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Court finds that clause in Invitation to Tender which may restrict access to the courts is not contrary to the Charter, Constitution Act, or public policy

In *J. Cote & Son Excavating Ltd. v City of Burnaby, 2018 BCSC 1491,* the Supreme Court of British Columbia found that the rights of J. Cote & Son Excavating Ltd.'s under the *Charter of Rights and Freedoms* (*Charter*) were not violated by a clause in the City of Burnaby's Invitation to Tender that purported to restrict access to the courts. In addition, J. Cote failed to show that potential loss of business from the clause amounted to undue hardship and thus the clause was not declared invalid on the basis of s. 96 of the *Constitution Act, 1867.*

Background

J. Cote & Son Excavating Ltd. (J. Cote) brought a summary trial application to seek a declaration that a clause in the Invitation to Tender of the City of Burnaby (City) was of no force and effect. J. Cote was a construction contractor that secured the majority of its work through competitive bidding and, specifically, municipal projects. In 2013, J. Cote commenced an action against the City due to a structural collapse that resulted in the death of one of J. Cote's workers. Two months following the commencement of the action, the following clause (impugned clause) was added to the City's Invitation to Tender on its municipal works (para 11):

> "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."

J. Cote argued that it would not have commenced the action against the City if it had known about the impugned clause given the potential financial consequences from loss of future work. J. Cote claimed that the impugned clause (para 15):

> "violates its right of access to the courts, which emanates from:
>
> • the common law right of reasonable access to the courts pursuant to *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 (CanLII) [Trial Lawyers Association] at paras. 71–72 and *Polewsky v. Home Hardware Stores Ltd. (2003),* 2003 CanLII 48473 (ON SCDC), 66 O.R. (3d) 600 (S.C.J.);
>
> • a Charter right of access to the courts pursuant to *British Columbia Government Employees' Union v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214 [B.C.G.E.U. SCC] and the preamble to the Charter;
>
> • section 96 of the *Constitution Act, 1867*, which provides protection for access to justice in conjunction with the rule of law, pursuant to Chief Justice McLachlin's majority reasons in Trial Lawyers Association at paras. 38–39."

J. Cote also claimed that the clause was contrary to public policy.

The City removed the impugned clause from its tender terms and brought a motion to dismiss the proceedings as moot. In 2017 BCSC 2323 (CanLII), Justice Fitzpatrick held the *Charter* claim was not moot, given that J. Cote was claiming *Charter* damages and exercised discretion to allow the public policy issue to proceed.

Decision

The Court noted that J. Cote did not claim a specific section was violated, but rather claimed the impugned clause breached the preamble and underlying *Charter* principles. J. Cote claimed that this breach should afford it a *Charter* remedy. The Court rejected this argument and concluded that "there is no freestanding right of access to justice under the *Charter* and because J. Cote's argument is not anchored in a particular section, there is no constitutional remedy available pursuant to either s. 24(1) of the *Charter* or s. 52(1) of the *Constitution Act* 1982." (para 44).

Next, the Court examined J. Cote's argument under s. 96 of the *Constitution Act, 1867.* The Court looked at *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General* 2014 SCC 59 (CanLII) which "created an 'undue hardship' the test for whether access to justice was being denied to a prospective litigant" (para 47). The Court noted that "[u]ndue hardship is a high threshold" (para 61). As the clause was inactive after the action was commenced, J. Cote argued that if it was aware of the impugned clause, it would have chosen to forego commencing the action given the potential for lost work. The Court found there was not sufficient evidence to determine if J. Cote experienced undue hardship due to the impugned clause. The Court also noted that J. Cote was not denied access to the courts as it brought the action against the City. The Court was not satisfied that business that may have been lost due to the clause amounted to undue hardship.

The Court also distinguished between legislation and direct rules as compared to contractual provisions and stated that the "right of access cannot be extended to contractual or tender provisions that indirectly discourage corporations from commencing litigation. To do so would undermine the undue hardship threshold established by the Supreme Court" (para 77). The Court dismissed J. Cote's application to declare the impugned clause invalid on the basis of s. 96 of the *Constitution Act, 1867* or a common law right of access.

The Court then briefly discussed whether the impugned clause was invalid for being contrary to public policy. The Court concluded that (para 84):

> "a municipality is entitled to insert a term as part of its public bidding process which bars bids from contractors who are engaged in litigation with the municipality, as long as there is no indication of bad faith and the clause lies within the municipality's power. In such cases, the clause is valid and not contrary to public policy."

The Court concluded the clause was "not invalid on public policy grounds" (para 84).

