September 2023

Quarterly Report

The Procurement Office

Special Issue: Focus on British Columbia

Feature Case Study

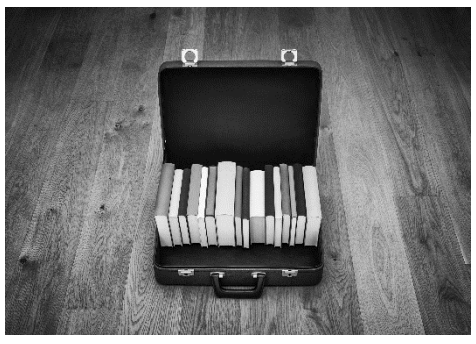
Former Clerk of BC's Legislative Assembly Guilty of Breach of Public Trust

Fraud Leads to Imprisonment

In its decision in *R. v. James*, the British Columbia Supreme Court found the defendant guilty of breach of public trust and fraud under $5,000 for improper clothing expenses claimed while serving as the Clerk of the House for British Columbia's Legislative Assembly. While the Court dismissed many of the charges in relation to other claimed expenses, it ruled that the defendant made improper expense claims in relation to certain clothing that was claimed as work-related "chamber attire".

The Court subsequently imposed a sentence of imprisonment for a period of three months, to be served in the community, including one month of house arrest, two months of overnight curfew, and travel restrictions outside of the province, along with a restitution order of $1,886.72 and a $200 victim fine surcharge.

As this case illustrates, the misuse of public funds, even in relatively small amounts, can result in criminal sanctions against public officials.



Lessons Learned: The recent ruling serves as wake up call for BC public institutions to bolster their procurement governance practices.

Enabling Innovation: While the last decade has seen a rapid adoption of negotiated RFPs across the public sector, public institutions should ensure that they are using professionally designed tendering documents and obtaining project-specific advice when leveraging negotiated bidding procedures (see Negotiating Beyond Contract A: 20 Points of Law).

Feature Article

BC Court of Appeal Opens the Door to Agile Procurement

Judicial Review Recognizes Non-Contract A RFP

In its decision in *Murray Purcha & Son Ltd. v. Barriere (District)*, the British Columbia Court of Appeal determined that the District of Barriere did not breach its tendering duties in the evaluation and award of a contract. The case dealt with a non-Contract A Request for Proposals (RFP) for winter road maintenance services. A losing bidder brought an application for judicial review, challenging the validity of the evaluation and award process.

The Court of Appeal ruled that the RFP did not create a Contract A contractual duty of fairness that would give rise to a commercial lost profit remedy claim by a proponent.

However, the Court of Appeal ruled that even if no Contract A was created to give rise to a lost profit claim, government procurement decisions remain subject to judicial review under administrative law.

This ruling confirms that public entities in British Columbia can avoid the risks and restrictions of a Contract A bidding process and leverage flexible formats that open the door to more agile and innovative tendering formats. However, they remain subject to due process standards as public bodies.

Training Certificate

Leveraging Lessons Learned

Procurement Training Office

We will be running our open enrolment Governance and Project Execution Certificate in a month-long format starting December 2023.

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

In 2023, Orbidder 2.0 goes head-to-head with our 5.0 Annotated RFx Templates and Platinum Training Program.

Paul Emanuelli

BC Court of Appeal Upholds Burnaby Ban

Court Rejects Constitutional Challenge to Debarment

In its 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 dispute arose out of an incident where a retaining wall collapsed while the contractor was executing a sewer contract for the City. The contractor claimed that the City was liable for the incident, alleging that the accident arose due to a "concealed condition" on the site. As the Court of Appeal noted, the City disputed this claim, and then added the following debarment clause to its tendering procedures:

> Tenders will not be accepted by the City of Burnaby (the "Owner") from any person, corporation or other legal entity (the "Party") if the Party, or any officer or director of a corporate Party, is, or has been within a period of two years prior to the tender closing date, engaged either directly or indirectly through another corporation or legal entity in a legal proceeding initiated in any court against the Owner in relation to any contract with, or works or services provided to the Owner; and any such Party is not eligible to submit a tender.

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 City'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.

As this case illustrates, debarments are not unconstitutional. However public institutions need to establish defensible rules when implementing these procedures.

Off the Record: The audit found that over half of the direct awards were not supported with proper documentation.

Paul Emanuelli

BC Government Audited

Rampant Sole-Sourcing in Alcohol Deals

In its report entitled *BC Distribution Branch Directly Awarded Contracts*, the Auditor General of British Columbia found that the government's Liquor Distribution Branch failed to follow the provincial government's procurement policy and repeatedly engaged in improper direct contract awards. Furthermore, the Auditor General found that the government failed to keep proper records of the reasons behind its direct contract award decisions and failed to document whether it has sought appropriate legal advice prior to making those direct award decisions awards.

Paul Emanuelli

BC Auditor Calls for More Training

Weak Contracting Oversight

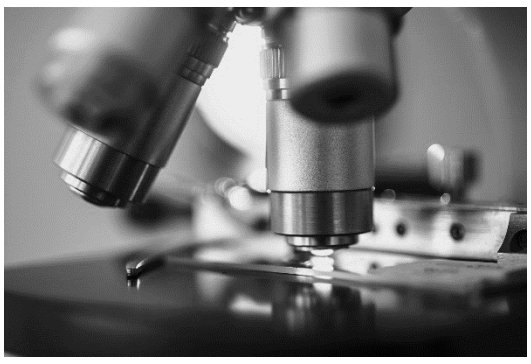
In its report entitled *Oversight of Contracted Residential Services for Children and Youth in Care*, the Auditor General of British Columbia found that the government failed to provide effective oversight of contracted residential services. The report noted that the government failed to consistently define the required services and instead allowed the services to evolve on an ad hoc basis. Furthermore, the Auditor General found that the government failed to monitor the quality of care provided by contractors to children and youth in the residential service portfolio.

