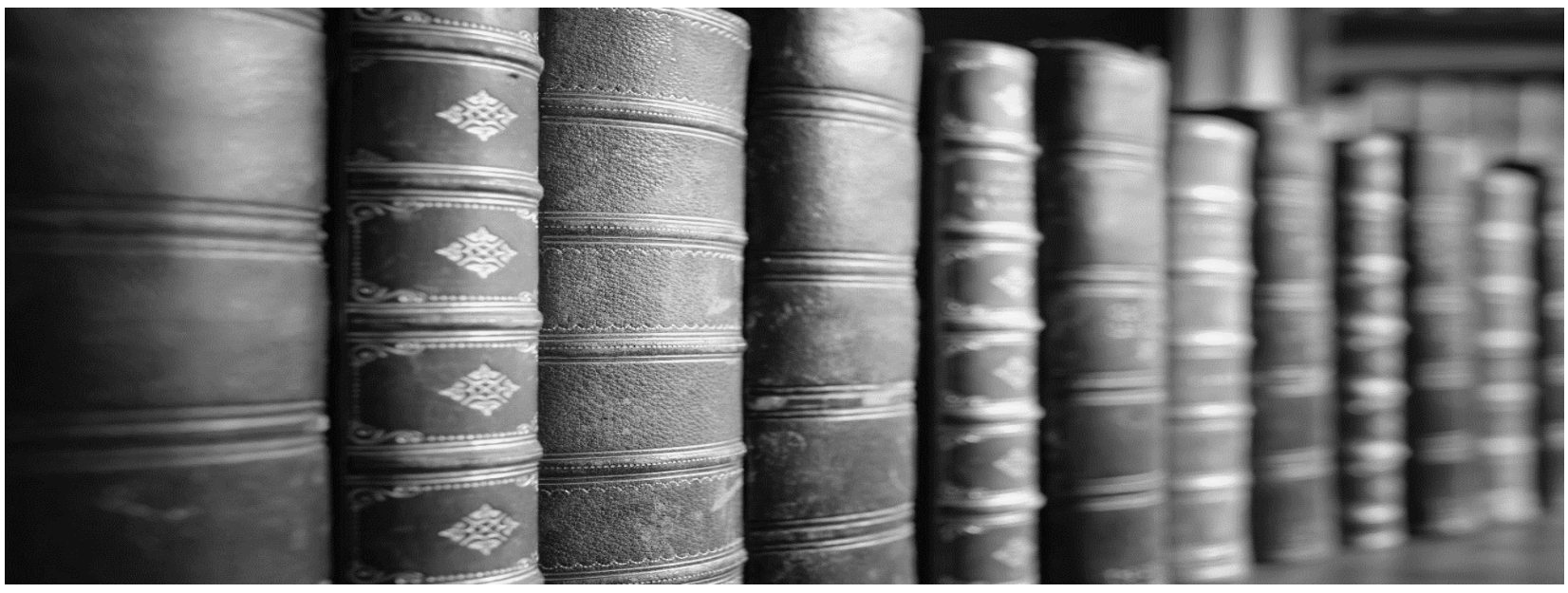
Paul Emanuelli

Halifax Liable for Faulty Specifications

Tendering Tort Claim

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 tendered 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 Court determined that the contractor did not assume responsibility for any design defects under the contract, which remained the responsibility of the municipality's design consultants.

As this case illustrates, contractors are not responsible for performance issues or extra costs incurred due to design defects that are caused by a purchasing institution's design consultants. Purchasing institutions should ensure that their policies and procedures properly address project roles and responsibilities to avoid accountability gaps in their projects. (see General Contractor Not Liable for Municipality's Design Defects)



Court Unimpressed by "Cobbled Together" Contract Documents: The Court noted that the contract documents had been "cobbled together" by the project engineer and had clearly not been proofread, which the engineer blamed on his administrative staff. The Court also raised concerns over the engineer's testimony, expressing difficulty in finding the witness credible or reliable. The Court ruled that the engineer made the entire project more difficult by improperly siding with the owner's unreasonable denial of payments to the contractor.