The Court dismissed the application.

This is a significant decision given the issues related to the *Constitution* and *Charter*. ■

Ontario Court of Appeal allows Bondfield to pursue damage claim against The Globe and Mail

In *Bondfield Construction Company Limited v. The Globe and Mail Inc.*, 2019 ONCA 166, the Court of Appeal (Court) confirmed that in order to succeed on a motion under s. 137.1 of the *Courts of Justice Act,* the responding party is not required to show that the moving party has no valid defence whatsoever; but rather, that the responding party must only demonstrate that the valid defence put forward could be rejected by a reasonable trier.

Background

Between September 2015 and February 2016, The Globe and Mail Inc. (Globe) published a series of articles about Bondfield Construction Company Limited's (Bondfield) successful bid on a large hospital construction contract. The articles suggested a connection between an executive at Bondfield, and an executive at the hospital who was on the committee that awarded the contract. Bondfield brought an action for damages claiming that the Globe's articles falsely alleged that corruption played a role in Bondfield obtaining the contract.

The Globe brought a motion under s. 137.1 of the *Courts of Justice Act* (Act) to dismiss the action, and claimed that Bondfield brought the action "to silence the Globe on matters of significant public importance" (para 3).

In order to succeed on a motion under s. 137.1 of the Act, the Globe had to satisfy the motion judge that the articles related to a matter of public interest. Once this burden was met, the onus shifted and Bondfield had to establish the following on a balance of probabilities (para 6):

> "There were grounds to believe that the claim had 'substantial merit' (s. 137.1(4)(a)(i)).
>
> There were grounds to believe that the Globe did not have a 'valid defence' (s. 137.1(4)(a)(ii)).
>
> The harm suffered or likely to be suffered by Bondfield as a result of the articles was sufficiently serious that the public interest in allowing the lawsuit to continue outweighed the public interest in protecting the Globe's freedom of expression (s. 137.1(4)(b))".

The motion judge found, and the parties accepted, that the articles related to a matter of public interest as the contract related to the expenditure of a significant amount of public funds. The motion judge also found, and it was not challenged on appeal, that the claim had "substantial merit" as the average reader would have concluded that Bondfield won the contract because of the relationship with the hospital executive.

At issue was whether the Globe had a valid defence. The motion judge held that to succeed, Bondfield had to establish that "the Globe had no valid defence whatsoever" (para 10, citing motion judge at para 46). The motion judge proceeded to find that the Globe potentially had a defence of fair comment available. The motion judge granted the motion, dismissed the action, and awarded the Globe costs. Bondfield appealed the motion judge's decision.

Decision

The Court of Appeal noted that subsequent to the motion judge's decision, the Court of Appeal released several decisions regarding the appropriate interpretation of s. 137.1(4)(a)(ii) of the Act. The Court clarified that the burden on Bondfield was not as onerous as the test set out by the motion judge, and rather than the test being "no valid defence whatsoever", the appropriate test was that "Bondfield was required to show that a reasonable trier **could** conclude that the Globe did not have a valid defence. Bondfield would meet that onus if it showed that a reasonable trier could reject all of the various defences put in play by the Globe" (emphasis added, para 15).

The Court found that on the correctness test, the motion judge would have found that Bondfield met this burden. Specifically, the Court noted that the Globe advanced two defences, fair comment and responsible communication, that could be accepted depending on the findings made by a trier. This was sufficient for Bondfield to pass the burden as set out in s. 137.1(4)(a)(ii) of the Act. The Court held that Bondfield met both hurdles under s. 137.1(4)(a) of the Act.

Next the Court looked at the balancing of the public interest as set out in s. 137.1(4)(b) of the Act. The motion judge would have found that the public interest favoured allowing the action to proceed. The Court engaged in a *de novo* balancing, and came to the same

conclusion. Specifically, the Court noted that the action had none of the normal hallmarks of a Strategic Lawsuit Against Public Participation (SLAPP) as Bondfield did not have a history of using lawsuits to silence criticism, there was no financial imbalance between the parties, and Bondfield's motive was not clearly punitive or retributory. As well, Bondfield produced substantial evidence of fiscal damage caused by the articles. The Court also recognized that the Globe was motivated by a desire to inform the public and the articles were not deliberately false. The Court concluded there were strong arguments on both sides and thus the action should be tried on its merits.

The Court allowed the appeal and set aside the dismissal of the action.

