Canadian Law Update

Critical Trends

The Procurement Office

Focus on The Duty to Award

Feature Case Study

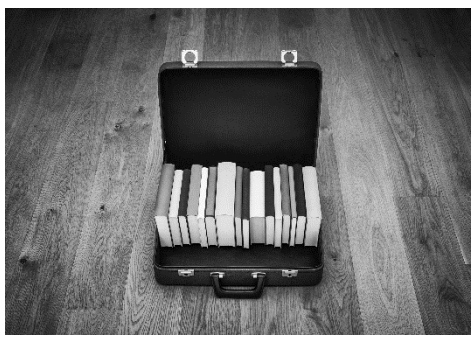
Tribunal Orders Retender After Flawed Evaluation

Finds Lack of Evaluation Records

In its March 2020 determination in *Bluenose Transit Inc. v. Department of Public Works and Government Services*, the Canadian International Trade Tribunal found that the government improperly awarded a contract to a non-compliant bidder. The Tribunal ordered the government to cancel that award and re-tender its requirements. The dispute dealt with a solicitation for bus transportation services for the Department of Defence in Nova Scotia. The complainant alleged the government awarded the contract to a non-compliant competitor whose base of operations fell outside the proximity zone specified in the solicitation. The Tribunal agreed. It ordered the government to set aside its contract award, re-tender its requirements, and establish proper record-keeping for its next evaluation to better ensure a reviewable and defensible evaluation record:

> PWGSC's failure to properly document the evaluation of the bids seriously undermined the integrity and transparency of the procurement process. This is underscored by the fact that PWGSC's evaluation error was made with respect to a relatively simple requirement, i.e. item 16 of the SOW. Without a record of the evaluation, the Tribunal's ability to understand how the error was made and how the solicitation could be improved has been hindered.

As this case illustrates, the failure to conduct and document a proper evaluation process can undermine the validity of any resulting contract award and create a significant duplication of effort when that award is nullified and the tendering process is repeated. Purchasing institutions would be well advised to execute their procurements properly on the first attempt.



Lessons Learned: Recent rulings serve as wake up call for public institutions to bolster their evaluation and award procedures.

The Duty to Award: Public institutions are under an implied duty to award a contract to the best bid. Any variations from this result, including by-passing the best bid in favour of another bidder, or cancelling a bidding process after bid submissions, can attract legal challenges that will require the purchasing institution to justify its decision-making.

Feature Article

Inspector General Finds Bid-Shopping Sole-Source

Recent Rulings Consider the Duty to Award

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 noted, 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.

As this case illustrates, public institutions should tread with caution before cancelling a tendering process after the receipt of bids or before bypassing the best bid and awarding the work to another supplier since these types of decisions expose them to legal challenge.

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 Rules Award Should Have Gone to Low Bid

Municipality Liable for Improper Low Bid Bypass

In its May 2018 decision 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. The case dealt with a tender call for a sewer system upgrade project. The municipality received four bids in the amount of $572,200, $674,000, $845,000, and $1,132,000, respectively. It rejected the low bidder as non-compliant and awarded to the second-lowest bid. The low bidder sued. The case turned on the post-bid discussions between the municipality and the low bidder, and on the issue of whether the low bidder's price was based on using a pre-cast concrete wet well as required in the specifications, or whether the low bidder planned on using an unapproved alternative approach based on a cast-in-place concrete wet well.

As the court summarized, the pre-cast approach set out in the specifications called for a prefabricated wet well that would have to be delivered to the location and installed, which posed some logistical issues due to overhead power lines at the location, whereas the cast-in-place alternative would allow the concrete to be poured on location. This would require the engineering of a mold but would simplify delivery and installation. While both parties agreed that the alternative approach was discussed by telephone when the low bidder was approached by the municipality as the presumptive winner, the low bidder maintained that its bid was always based on the pre-cast method and that it had simply inquired on the alternative approach to see if it could be approved as a change order to deal with the onsite problem of the overhead power lines.

