Canadian Law Update

Critical Trends

The Procurement Office

Focus on Tender Compliance

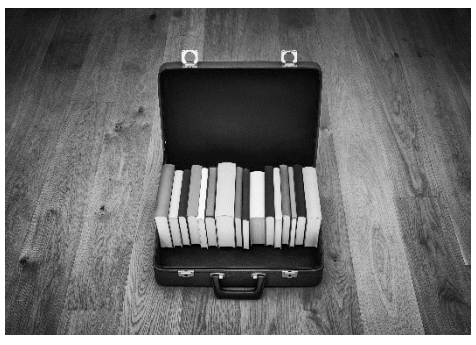
Feature Case Study

Legal Challenge Rejected After Electronic Bid Imbroglio

Instructions Not Followed

In its February 2022 determination in *University of Guelph, Laboratory Services Division v. Canada (Department of Public Works and Government Services)*, the Canadian International Trade Tribunal rejected a complaint after finding that the complainant failed to properly follow the government's electronic bid submission instructions. The dispute dealt with a request for proposal for laboratory services issued on behalf of the Canadian Food Inspection Agency for testing for chemical residue contaminants of foods, food crops and tissues of food animals.

While the University of Guelph brought a bid protest alleging that the government improperly rejected its bid submission, the Tribunal rejected that complaint after finding that the complainant failed to properly follow the bid submission instructions, which required bidders to pre-register a new "conversation" on the bidding system at least six days in advance of the bid submission deadline. The Tribunal found that instead of opening a new "conversation" on the bidding system as instructed, the complainant mistakenly used an old "conversation" that was not linked to the new bidding opportunity when it submitted its bid, which left the government's Bid Receipt Unit with no choice but to reject the submission.



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

Compliance Controversy: The court ruled that "a signed bid was a mandatory submission requirement of this open call for bids" and that the "failure by the bidder to submit a bid that conforms to all the mandatory terms of the open call for bids resulted in the submission of a non-compliant bid." In summarily dismissing the lawsuit, the court also noted that "Contract A was not formed between Redwood and Memorial by the submission of the Redwood Bid, and no contractual obligation binding on the public body or bidder ever came into existence."

Feature Article

Unsigned Bid Breaches Mandatory Submission Requirement

Failure to Sign Bid Form Fatal to Bid Validity

In its January 2023 decision in *Redwood Construction Ltd. v. Memorial University of Newfoundland*, the Newfoundland and Labrador Supreme Court - General Division rendered a summary judgment against a non-compliant bidder.

The case dealt with a tendering process for the construction of a new building for Memorial University. The university rejected the low bid for non-compliance and awarded to the next-best bidder. The low bidder sued and brought a motion for summary judgment.

The court determined that the lower bidder's bid was non-compliant and summarily dismissed the lost profit claim after finding that the bidder failed to submit a signed bid and therefore failed to create Contract A.

As this case illustrates, the failure to adhere to the formalities of submitting a compliant bid form can prove fatal to the validity of a bid and to any subsequent claims brought by the rejected non-compliant bidder. (see Unsigned Bid Leads to Non-Compliance Rejection)

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

Stripped Links Render Bid Non-Compliant

Canada's Federal Tribunal Rejects Electronic Bid Bond

In its May 2022 determination in *Gregory Kerr Ltd. v. Canada (Department of Public Works and Government Services)*, the Canadian International Trade Tribunal rejected the complaint of a disqualified low bidder after finding that the bidder failed to submit a valid electronic bid bond. The dispute dealt with an invitation to tender issued by the Department of Public Works and Government Services on behalf of the Department of Fisheries and Oceans for repairs to a wharf structure located in Sambro, Nova Scotia.

The government rejected the low bid after it was unable to verify that bidder's electronic bid bond. The low bidder challenged that rejection, asserting that it had submitted a valid bond.

However, the government was unable to verify the validity of the bid bond since the digital links contained in the electronic document did not work.

Further, the government's subsequent attempts to verify the bond on the bonding company's website returned a "non-verified" result.

As the Tribunal noted, the bidder was not allowed to resubmit its bid bond in a valid format after the bid deadline since that would have amounted to improper bid repair.

The bonding company's post-deadline confirmation of the bid bond's validity was rejected by the government for the same reason.