It remains to be seen whether the action will proceed and whether it will be successful. ■

Court of Appeal finds that District complied with duty to act fairly, despite bid price disclosure, and confirms that potential remedies for proponents who are of the view that they have been unfairly treated are very limited where RFP is structured as a non-Contract A RFP

In *Murray Purcha & Son Ltd. v. Barriere (District),* 2019 BCCA 4, the British Columbia Court of Appeal (Court) found that the Request for Proposal (RFP) did not create a contractual duty of fairness. However, there was a procedural duty of fairness which Barriere met by following the process as set out in the RFP. Accidental disclosure of the bid price by a proponent did not breach the duty of fairness.

Background

The District of Barriere (Barriere) issued an RFP for winter road maintenance services. Murray Purcha & Sons Ltd. (Purcha) had previously contracted with Barriere but it was not renewed.

The RFP was a two-envelope bid: Envelope #1 contained information regarding each bidder's work plan in order to assess the quality, and Envelope #2 contained the price. The work plan was scored based on a set of criteria, and the proponent had to receive a minimum score on Envelope #1 for Envelope #2 to be opened.

Five bids were received, Purcha ranked third overall after both rounds. Defiance Enterprises Inc. (Defiance) was awarded the contract.

Purcha brought an application for judicial review of Barriere's decision and alleged that Barriere breached the duty of procedural fairness. The judicial review judge reviewed the allegations on a standard of reasonableness and found that Barriere's decision was reasonable. The judicial review judge noted that Defiance disclosed that it would have donated a percentage amount of its revenue to the community in Envelope #1. By disclosing this amount, Barriere would have been able to determine Defiance's bid price before opening Envelope #2. However, the judicial review judge accepted that Barriere did not calculate Defiance's Bid. The judge also noted that if the price had been indirectly revealed and this constituted a breach of procedural fairness, the judicial review judge would have exercised her discretion and not provided a remedy.

Decision

The Court began by looking at the standard of review. The Court noted that Purcha challenged Barriere's decision on both procedural and substantive grounds. The Court found the standard of review to be reasonableness on the substantive grounds and correctness on the procedural grounds.

The Court looked at the RFP and noted that whether "a Request for Proposal creates a contractual duty of fairness under a Contract A analysis is determined by whether the parties intended to initiate contractual relations by the submission of a response to the RFP" (para 32). The Court looked at the language of the RFP and stated that in this case the language expressly stated that there was no intention to create contractual obligations. Therefore, the Court concluded that the RFP did not create a Contract A and thus there was no contractual duty of fairness.

Next, the Court looked at whether there was a procedural duty of fairness based on administrative law principles. The Court confirmed that Barriere had "an obligation of procedural fairness towards proponents who responded to the RFP" (para 38). Regarding the content of that duty, the Court noted that the most significant factor in this case is the legitimate expectations of the parties who responded to the RFP. The Court found that the parties could "legitimately

expect that [Barriere] would follow [the] general procedures"(para 46) as set out in the RFP. The Court noted that Barriere set out a two envelope process and found that this process was in fact followed.

The Court noted that Purcha's main objection was not that the procedure was not followed, but rather that how the procedure was followed led to unfairness. Specifically, Purcha argued that: (1) it was unfair for Barriere to consider Defiance's proposal because it breached the secrecy requirement; and (2) that Barriere evaluated Defiance's bids on the basis of undisclosed criteria.

The Court found these were substantive decisions more appropriately assessed on a reasonableness standard of review. The Court agreed with the judicial review judge and found that Barriere's decisions in reviewing the applications were not unreasonable. The Court emphasized that the RFP allowed Barriere to maintain discretion to consider non-compliant proposals. The Court agreed with the judicial review judge that Defiance should not have included the percentage amount in Envelope #1 that would have enabled Barriere to calculate their bid. However, the Court did not find this breached the legitimate expectations of the bidders to follow a fair procedure. The Court concluded that Barriere did not breach the duty of procedural fairness.

The Court then briefly looked at the substantive outcome and found it was reasonable.

The Court dismissed the appeal.

The findings of the Courts with respect to the duty of fairness are significant. The decision indicates that an owner can avoid potential liability by including language in the RFP expressly stating that there is no intent to create contractual obligations. A Contract A is not imposed. It will be interesting to monitor how other Courts react to this Decision. ■

Court finds that duty of fairness does not require reconsideration of disqualification from RFP

In *Inzola Group v Brampton (City)* 2019 ONSC 7632, the Ontario Superior Court of Justice (Court) found that the City of Brampton (City) was entitled to disqualify Inzola Group Limited (Inzola) for breaching the terms of the Request for Proposal (RFP) and the duty of fairness did not require the City to reconsider the disqualification.