The court ruled that the post-bid discussions were irrelevant since the bid was compliant on its face when it was submitted and contained no conditions that would render it a counter-offer and therefore non-compliant. The court also ruled that the municipality misapplied the duty to reject a non-compliant bid based on a flawed understanding of the facts. The low bidder was therefore awarded $356,000 in lost profit damages due to the improper rejection of its bid. As this case illustrates, while purchasing institutions may be under a duty to reject non-compliant bids, they must first confirm that the bid in question is in fact non-compliant. Engaging in post-bid evaluation improvisations based on undisclosed evaluation criteria and unstructured oral communications is a high-risk approach to determining bid compliance.

Unclear Rejection: The Court of Appeal noted that the municipality failed to provide the reasons why it was not prepared to waive the non-compliance.

Paul Emanuelli

Lost Profits Ordered for Failure to Award

Missing Label Leads to Compliance Lawsuit

In its May 2019 decision in *Reaction Distributing Inc. v. Algonquin Highlands (Township)*, the Ontario Court of Appeal found a municipality liable for disqualifying a bidder over the failure to label the outside of its bid as required by the tender call rules. The rejected bidder submitted its bid in a three-ring binder enclosed within an unlabelled box.

The municipality rejected that bid and was found liable for $71,063.60 in lost profit damages after the trial court determined that the bid was substantially compliant and should have been accepted. The municipality appealed the decision, but the Court of Appeal upheld the trial ruling.

Paul Emanuelli

RFP Results in Dismissal of Low Bidder Claim

In its January 2020 decision in *Taggart Construction v. City of Kingston,* the Ontario Superior Court of Justice summarily dismissed the legal claim of a losing low bidder. The dispute dealt with a Request for Proposals ("RFP") for the third phase of an ongoing construction project in Kingston, Ontario. The plaintiff argued that the municipality breached its own tendering rules by using a high-score RFP rather than a low bid evaluation process and asserted that it should have been awarded the contract as low bidder. The court disagreed and summarily dismissed the claim. The court found that the plaintiff's proposal, while containing the lowest price, scored below the winning proposal in several of the technical factors set out in the RFP evaluation criteria. As the court noted, while the plaintiff was approximately $1 million lower in price, its proposal had no cold weather construction plan, was weak in the areas of subsurface investigation, and proposed a longer overall construction schedule when compared to the winning proposal. The court concluded that the technical factors in the RFP evaluation criteria supported the selection of the winning proposal over the lowest bid proposal. As the court noted, at the time of bidding, the plaintiff was well aware that the contract would be awarded to the highest scoring proposal since the technical non-price factors were set out in the RFP.

Paul Emanuelli

Government Liable for Stalling on Award

Lost Profit Damages

Self-Inflicted Delays: Purchasing institutions cannot rely on their own lack of procedural diligence as a defence against failing to make a contract award.

In its February 2019 determination in *Turbo Expert Québec Inc. v. Department of Public Works and Government Services*, the Canadian International Trade Tribunal ruled that the government was not permitted to let the bid validity period expire due to its own lack of diligence and then use that expiry as an excuse to cancel and not award a contract. The Tribunal ordered the government to award the contract to the complainant or pay the complainant's lost profits.

The dispute dealt with a request for proposals for the provision of frigate engine turbo chargers. The complainant was the second-ranked proponent. After its attempts to award to the top-ranked proponent failed, the Department of Public Works and Government Services ("PWGSC") decided to cancel the process instead of proceeding to the second-ranked proponent, arguing that it was too late to select the second proponent because of the expiry of the bid validity period.

