Canadian Law Update

Critical Trends

The Procurement Office

Focus on Legal Foundations

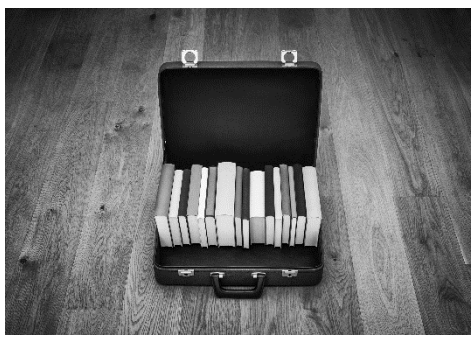
Feature Case Study

Judicial Review Overrules Rejection of $65 Million Bid

Dispute Over Proof of Insurance

In its March 2021 decision in *Pomerleau Inc. v. The Province of New Brunswick*, the New Brunswick Court of Queen's Bench struck down the government's decision to disqualify a $65 million hospital project bid over an insurance certificate requirement. The requirement in question called for an insurance certification letter from a "New Brunswick resident agent of an insurance company" but the government rejected the certificate since the agent did not have a physical office in the province.

The complainant brought an application for judicial review seeking to quash that disqualification, maintaining that the government was inconsistent in interpreting the residency rule for insurance agents since it had previously accepted the complainant's insurance certificate from the same insurance company in a prior bidding process. The court agreed, finding that the government acted unreasonably and that the decision to reject the insurance certificate raised "concerns of subjective, arbitrary and inconsistent decision-making that may offend the principle of the rule of law." (see Recent Rulings Reflect Increasing Judicial Review Challenges)



Lessons Learned: Recent rulings reflect an increase in judicial review challenges based on administrative law principles.

The Rise of Judicial Review: The scope of government procurement judicial review challenges remains a complex and situation-specific question of fact and law that is subject to ongoing jurisprudential evolution. While the overall trend appears to be moving toward more oversight and judicial intervention, this trend is not absolute, and open questions remain regarding the scope of judicial review in government procurement decisions.

Feature Article

Court Reviews Municipality's *CFTA* Compliance

Recent Rulings Reflect Increasing Judicial Review Challenges

In its January 2023 decision in *Transdev Canada Inc. v. York (Regional Municipality)*, the Ontario Superior Court of Justice – Divisional Court dismissed a judicial review application after finding that the applicant failed to provide evidence in support of its arguments. The case dealt with the award of a contract pursuant to a competitive bidding process for the operation of a public transit system in the Region of York. The second-ranked bidder challenged that award, arguing that the winning bidder should have been disqualified due to the inclusion of a subcontractor in its bid.

The court disagreed, noting that the applicant's bid would have been disqualified as well had the solicitation rules prohibited the incorporation of subcontractors in the bid documents. While the applicant argued that the procurement process breached the fair process provisions in the *Canadian Free Trade Agreement*, the court found no evidence to support these allegations and found no breaches of the rules set out in the specific tender call document. The court concluded that the contract award decision was reasonable and dismissed the application.

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

Contract A Damages Claim Dismissed

Ruling Rejects Lost Profit Claim Against Dialogue RFP

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.

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. This resulted in the plaintiff's disqualification. The plaintiff challenged the reasonableness of the confidentiality agreement, arguing that it was overly broad in applying to all confidential information without any time limits. However, the court rejected the plaintiff's arguments and accepted expert evidence from the municipality regarding the confidentiality agreement.

The court also ruled that even if the plaintiff had been improperly disqualified, it would not have been entitled to lost profit damages since the process used by the municipality was not a Contract A bidding process, but was a properly designed negotiated RFP that did not give rise to lost profit damages. As the court further explained, non-Contract A negotiated RFPs are designed to avoid exposing purchasing institutions to protracted lost profit claims. 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. The Court of Appeal also agreed that the trial judge properly interpreted the RFP rules. The trial court's order for the plaintiff to pay over $3 million in legal costs was also upheld.

Uncertain Enforceability: While the Yukon Court of Appeal's decision left many unresolved issues, the plaintiff's leave to appeal to the Supreme Court of Canada was dismissed without reasons in April 2019, leaving uncertainty regarding the ultimate enforceability of Contract A liability disclaimers. (see Frontier Justice and the End of Contract A)

Paul Emanuelli

Lost Profit Award Overturned on Appeal

Ruling Leaves Uncertainty Over Contract A Liability Disclaimers

In its November 2017 decision in *Mega Reporting Inc. v. Yukon*, the Yukon Supreme Court found the government liable for running a flawed evaluation process notwithstanding a limitation of liability disclaimer contained in the Contract A tender call document. However, in June 2018 the Yukon Court of Appeal subsequently overturned that decision and ruled that that disclaimer shielded the government from liability.

The Yukon Court of Appeal ruled that disclaimers should only be struck down on policy grounds in extreme situations where harm to the public good is "substantially incontestable". The Court of Appeal ruled that the liability disclaimer should be enforced and that it was a matter for voters, rather than the courts, to intervene if the government had acted improperly.

Paul Emanuelli

Judicial Review Recognizes Negotiated RFP Process

No Lost Profit Remedy

In its January 2019 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 two different standards of review under administrative law.