While the complainant claimed that the technical issues surrounding the bid bond's validity were caused by the government's electronic tendering system, the Tribunal noted that none of the other bidders had any issues with the submission of their electronic bid bonds into the government's tendering system. The Tribunal concluded that the problem arose when the complainant, contrary to instructions provided by its bonding company, merged the original electronic bid bond with its other bid documents and then submitted a single combined electronic file into the government's tendering system. As the Tribunal concluded, this had the effect of stripping away the electronic links in the original bid bond and rendering the bid bond non-verifiable.

No Duty to Investigate: Legal rulings recognize the right to accept bidder representations at face value unless the tendering process rules expressly include additional verification procedures. To avoid due process challenges, purchasing institutions need to be transparent about what those additional procedures will require.

Paul Emanuelli

Accepting Bids at Face Value

Tribunal Upholds Right to Rely on Bidder Representations

The Canadian International Trade Tribunal has rendered multiple recent rulings that recognize the right of a purchasing institution to rely on bidder representations during an evaluation and award process.

As these cases illustrate, purchasing institutions have the right to rely on bidder representations and are not required to fact-check those representations during an evaluation and award process unless the evaluation rules establish additional verification procedures.

Paul Emanuelli

Single Technical Requirement Triggers Multiple Bid Protests

Overly-Complicated Assessment

In its February 2021 decision in *Heiltsuk Horizon Maritime Services Ltd. v. Atlantic Towing Canada*, the Federal Court of Appeal overruled the Canadian International Trade Tribunal after concluding that the Tribunal made significant errors in its adjudication of the bid protest. The dispute involved a federal government request for proposals for emergency towing vessels for the British Columbia coastline. The bid protest resulted in three Tribunal determinations, which in turn resulted in five judicial review applications to the Federal Court of Appeal. The controversy turned on a mandatory technical evaluation criterion that set out the minimum towing power for the required ships. The second-placed losing bidder, Heiltsuk Horizon Maritime Services Ltd., challenged the evaluation process used by the government to confirm the vessel towing capacity of the winning bidder, Atlantic Towing Limited. While the government's initial evaluation and award decision was ultimately upheld, this case serves as a cautionary tale against using bid compliance criteria that are based on complex technical factors and unclear verification procedures since the use of complex criteria exposes an evaluation process to protracted legal proceedings.

Paul Emanuelli

More Technical Compliance Disputes

Assessments Under Scrutiny

Litigation Triggers: By framing future technical performance standards as bid compliance requirements, public institutions introduce avoidable complexity into the evaluation process that exposes award decisions to protracted legal challenge.

In its May 2021 determination in *Sourcetec Industries Inc. v. Canada (Department of Public Works and Government Services)*, the Canadian International Trade Tribunal upheld the rejection of the complainant's bid for failing to meet a mandatory technical requirement. The dispute dealt with a request for proposal issued on behalf of the Department of National Defence for the supply and delivery of temporary particle filters for vehicle exhaust required by Canadian Forces Base Petawawa.

While the complainant challenged its disqualification, the Tribunal rejected the complaint after finding that the complainant's proposal did not address the technical standards that applied to the contested mandatory technical requirement. The Tribunal ruled that the evaluators acted reasonably in not relying on their prior familiarity with the proposed product to deem it compliant notwithstanding the technical deficiencies in the complainant's proposal since this would have amounted to a breach of the evaluation rules. (see Past Compliance Does Not Guarantee Future Compliance)