The Auditor General recommended that the government put more focus in proactively defining its program service needs. It also made a series of recommendations in relation to its procurement and contract management practices in the portfolio, stating that the government should improve its management and contract oversight practices by ensuring that roles and responsibilities are appropriately assigned, and that responsible staff receive appropriate training and support to fulfill their roles.

Paul Emanuelli

City of Vancouver Sued Over Cancellation

Budget Dispute



Under the Microscope: Public institutions expose themsevles to legal scrutiny when they rely on budgetary constraints to cancel a tendering process.

In its decision in *Innovations for Audio Video Inc. v. Vancouver (City)*, the British Columbia Supreme Court upheld a trial decision that found the City of Vancouver not liable for cancelling a tendering process for budgetary reasons.

The case dealt with an RFP for the supply and installation of a sound system in the Killarney Ice Arena. The plaintiff, Innovations for Audio Video, was one of five bidders that responded to the cancelled solicitation. It sued for damages but lost at trial.

Innovations appealed the trial judgment, arguing that the trial judge made a number of errors in findings of fact, including errors in considering whether the City had acted in bad faith in rejecting the original bids. However, the British Columbia Supreme Court agreed with the trial judge's finding regarding the City's right to terminate for budgetary reasons.

As this case illustrates, a purchasing institution may have the right to cancel a bidding process due to budgetary constraints. However, such cancellation decisions are subject to legal challenge. Even when successfully defended, these claims can prove costly in time and financial resources. (see City Not Liable in West Coast Over-Budget Bid Battle)

Paul Emanuelli

BC Court of Appeal Upholds Bid Rejection

Bidder Missed Form Deadline

In its decision in *True Construction Ltd. v. Kamloops (City)*, the British Columbia Court of Appeal upheld a lower court's summary dismissal of a claim by a non-compliant bidder in a dispute over a fire hall construction tender. The low bidder was rejected for failing to submit all of the required forms by the bid deadline. It sued for lost profits.

The municipality brought an application for summary dismissal, arguing that the plaintiff's bid was non-compliant and incapable of acceptance and that there was no need for the matter to proceed to trial. The trial court agreed. The bidder appealed but its appeal was dismissed after the Court of Appeal agreed with the lower court ruling. As this case illustrates, public institutions have both the right and duty to reject non-compliant bids.

BC Court of Appeal Lays Down the Law: Bidders should ensure they submit compliant bids if they want to sucessfuly assert their tendering rights.

Non-Compliance Leads to Lost Legal Challenge

BC Court of Appeal Rejects Lost Profit Claim

Spotlight on Tender Compliance

In its decision in *M.G. Logging and Sons Ltd. v. British Columbia*, the British Columbia Court of Appeal dismissed a losing bidder's lost profit claim after finding that the bidder submitted a non-compliant bid with missing information in response to a timber licence tender call.

The Court of Appeal noted that a non-compliant bid is incapable of acceptance and that a non-compliant bidder has no basis to claim lost profits when its bid is rejected. Since the non-compliant bidder's claim could not succeed, the Court of Appeal agreed with the lower court's decision to summarily rejected the claim.

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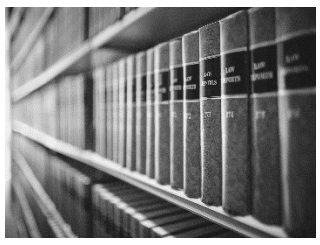
Not Above the Law: In recent years, Canadian public institutions have repeatedly failed in trying to sheild procurement decisions from judicial review.

BC Challenged Over "Community Benefits"

Union-Only Decision Subject to Judicial Review



In its decision in *Independent Contractors and Businesses Association v. British Columbia (Transportation and Infrastructure)*, the Supreme Court of British Columbia rejected a summary dismissal application.

The government brought a motion to dismiss the case. However, the Court found that the decision in question remained subject to challenge under the general judicial review powers of the courts, whereby the courts can review the contracting decision of government where the exercise of statutory power over the public interest is involved. The government appealed.

The Court ruled that the provincial government's decision to limit work on a government construction contract to unionized labour remained subject to legal challenge by way of judicial review.

The dispute dealt with a Request for Qualifications (RFQ) issued by the Minister of Transportation and Infrastructure for British Columbia for the Pattullo Bridge Replacement Project. The RFQ required that contractors source their labour exclusively from B.C. Infrastructure Benefits Inc., a Crown Corporation that, in turn, directed that work to the unions affiliated with the Allied Infrastructure and Related Construction Council of B.C. through a collective bargaining agreement referred to as a "Community Benefits Agreement".

The applicants legally challenged this process, seeking a declaration that the RFQ requirement was an unreasonable exercise of the Minister's statutory power and infringed the Canadian Charter of Rights and Freedoms.

> "...the closer the connection between a procurement process and the exercise of a statutory power, the greater the likelihood that the activity can be subject to judicial review."
>
> - BC Supreme Court citing Paul Emanuelli's *Government Procurement*

However, the British Columbia Court of Appeal agreed that the government's decision was subject to common law judicial review under the constitutional powers of the courts. The Court of Appeal also ruled that the government's decision was subject to review under the *Judicial Review Procedure Act*. The government appealed this decision as well, but the Supreme Court of Canada dismissed that appeal.