Canadian Law Update

Critical Trends

The Procurement Office

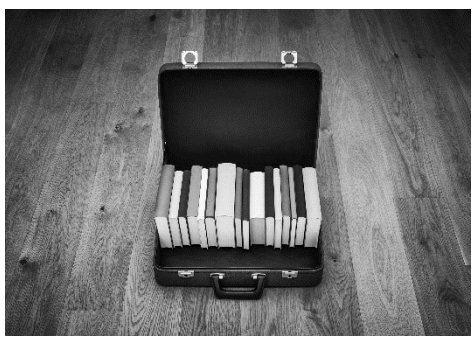
Focus on Bidder Debarment

Feature Case Study

Contractor Banned for Kickback Scheme

Five Year Debarment

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 report dealt with a contract for the renovation of a municipal library. 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 determined that the general contractor failed to fulfil its duty to act in the best interest of the municipality and that its change order scheme put it in a conflict of interest with the municipality. The Inspector General found that the scheme constituted a fraudulent practice under the municipal bylaw and concluded that the general contractor should be barred from future municipal work for a period of five years. (see Suppliers Circumvent Debarment Rules)



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

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.

Feature Article

Montreal's Inspector General Finds Banned Bidders Using Fronting Companies

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 in question should be barred from any future municipal contract work for a period of five years.

Similarly, 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.

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

Court Upholds Greater Sudbury Bidder Ban

Debarments Subject to Due Process

In its June 2018 decision in *Interpaving Limited v. City of Greater Sudbury*, the Ontario Superior Court of Justice – Divisional Court found that the City of Greater Sudbury breached its fair process duties when it failed to provide advanced notice to Interpaving Limited ("Interpaving") prior to barring the contractor from future contracts. The majority of the court ruled that the municipality cured that initial process breach through a subsequent reconsideration.

As the court summarized, Interpaving had a 40-year track record performing work for the municipality, with contracts valued at up to $19 million annually and a workforce that fluctuated seasonally from 200 to 400 staff.

The municipality decided to debar Interpaving for four years because the contractor had initiated litigation against the municipality and also violated health and safety legislation, both of which were recognized grounds for debarment under the relevant municipal by-law.

The court determined that neither the municipality's by-law debarment rules nor its specific debarment decision breached applicable open competition obligations under the trade treaties. However, the court also found that the municipality's debarment decision was subject to procedural fairness and determined that the municipality's failure to provide advanced notice to Interpaving prior to making the debarment decision breached its due process duties.

Notwithstanding the initial breach of its procedural fairness duties, and notwithstanding challenges by Interpaving regarding the admissibility of evidence in subsequent discussions between the parties prior to the municipality's reconsideration decision, the court found that the municipality ultimately cured its original procedural defects through its reconsideration process since Interpaving was given the opportunity to address the initial grounds of debarment.

As this case illustrates, the greater the adherence to due process principles, the better the chances that a debarment decision will stand up to judicial scrutiny when a contractor seeks to legally challenge that decision. (see Debarments Subject to Due Process)

Due Process: While rulings have recognizes that debarments are allowed under the treaties and are also constitutional, they must still follow due process. Retroactively applied rules remain subject to challenge.

Paul Emanuelli

Toronto Ban Suspended

Court Grants Injunction Against Retroactive Debarment

In its May 2017 decision in *Four Seasons Site Development Ltd. v. Toronto (City)*, the Ontario Superior Court of Justice granted an injunction against a municipal debarment decision. The applicant was barred from bidding on construction projects for alleged past performance issues. The City of Toronto had updated its procedures to enable debarment for past performance.

The contractor challenged the retroactive application of those rules, arguing that municipal officials had acted outside of their authority since, at the material time, debarment only applied to code of conduct breaches but not to past performance. The court suspended the debarment decision until its merits could be assessed at trial.

Paul Emanuelli

Court Recognizes Debarment Rules as Implied Terms

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. 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.

Paul Emanuelli

Calgary Cracks Down on Overbilling

Contractor Investigated

Effective Deterrents: Public institutions should incorporate debarment protocols into their procurement procedures to deter poor performance and other types of unethical and fraudulent conduct.

The September 2001 decision of the Alberta Court of Queen's Bench in *Green Country Maintenance Ltd. v. Calgary (City)*, illustrates the importance of sound contract management in obtaining value-for-money under current and future contracts.