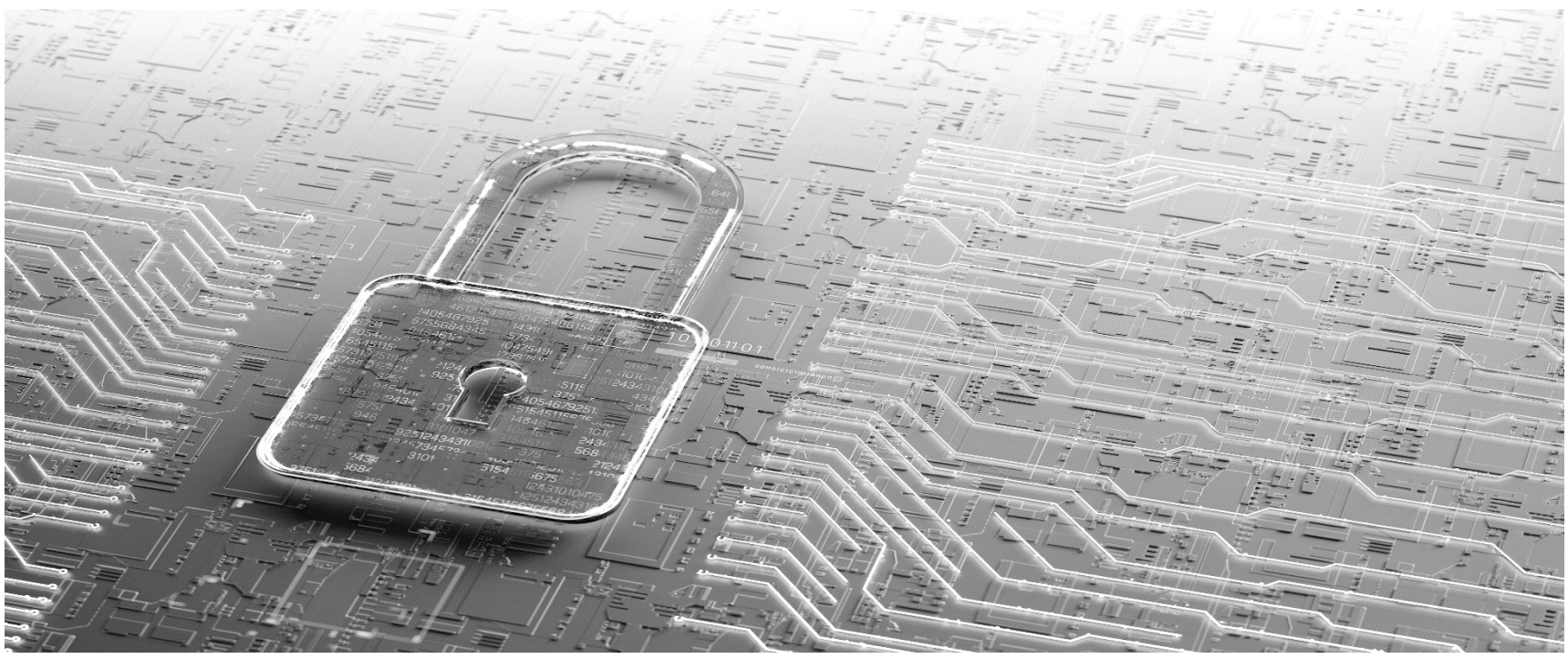
In its 2022 report entitled *Recommendations Regarding Call for Tenders 17-6146 Involving the Acquisition of a Cloud Solution by Ville de Montréal*, Montreal's Inspector General found that the City of Montreal improperly awarded a $16 million cloud services contract to a non-compliant bidder after concluding that "the bid assessment was not consistent with respect to all the bidders for a technical compliance requirement." (see City Awards Cloud Contract to Non-Compliant Bidder)

Paul Emanuelli

Cases Turn on Timing of Compliance

In its January 2019 decision in *Aquatech v. Alberta*, the Alberta Court of Queen's Bench rejected a losing proponent's claim that the government awarded a contract to a non-compliant competing bidder. The court determined that the complainant misinterpreted the RFP when it mistakenly argued that proponents had to prove that they met the staffing requirements during the evaluation process when the RFP terms only required that those requirements be met after award during contract performance. (see Dispute Turns on Timing of Requirements)

Similarly, in its November 2020 decision in *Stericycle ULC v. HealthPRO Procurement Services Inc.*, the Ontario Superior Court of Justice dismissed a losing bidder's claim that the award went to a non-compliant bidder after ruling that the requirement in question was a post-award performance standard and was therefore not subject to a bid evaluation challenge. (see Bid Compliance Not Impacted by Post-Award Requirements)



Locked Into Non-Compliance: While in some circumstances the complexity inherent in technical testing may lead purchasing institutions to adopt a phased testing process that allows for rectification cure periods to address technical deficiencies, unless the rules expressly contemplate those procedures, bidders do not have the right to rectify technical non-compliance in their proposed products.

