Canadian Law Update

Critical Trends

The Procurement Office

Focus on Open Competition

Feature Case Study

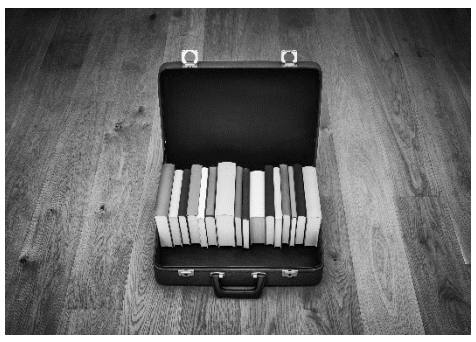
Tribunal Overrules Sole-Source Based on Security Exemption

RCMP Overruled

In its August 2019 decision in *Harris Corporation v. Department of Public Works and Government Services,* the Canadian International Trade Tribunal ruled that government bodies cannot unilaterally declare themselves exempt from their trade treaty duties by declaring security exemptions.

The dispute dealt with a bidding process for the provision of night vision goggles for the Royal Canadian Mounted Police. When challenged, the government declared a national security exemption in support of its argument that the procurement was not subject to review by the Tribunal.

The Tribunal disagreed, ruling that the declaration of exemptions remained subject to review since trade treaties are intended to be binding and government institutions cannot simply declare themselves exempt from those obligations. (see Security Concerns Do Not Trump Trade Treaties)



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

Erosion of Oversight: Recent federal cases reveal the ongoing erosion of Canadian International Trade Tribunal oversight powers in the face of controversial federal government sole-sourcing for purported national security reasons. Whether more federal institutions will misuse the national security exemption in the future remains an open question.

Feature Article

Ruling Says Canada Breached International Legal Standards

Feds Invoke "National Security" to Limit Tribunal Oversight

After its August 2019 decision in *Harris Corporation v. Department of Public Works and Government Services*, where the Canadian International Trade Tribunal ruled that government bodies cannot unilaterally declare themselves exempt from their trade treaty duties by declaring security exemptions, Canada's federal government passed a statutory amendment that removed the Tribunal's oversight powers over those procurements.

In its subsequent March 2021 ruling in *Ocalink Technologies Inc. v. Department of Public Works and Government Services*, the Tribunal found that a 2019 federal statutory amendment breached international legal standards by removing the transparency requirements that previously applied to national security sole-sourcing.

The Tribunal also noted that the federal government misused the now-shrouded national security exception to engage in pandemic-related sole-sourcing that did not properly fall under the national security exception and questioned the legality of the new regulations.

In fact, in its March 2022 determination in *Thales Canada Inc. v. Canada*, the Tribunal determined that it had no jurisdiction to conduct an inquiry over the complaint in question. As the Tribunal noted, the invocation of the national security exemption was based on regulatory amendments that were passed in 2019 that enabled a broad and non-reviewable right to exempt procurements from the Tribunal's jurisdiction even when the matters at issue do not pertain to national security.

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 Rejects "Public Safety" Argument

Ontario Breaches CETA With Made-in-Canada Requirement

In its June 2022 decision in *Thales DIS Canada Inc. v. Ontario*, the Ontario Superior Court of Justice – General Division granted a losing bidder's judicial review application and quashed the Ontario government's decision to issue a Request for Bids ("RFB") with Canadian content requirements, as well as the government's decision to reject the complainant's protest under the government's internal bid dispute mechanism.

The judicial review decision dealt with an RFB issued by the Ontario Ministry of Transportation on behalf of multiple government ministries for a contract to provide image capture services, photo comparison technology services, and identification card production services for various identity cards including drivers' licence cards and health cards.

The applicant, Thales, who is part of a French multinational company with a Polish subsidiary that produces identification cards and passports at its facility in Gdansk, Poland, for governments in the European Union, the United Kingdom, and certain American states and Canadian provinces, challenged the government's domestic production requirements and challenged the government's decision to reject its bid protest. In its judicial review application, Thales asserted that the Canadian card production requirement in the RFB violated the non-discrimination provisions of the *Canada-European Union Comprehensive Economic Trade Agreement* and the *Canadian Free Trade Agreement* and that the government's decision to reject its bid protest under the government's internal bid dispute mechanism was biased and procedurally unfair.