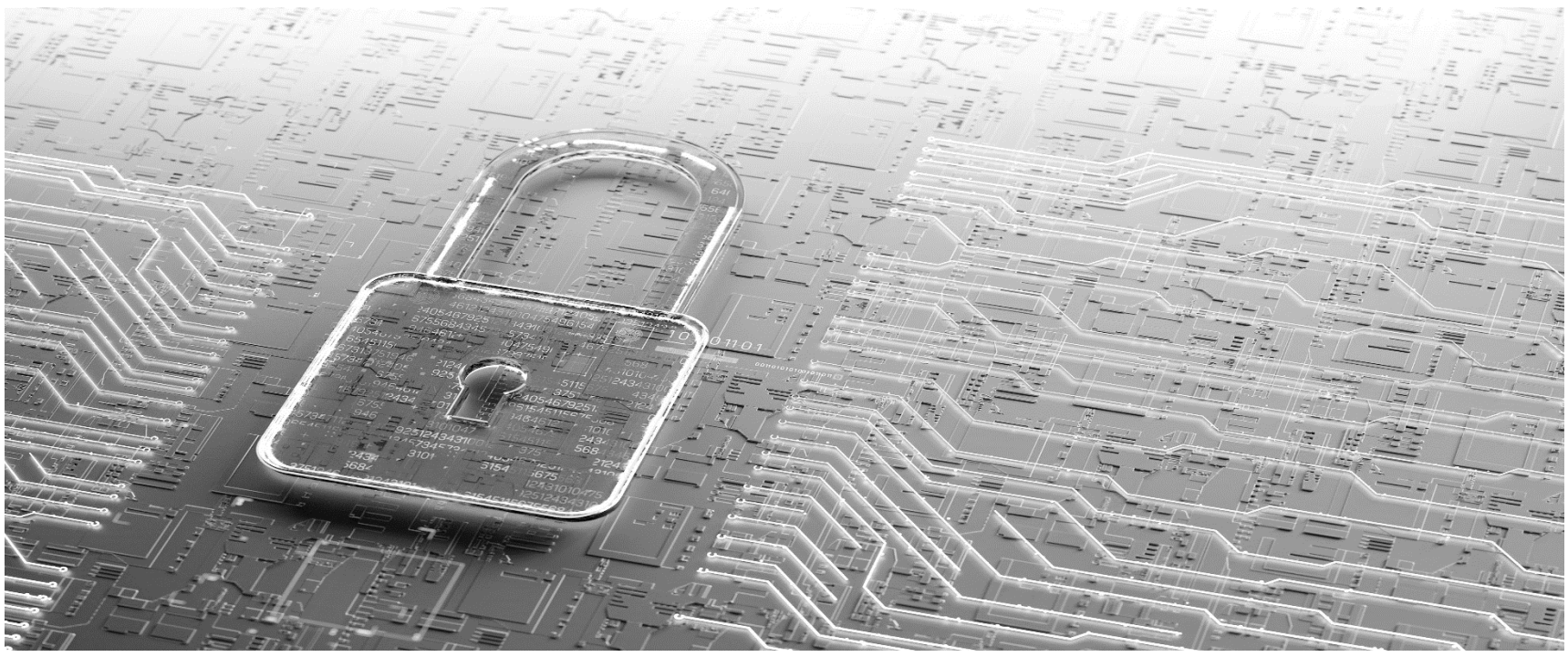
After receiving a complaint that one of its contractors was leaving work early, the city investigated the operations of the particular contractor for one and a half months and discovered that during that period the contractor had submitted inaccurate time sheets. The contract was terminated and the contractor's tenders for subsequent contracts were rejected.

The contractor challenged the city's actions but the court upheld both the contract termination and the subsequent tender rejections, stating: "I am of the view, after reading all the evidence and hearing the submissions from counsel, that the City of Calgary acted in a fair manner that was within its authority when it suspended the services of Green Country, and when it subsequently refused the tenders ... ." The contract in question contained a clause that allowed the city to terminate when a contractor failed to provide "quality service". That clause also contained the right, depending on the severity of the circumstances, to declare a terminated contractor ineligible for future tendered work.

Paul Emanuelli

BC Rebuked for Improper Debarment

In its April 2005 decision in *Soo Logging Co. v. British Columbia (Minister of Forests)*, the British Columbia Supreme Court found that the government improperly blacklisted a contractor on account of alleged past performance problems. The Ministry had previously terminated the contractor due to the alleged performance problems. When the contractor sued, the Ministry unofficially blacklisted the contractor from subsequent tendering opportunities. The contractor challenged these actions. The court was critical of the government's unreasonable and intransigent approach in the litigation. The court found "conduct deserving of rebuke on the part of the Ministry representatives who were instructing counsel". As the court cautioned, purchasers should not use subsequent tendering processes as an opportunity to "get even" with contractors for past performance disputes.