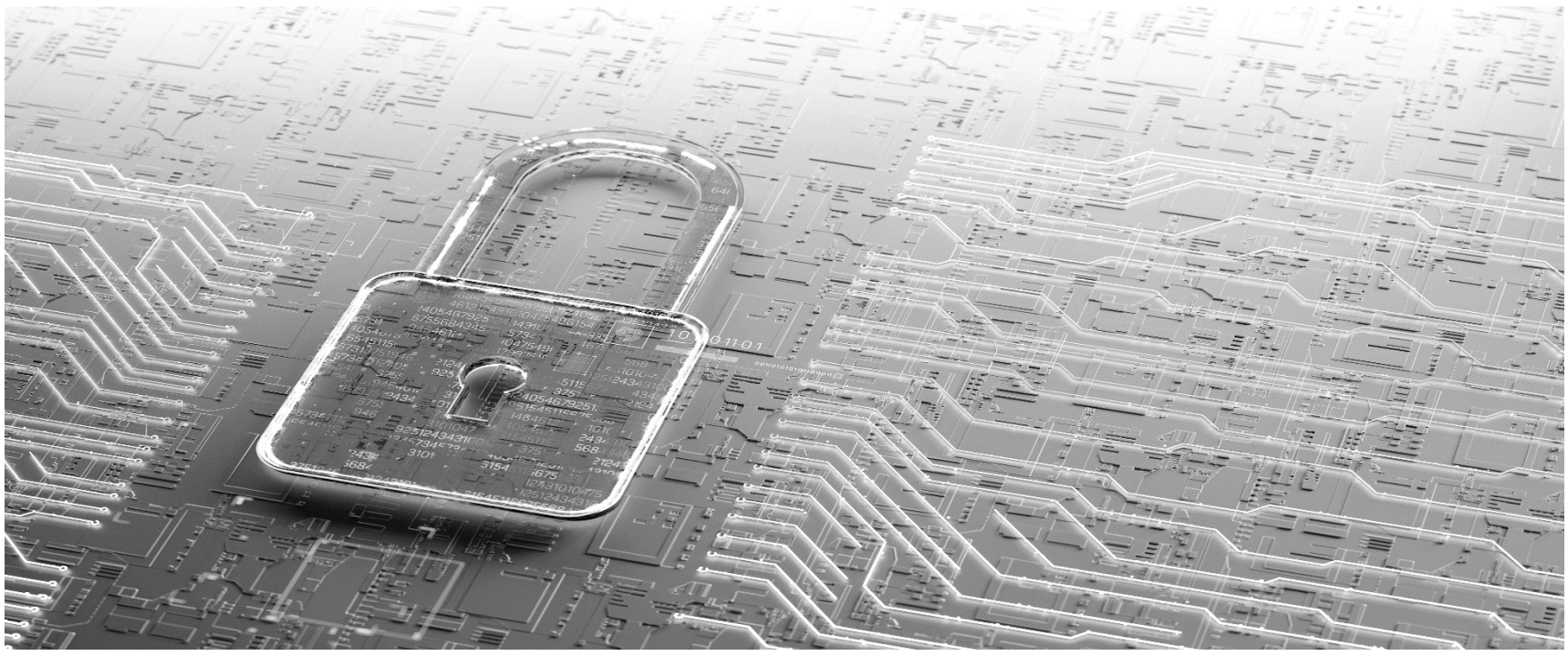
However, the Tribunal found that the government failed to exercise proper due diligence during that bid validity period, which could have included taking steps to have the remaining bidders agree to extend their initial offers.

The Tribunal therefore concluded that "PWGSC failed to act in a reasonable and diligent manner by letting the bid validity period expire", and that "PWGSC cannot use the expiration of the bid validity period caused by its own lack of diligence to justify not awarding the contract." The Tribunal ordered the government to award the contract to the complainant or pay lost profit damages for failing to do so. (see Self-Imposed Delays No Excuse for Cancellation)

Paul Emanuelli

Rulings Uphold Low Bid Bypass Decisions

In its January 2018 decision in *Everest Construction Management Ltd. v. Strathmore,* the Court of Appeal of Alberta dismissed the appeal of a trial decision that upheld a purchaser's low bid bypass. The municipality selected the second-lowest bid because that bid's faster proposed completion time offset the slightly higher bid price. The Court of Appeal upheld the right of the municipality to take the completion time into account under its privilege clause since it had asked for bidders to propose their schedule as part of the bidding process. Similarly, in its June 2018 decision in *Miller Group Inc. v. The Village of Salisbury*, the Court of Queen's Bench of New Brunswick upheld the bypass of a low bid based on local preference exceptions under the relevant provincial statute. The municipality bypassed the low bid and selected the local incumbent. The court upheld the low bid bypass. (see Recent Rulings Consider Duty to Award).