As the Court of Appeal determined, procedural decisions are subject to the strict standard of procedural correctness, whereas substantive decisions are subject to a more deferential reasonableness standard. (see Judicial Review Recognizes Non-Contract A RFP)

Paul Emanuelli

Design Defects Lead to Legal Dispute

Municipality Liable in Tort

Clarifying Project Roles: 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.

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 tendering 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 dispute dealt with a boiler room project at the Emera Oval, an ice rink in Halifax, Nova Scotia. During contract performance, the contractor raised concerns that the boiler room was too small to accommodate the boilers required in the contract specifications. The contractor proposed different solutions to address the space limitations, but those recommendations were rejected by the external design consultants retained by the municipality to prepare the specifications and manage the contract. The contractor performed the boiler installation in accordance with the original specifications but was then required to perform additional work to bring the installation into compliance with applicable technical standards. Citing Supreme Court of Canada precedent, the court noted that engineers are responsible for their design work and may be liable when contractors rely on flawed designs when performing their work. 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. (see General Contractor Not Liable for Municipality's Design Defects).

Paul Emanuelli

Negligent Misrepresentation and Omission Claim

Purchaser Made to Pay

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. The dispute dealt with a construction contract for three industrial waste cells for Peace Regional Waste Management Company awarded to Maxim Excavating Ltd following a tendering process. Peace Regional retained the services of Omni-McCann Consultants Ltd. to act as the project engineers. Peace Regional withheld payments due to project delays. Maxim brought a claim for those outstanding payments, as well as a claim for excess payments for additional out-of-scope work performed on the project. (see Scope Changes Trigger Delay Disputes).

Financial Claim Dismissed: The court rejected the plaintiff's argument that the request for expression of interest put the municipality under a duty to negotiate in good faith that exposed the institution to a financial claim when negotiations failed.

Court Rejects "Good Faith" Negotiation Duties

Misrepresentation Claim Rejected

Spotlight on Negotiations

In its January 2022 decision in *Correct Building Corp. v. Lehman*, the Ontario Superior Court of Justice granted as summary dismissal motion after finding that the defendant municipality was not under an implied duty to negotiate in good faith in relation to a land development project. The dispute involved a failed negotiation that occurred after the City of Barrie released a request for expression of interest to identify parties interested in developing municipal lands. After the negotiations failed the unsuccessful developer brought an action claiming a breach of good faith duties and misrepresentation.

Those claims were summarily dismissed. In support of this ruling, the court concluded that there was no implied common law duty to negotiate in good faith. After concluding that the negotiation process did not give rise to good faith duties, and also concluding that the municipality did not engage in any negligent misrepresentation, the court granted the summary dismissal. As this case illustrates, the courts continue to be reluctant to recognize new common law duties owed between negotiating parties.

Administrative Law Standards: Public institutions are increasingly coming under the scrutiny of public law due process standards in judicial review proceedings that are brought by suppliers to challenges public sector procurement practices.

Courts Regulate Government Contracting

Recent Rulings Reflect Increasing Judicial Review Challenges

In recent years the Canadian courts have started playing a more interventionist role in judicially reviewing the procurement decisions made by public bodies. While the rulings do not always go against the public institution, they reflect a higher degree of scrutiny over government contracting procedures.

This increasing interventionism represents one of the most significant recent legal developments in the Canadian procurement system, highlighting the significance of administrative law principles as a source of checks-and-balances in the Canadian government procurement system.

For example, in its June 2018 decision in *Interpaving Limited v. City of Greater Sudbury*, the Ontario 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. However, the majority of the court ruled that the municipality cured that initial process breach through a subsequent reconsideration.

Further, in its January 2019 decision in *Leading Edge Geomatics Ltd. v. Service New Brunswick*, the Court of Queen's Bench of New Brunswick recognized the right to challenge government evaluation decisions under applicable statutory frameworks, finding that the government was not immune from judicial review challenges to its procurement processes. The dispute dealt with a request for proposals issued by Service New Brunswick ("SNB") for aerial surveying services. A losing respondent brought a judicial review challenge, alleging that the evaluation and award process was conducted in an unfair manner and seeking to strike down the contract award.

The court found that "SNB meets the threshold of justification, transparency and intelligibility" and the judicial review challenge was therefore dismissed on the merits of the case. Similarly, in its July 2019 decision in *Independent Contractors and Businesses Association v. British Columbia*, the Supreme Court of British Columbia ruled that the government's decision to limit work to unionized labour remained subject to judicial review. That decision was upheld in August 2020 by the British Columbia Cour of Appeal.

> "SNB, at all material times, fulfilled the requirements of fairness and transparency in the procurement process."
>
> - Court of Queen's Bench of New Brunswick in *Leading Edge Ltd. v. Service New Brunswick*

Further, in its July 2022 decision in *GCT Canada Limited Partnership v. Vancouver Fraser Port Authority*, the Federal Court of Canada dismissed a judicial review application after finding that the Vancouver Fraser Port Authority was operating within its commercial decision-making authority and was not biased in its decision to reject a current operator's proposed port expansion project. The court rejected the applicant's assertions that the VFPA was biased in setting the 60-percent limit for container business for any single entity. As these cases illustrate, the fairness duties that apply to a public institution's contract-related decision-making will vary based on the statutory powers granted to that institution and based on the specific decisions that it is mandated to make under those powers.