The government argued that the terms of the RFB were not reviewable by the court, that its bid dispute process was fair, and that its related bid dispute decision was reasonable. The court disagreed, with the two-judge majority, as well as the concurring third judge, finding that the government's RFB and subsequent bid dispute decision should be quashed after the government failed to justify the "public safety" rationale for the domestic production requirement.

As this case illustrates, the decision to limit competition through the adoption of restrictive requirements should be based on legally defensible considerations. When challenged, government institutions bear the burden of defending their restrictive practices and run the risk of having their procurement decisions invalidated when they fail to meet applicable legal standards.

Not Above the Law: Attempts by public institutions to impose limits on competition remain subject to legal challenge in various forms, which can include judicial review challenges based on the statutory or common law review powers of the courts, as well as bid protest challenges under the trade treaties. Government institutions should tread carefully before imposing requirements that unnecessarily restrict competition or impose local preferences since exceptions to open competition are narrowly read by adjudicative bodies. (see Court Upholds Local Preference Low Bid Bypass and Municipal Sole-Source Breaches Treaty Rules)

Paul Emanuelli

Summary Dismissal Denied

BC Fails to Shield "Community Benefits" Scheme From Judicial Review

In its July 2019 decision in *Independent Contractors and Businesses Association v. British Columbia (Transportation and Infrastructure)*, the Supreme Court of British Columbia rejected a summary dismissal application after ruling 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.

In its August 2020 ruling, 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 overruled the trial court and ruled that the government's decision was also subject to review under the *Judicial Review Procedure Act*.

Paul Emanuelli

Saskatchewan Breaches CFTA With Local Preference Scheme

Restrictive Requirements

In its February 2022 decision in *Ministry of Highways for the Province of Saskatchewan v. West-Can Seal Coating Inc.,* the Saskatchewan Court of Queen's Bench rejected the Saskatchewan government's judicial review application after finding no reason to set aside an arbitration ruling that found the government in breach of the *Canadian Free Trade Agreement*.

The March 2021 arbitration decision in *New West Partnership Bid Protest Mechanism Arbitration HWY-20126, Saskatchewan* determined that the Saskatchewan provincial government breached the trade treaty rules by applying improper local labour requirements to bid evaluations. The arbitration was conducted pursuant to the bid protest mechanism established by the four western Canadian provinces for the adjudication of trade treaty bid protests.

The arbiter ruled that the government's community benefits scheme breached local preference prohibitions by improperly penalizing non-local contractors and ordered that the government remove community benefits scoring and penalties from future procurements.

Paul Emanuelli

Court Upholds Ad Hoc Purchase

Precise Drafting Required

Staying Within Scope: Purchasing institutions should be careful to establish clear parameters for any post-award ad-hoc purchases since those purchases remain subject to challenge on the basis that they constitute an out-of-scope post-award sole-source.

In its December 2019 decision in *Vidéotron Ltée v. Shared Services Canada*, the Federal Court of Appeal found that the government's use of an "ad hoc" clause to make additional purchases was a matter of contract administration that fell within the scope of the awarded contracts.

The dispute involved the federal government's acquisition of additional telecommunications infrastructure from Bell Canada under two separate contracts in connection with Canada's hosting of a G7 event. Another supplier, *Vidéotron*, challenged this transaction as being an out-of-scope purchase that should have been put to open tender. The Court of Appeal rejected the challenge, finding that the purchase did not breach the trade treaty open tendering rules since the inclusion of the "ad hoc" clause to address the government's fluctuating needs was part of the original tendering processes that led to the award of the contracts in question. Further, the Court of Appeal determined that the clauses were sufficiently specific in relation to their use for "special events" such as the G7 meeting, and that the expenditures in question were minor in relation to the total value of the awarded contracts. As this case illustrates, purchasing institutions should define their requirements with care to ensure that they can meet their future needs within the scope of their contract awards.

Paul Emanuelli

Agency Engages in Bid-Shopping Sole-Source

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.

As this case study illustrates, public institutions should avoid sole-sourcing work based on open-ended discretionary clauses in their contracts since this practice may not comply with applicable open procurement rules.