No Right to Rectify Unless Rules Allow Cure Period

Tribunal Rejects Implied Right to Rectify

Spotlight on Tender Compliance

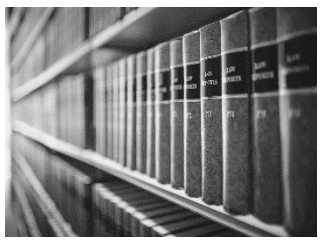
In its October 2021 determination in *1091847 Ontario Ltd. v. Shared Services Canada*, the Canadian International Trade Tribunal upheld the government's technical compliance assessment and rejected a non-compliant bidder's bid protest. The dispute dealt with a request for proposal issued on behalf of the Department of Foreign Affairs, Trade and Development for the provision of uninterruptable power supplies and power distribution units. The RFP terms included active technical testing of the proposed products. The complainant's proposed product failed that testing.

It challenged the result, asserting that the government failed to provide an opportunity to address the technical deficiencies in its proposed product. The Tribunal ruled that the proof of proposal testing procedures used by the government were conducted in accordance with the RFP terms and that those terms did not allow bidders to correct any defects in their proposed products during the active testing phase. As this case illustrates, non-compliant bidders do not have the right to rectify non-compliance unless the process rules allow for such post-bid rectifications.

Properly Applied Cure Periods: In its February 2021 determination in *Marine Recycling Corporation and Canadian Maritime Engineering Ltd. v. Canada*, the Canadian International Trade Tribunal recognized the government's phased approach to bid compliance where bids were first reviewed for pricing irregularities to determine whether any information required to be included in the financial bid was missing so that bidders could remedy any identified deficiencies before proceeding to a second technical review phase.

Bringing Due Process to Compliance Cure Periods

Tribunal Rules on Compliance Rectification Procedures



To avoid bid compliance disputes, public institutions are increasingly adopting the use of post-bid compliance rectification procedures.

However, to be legally defensible, bidding procedures that employ post-bid compliance rectifications must operate outside of the "bid repair" restrictions of Contract A bidding rules. As the cases below illustrate, even where non-Contract A process rules expressly allow for post-bid cure periods, those rules must be administered in a fair and procedurally correct manner.

For example, in its May 2019 determination in *Accipiter Radar Technologies Inc. v. Department of Public Works and Government Services*, the Canadian International Trade Tribunal determined that the government's unequal application of rectification and clarification procedures resulted in a biased evaluation process. The dispute dealt with a request for proposal for coastal radar equipment for the Canadian Coast Guard.

The complainant alleged that the government gave preferential treatment to competing bidders when it permitted a compliance cure period during a Compliance Assessment Report ("CAR") process. The complainant also asserted that the government further biased the evaluation process through the unequal use of clarifications. While the Tribunal found that the government did not apply biased procedures in its CAR rectification process, it agreed with the complainant that the use of clarifications unfairly favoured competing bidders and biased the evaluation. The Tribunal also determined that this unequal treatment gave competing bidders an unfair advantage and breached the government's trade treaty duties. Further, the Tribunal ruled that this resulted in a biased evaluation process.

The Tribunal determined that the inconsistent use of clarifications prior to engaging in a compliance rectification process gave the other bidders a material advantage in responding to the compliance requirements and placed the complainant at a disadvantage.

> "...the issue of fairness arises in respect of the clarification questions, not the CARs themselves."
>
> - Canadian International Trade Tribunal

Similarly, in its October 2020 determination in *Falcon Environmental Inc. v. Canada (Department of Public Works and Government Services)*, the Tribunal ordered the cancellation of a contract and ordered that the contract be awarded to the complainant after concluding that the original award was based on a flawed evaluation process. The dispute dealt with a request for proposals for aerodrome wildlife control services at Canadian Forces Base Trenton and Canadian Forces Detachment Mountain View. While the Tribunal accepted the government's use of a post-bid rectification process to allow bidders to rectify and cure non-compliance issues in their initial bids, it found that the tender call rules did not permit the government to use information collected through this CAR process to also score the bids. As these cases illustrate, recent decisions are increasingly recognizing the validity of transparent rectification processes that help resolve bid compliance issues and avoid unnecessary litigation. However, those procedures must be fairly applied.