Locking in on the Duty to Award: The trial court and Court of Appeal both applied strict bidding rules to imply a duty to award to the best bid. These rules can expose public institutions to bid shopping claims when they decide to cancel and retender.

Court of Appeal Agreed Retender Was Improper

Municipality Liable for Bid-Shopping

Spotlight on Duty to Award

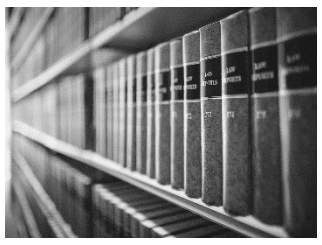
In its May 2018 decision in *Gulf Developments Inc. v. Essex (Town)*, the Ontario Court of Appeal dismissed the appeal of a municipality that engaged in an improper retendering process and was found liable for bid shopping. The Court of Appeal agreed with the trial judge's decision, which applied Supreme Court of Canada precedents relating to Contract A bidding rules.

The Court of Appeal noted that the municipal council resolved to award the contract to the plaintiff bidder, but the municipality then retendered the project and re-awarded the contract to another bidder when it should have addressed the issues that triggered the retendering process through a scope change with the original awardee.

High-Risk Rescissions: In its May 2021 determination in *Joe Parsons Construction Ltd. v. Public Works and Government Services*, the Canadian International Trade Tribunal found that the government breached its confidentiality duties by prematurely disclosing the contract price of the winning bidder and then rescinding that award due to the after-the-fact discovery of alleged price evaluation irregularities. The Tribunal found that the government overreacted in its decision to retender since the original concern over the ability to correct calculation errors was unwarranted. The Tribunal ordered the government to re-evaluate the original bids and compensate the complainant for any lost profits.

Rescinding and Retendering Triggers Litigation

Recent Rulings Consider Duty to Award



As recent cases illustrate, given the implied duty to award to the best bid, public institutions expose themselves to litigation when they cancel a bidding process after the receipt of bids, or when they rescind their contract award decisions.

For example, in its June 2017 decision in *ASI Group v. Toronto (City)*, the Ontario Superior Court of Justice upheld the City of Toronto's decision to cancel and retender a project. The case dealt with a tender call for dive services. The municipality decided to cancel and re-tender the project upon discovering that it had failed to provide material background information to all bidders. The low bidder sued. The court rejected the lost profit claim, finding that the municipality was under a duty to cancel and re-tender the contract since the disclosure of missing material information, namely diving inspection reports, was necessary to maintain a level playing field between incumbent contractors and new bidders. The court also found that cancelling and retendering was fair in the circumstances even though the original low bidder's bid price was disclosed to all bidders during the original bid opening. As this case illustrates, the failure to address material disclosures can have significant adverse effects on the fairness of a tendering process. Purchasers would be well served to ensure that their original tender calls contain all required material disclosures since the ability to rectify these deficiencies downstream after bids are submitted is significantly restricted and may compel the cancellation of a bidding process and give rise to related legal challenges. (See Faulty Disclosures Lead to Retender)

In its April 2018 determination in *Hawboldt Industries v. Department of Public Works and Government Services*, the Canadian International Trade Tribunal ruled that the government's premature contract award announcement resulted in a breach of its confidentiality duties after the award was rescinded.

> "Retendering is high risk, especially when the original bid prices were disclosed."
>
> - Paul Emanuelli

The dispute dealt with a request for proposals for electro-hydraulic marine cranes. The government announced the contract award, including the contract price, to competing bidders, but then discovered that it had to cancel the award after some of the losing bidders raised concerns about errors in the evaluation process. The initially selected bidder brought a legal action, asserting that the government breached its confidentiality duties by disclosing its winning price to its competitors and, in so doing, prejudiced the bidder's competitive position during the re-tendering process. The Tribunal ruled that the complainant was entitled to damages for a percentage of its lost profits. (see Recent Rulings Protect Confidential Bidder Information)