Litigation Lockout: The courts have recognized litigation as a basis for debarment. However, purchasing institutions should seek legal advice before triggering these grounds.

Bias and Conspiracy Claims Rejected

BC Court Upholds Ban of Litigious Bidder

Spotlight on Debarment

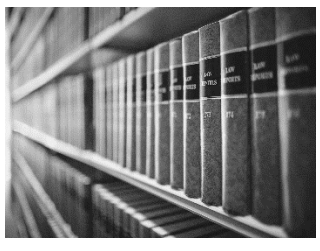
In its May 2007 judgment in *Advanced Ergonomics Inc. v. British Columbia (Workers' Compensation Board)*, the British Columbia Supreme Court dismissed an unsuccessful proponent's claim of bias and conspiracy and upheld the purchaser's right to refuse subsequent proposals from the litigious supplier. The case dealt with an RFP for ergonomics consulting services. The plaintiff responded to the RFP but was unsuccessful. It brought an action alleging bias and conspiracy, claiming that although it had been invited to bid, the purchaser had decided in advance that it would not win. The plaintiff claimed that it had incurred $100,000 in bidding costs.

The court found no basis for the plaintiff's claims and dismissed the action. Furthermore, the court recognized a purchaser's right to deny a supplier the opportunity to bid on contracts due to ongoing lawsuits. The court cited a prior decision in *Sound Contracting v. City of Nanaimo* which held that "there was nothing wrong with a public body refusing to deal with a contractor who was engaged in litigation with the public body." As this case illustrates, barring litigious bidders can be a useful purchaser remedy in appropriate circumstances.

Appeal to Supreme Court of Canada Dismissed: Canada's highest court rejected the barred bidder's attempt to appeal the British Columbia Court of Appeal ruling.

Burnaby Debarment Survives Legal Challenge

Court Upholds Constitutionality of Debarment



In its May 2019 decision in *J. Cote & Sons Excavating Ltd. v. Burnaby (City)*, the British Columbia Court of Appeal ruled that a municipality's two-year debarment of a contractor due to prior litigation with the municipality was not unconstitutional.

The dispute dealt with a debarment decision by the City of Burnaby, British Columbia, which was challenged on constitutional grounds by the barred contractor. The contractor lost at trial and appealed the trial ruling. However, the Court of Appeal upheld that lower court decision, finding that the debarment did not infringe the contractor's constitutional rights.

The contractor specialized in road construction and utilities work, with about 70% of its work secured by bidding on municipal contracts and about 25 percent of the contractor's work in the region coming from the City of Burnaby. The dispute arose out of an incident in October 2012 where a retaining wall collapsed while the contractor was executing a sewer contract for the municipality. The contractor claimed that the municipality was liable for the incident, alleging that the accident arose due to a "concealed condition" on the site. The municipality disputed this claim and added a debarment clause to its tendering procedures that made past performance and litigation grounds for debarment. That clause was then used against the contractor. The contractor challenged the debarment clause as unconstitutional, maintaining that the clause denied it access to the courts. The Court of Appeal disagreed, finding that the contractor could not rely on abstract "rule of law" principles to challenge the municipality's debarment provision since the clause was not a general law but was instead a municipal policy relating to a specific set of circumstances.

Furthermore, the debarment clause did not breach the section 96 constitutional provision referred to by the contractor since, as the Court of Appeal ruled, that constitutional provision, which establishes the powers of the superior courts, does not protect the right to bid on government contracts.

> "Section 96 of the *Constitution Act, 1867* does not protect the ability or right to bid on public tenders."
>
> - British Columbia Court of Appeal

The contractor's appeal was therefore denied and its subsequent appeal to the Supreme Court of Canada was then dismissed without reasons.

As this case illustrates, public institutions operating within jurisdictions that have no statutory debarment codes remain free to create their own institutional-level operating rules to deal with the barring of contractors. While contractors may have the right to challenge the legitimacy of those rules and enforcement of those rules, this does not preclude those public institutions from establishing defensible local debarment regimes to deal with their local contracting issues. (see Court Upholds Constitutionality of Debarment)