Defining the Marketplace: The decision turned on the definition of the relevant marketplace. While the Commissioner of Competition argued that the market in question was for galley delivery, meaning the delivery of third-party food products onto the airplanes, the Tribunal determined that the market also included catering services where the supplier prepared and delivered the food for international flights. The Tribunal agreed with the Airport Authority that the inclusion of more suppliers for only galley services could undermine the viability of the current operators that also provided catering services, which would be highly disruptive to the services provided for international flights.

Tribunal Recognizes Operational Requirements

Airport Authority Defends Limited Competition

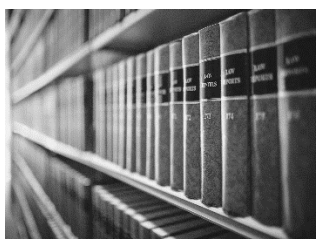
In its October 2019 decision in *The Commissioner of Competition v Vancouver Airport Authority*, Canada's Competition Tribunal found that the Vancouver Airport Authority (VAA) did not breach competition rules when it limited the number of catering companies eligible to bid on airline catering contracts. The Tribunal found that the decision to limit the number of companies was made for the valid business reasons of maintaining two viable operators for competition, since opening competition to other operators for only part of the overall work (galley delivery but not catering) could undermine competition and disrupt service to airlines if an incumbent left the market due to the entry of another supplier.

As this case illustrates, in addition to being subject to potential trade treaty challenge, contracting procedures that limit competition may also be subject to anti-competition actions initiated by authorities responsible for enforcing general competition laws. In either instance, the scoping of contractual requirements, and their impact on competition, remains a critical concern. To the extent that contract scoping decisions have the effect of limiting competition, purchasing institutions should ensure that those decisions are supportable based on legitimate operational requirements.

Tribunal Rejects Unforeseen Urgency Excuse: The legal ruling stated that "given the ubiquitous coverage of the issue in Canadian and foreign media, the Tribunal finds that the behaviour exhibited by Statistics Canada under the circumstances of the impending decriminalization cannot be justified as being in response to an unforeseeable event."

Tribunal Awards Lost Profit Damages for Improper Sole-Source

Failure to Plan Cannabis Testing Not an Emergency



In its June 2018 determination in *ALS Canada Ltd v. Statistics Canada*, the Canadian International Trade Tribunal rendered one of its first rulings under the *Canadian Free Trade Agreement* and the *Canada-Europe Comprehensive Economic and Trade Agreement*.

The case dealt with a direct award for the provision of municipal wastewater testing for evidence of cannabis consumption. The government issued an Advanced Contract Award Notice, as required by the procurement rules, announcing its intention to directly award the contract instead of putting it out to tender. The government maintained that the awardee was the sole provider of the required testing methodology and that the services were required on an urgent basis, as Statistics Canada needed data of cannabis levels prior to legalization to acquire the pre-legalization data to support before-and-after statistics.

The Tribunal rejected the government's assertions of only one available service provider who could perform the required sampling, finding that the government failed to prove that the testing performed by the selected service provider was the only available test method, or that other available test methods could not achieve the required results. Furthermore, the Tribunal found that the requirements did not fall under the trade treaty extreme urgency exceptions that permitted direct awards since the requirements were foreseeable in advance. The Tribunal ruled that the government's failure to plan for water testing did not constitute an emergency, given its long-announced intention to legalize cannabis:

Statistics Canada's decision also fails for lack of urgency, let alone extreme urgency: the requirement was sufficiently foreseeable for normal tendering procedures to be followed. The Tribunal has held that in order to justify limited tendering under the ground of urgency, the government institution must show both that there is extreme urgency and that it was caused by unforeseeable events.

> "...government institutions cannot claim delay or inaction of their own causing as an excuse for recourse to sole sourcing under the guise of urgency."
>
> - Canadian International Trade Tribunal

As this case illustrates, government institutions bear the onus of establishing legitimate trade treaty exceptions when seeking to avoid their open tendering duties. In this case, the government failed to establish that the selected supplier was the sole source of the required services. The government was also unable to rely on its failure to properly plan its requirements in advance as the basis for bypassing its open procurement obligations. The complainant was therefore awarded its lost profits for being denied an opportunity to compete for the contract award.