Court Finds Owner's Engineer Not a Credible Witness

Local Waste Authority Liable for Extra Costs

Spotlight on Contract Drafting and Contract Management

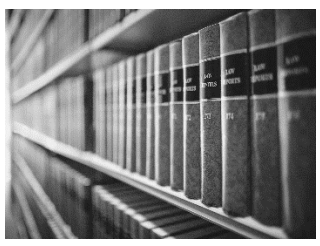
In its May 2022 decision in *Maxim Excavating Ltd v. Peace Regional Waste Management Company*, the Court of Queen's Bench of Alberta awarded extra payment in the amount of $300,000 plus interest to a contractor after determining that the owner and the owner's engineer were unreasonable in refusing to adjust the project schedule and make additional payments for out-of-scope work.

As this case illustrates, purchasing institutions, including their external advisors, should be careful to draft contract performance requirements that capture the full scope of anticipated work since out-of-scope work increases the risk of downstream performance delays and payment disputes. (see Scope Changes Trigger Delay Dispute)

Not Above the Law: In recent years, Canadian municipalites have repeatedly faced bid protests, public inquiries, and public audits that have stress-tested their procurement practices. In many cases those practices have been found lacking and have called for significant governance overhauls. (For improper municipal procurement practices see: Councillor Breaches Code of Conduct, Suppliers Circumvent Debarment Rules, Court Grants Injunction Against Retroactive Debarment, Missing Label Leads to Compliance Lawsuit, Ontario Inquiry Calls for Conflict Reforms. More generally for municipal procurement see: Recent Rulings Reflect Increasing Judicial Review Challenges, Recent Rulings Consider Duty to Award, Conflict Case Dismissed for Lack of Financial Interest, Court Rejects "Good Faith" Negotiation Duties, Dispute Legal Advice Remains Confidential, Court of Appeal Upholds Depoliticized Process, Establishing Proper Approval Protocols)

Municipalities Face Multiple Bid Protests

Local Governments a Target for Tendering Litigation, Public Inquiries and Audits



Recent legal rulings reveal an increasingly litigious tendering terrain for Canadian municipalities. From coast-to-coast, the case law flowing from court rulings, treaty-based bid protests, and public audits has put a spotlight on local procurement.

For example, in its 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. Further, in its 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 ordered that the improperly awarded contract be terminated. (see Montreal's Inspector General Enforces Treaty Rules)

Turning to the treaty-based bid protests that apply to municipalities in Western Canada, in *PMH Insights Inc. v. Parkland County,* an Alberta arbiter found that Parkland County's software sole-source breached the *New West Partnership Trade Agreement*. The arbiter found the municipality in breach of the treaty and ordered it to pay the complainant fees and costs flowing out of the improper sole-source.

Similarly, in *Parkland Geotechnical Consulting Ltd. v. The City of Red Deer*, an arbiter found that the municipality breached the trade treaty rules by introducing unnecessarily restrictive conditions in a pre-qualification process for land development consulting services. The arbiter directed the municipality to rectify the breach and ordered it to pay $28,000 in fees and costs. (see Western Canada Implements Bid Protest Mechanisms)

> "The days of flying under the radar are over. No municipal institution, no matter how small, is immune from procurement challenges."
>
> - Paul Emanuelli

Turning to Atlantic Canada, in *Triton Hardware Limited v. Torngat Regional Housing Association*, the Supreme Court of Newfoundland and Labrador awarded lost profit damages to a bypassed low bidder after the Housing Association improperly relied on a privilege clause to award the contract to a higher bidder based on its undisclosed prior performance preference (see Lost Profits Awarded Over Hidden Preference) and in *C.F. Construction Ltd. v. Town of Westville*, the Supreme Court of Nova Scotia found the Town of Westville liable for improperly rejecting a low bid. (see Municipality Liable for Improper Low Bid Bypass)