Background

In October 2009, the City issued a RFP for an addition to Brampton City Hall. Council hired Professor McKellar to consult on the procurement process. The RFP requested respondents to provide submissions which would be evaluated by the Evaluation Committee. Two or three respondents would then be invited to participate in a Competitive Dialogue process which would lead to each respondent submitting a Final Offer. The Evaluation Committee would then select a Preferred Respondent to be recommended to Brampton City Council (Council) for approval.

The terms of the RFP required respondents to sign a confidentiality agreement and also required that respondents communicate solely through the Purchasing Supervisor. The RFP also prohibited disclosure and announcements to the media.

Inzola submitted a proposal. The Evaluation Committee invited Inzola, Dominus Construction (Dominus) and Morguard Investments (Morguard) to participate in the Competitive Dialogue and provided them with a Confidentiality Agreement. Morguard and Dominus reviewed the agreement and signed it. The Principal of Dominus and a Senior VP from Morguard provided evidence that they "saw nothing unusual or concerning in the Confidentiality Agreement required by the City" (para 47).

Inzola refused to sign the agreement. Inzola was informed that in order to attend the first meeting, the Confidentiality Agreement had to be signed or "the City would deem Inzola to have withdrawn from the process" (para 53). Inzola missed the deadline and despite this the City stated it would consider revisions to the Confidentiality Agreement. Counsel for Inzola wrote a letter to the Purchasing Supervisor which stated that "the Confidentiality Agreement was overly broad; that Council should be entitled to see each of the three proposals and that Inzola had no option but to approach Council directly" (para 64). Council refused to allow Mr. Cutruzzola, one of the principals of Inzola, to present to the Committee of Council. Mr. Cutruzzola then gave an interview to the Brampton Guardian expressing concerns with the procurement process.

Professor McKeller advised the City that Inzola's actions had violated several provisions in the RFP and the Evaluation Committee disqualified Inzola for breaching the sole point of contact provision by trying to address Council, for failing to sign the Confidentiality Agreement, and for speaking to the Media. Inzola

amended the Confidentiality Agreement and signed it but the City refused to reinstate Inzola.

Decision

The Court found that Inzola breached the RFP by not signing the Confidentiality Agreement. The Court accepted expert evidence that it would be hard to narrow the definition of confidential information to only commercial information as "it would be extremely difficult to determine what confidential information was commercial and what was not" (para 200). The Court did not find the Confidentiality Agreement was overly broad. Further, the Court noted the agreement was drafted by external counsel, and an expert testified that "the definition of confidential information in the agreement was a standard one that he had seen 'countless times' " (para 201).

The Court also found that Inzola breached the sole contact provision by having Counsel write to the Mayor and Council and asking Council to intervene. The Court rejected Inzola's argument that Council should effectively serve as an appeal court for the procurement process. The Court found that this suggestion would go against the recommendations in 2005 Toronto Computer Leasing Inquiry report of Justice Bellamy (Bellamy Report), which recommended that City Councillors should be separate from the procurement process, including not seeing any documents while the procurement is ongoing.

Finally, the Court concluded that Inzola breached the RFP by speaking to the Brampton Guardian.

The Court found that the decision to disqualify Inzola was not due to bias. The Court rejected Inzola's argument that the process was rigged and noted the City went to great lengths to create a process that would be objective. The Court also noted that despite advice to the contrary by Professor McKellar, the City gave Inzola an extension and discussed alternatives to the Confidentiality Agreement. The Court stated that even if the Confidentiality Agreement was overly broad, the good faith and fairness obligation did not require "strict adherence to an RFP" (para 238). The Court concluded that the decision to disqualify Inzola, based on the recommendation of "an admittedly impartial expert" (para 238) satisfied the City's obligation of fairness and good faith.

The Court also found that the duty of fairness would not require the City to reconsider the disqualification. The Court concluded that "the City acted reasonably in not reinstating Inzola as that would have presented a heightened risk of withdrawal by Dominus and Morguard" (para 239).

The Court then proceeded to determine damages, if it was in error with respect to its liability determination. The Court noted that the RFP was general and left much to be negotiated. Inzola argued that it was entitled to expectation damages as if it was not disqualified, it would have been awarded the contract. However, the Court noted that Inzola did not cite a single case where expectation damages were awarded for breach of an RFP. The Court also rejected this hypothetical approach to damages.

Inzola argued that if damages were not awarded, it would send a signal that there are no consequences for breaching the duty of fairness. The Court found the policy concerns valid, but noted that there were more compelling policy considerations on the other side. Specifically, that allowing damages for breach of an RFP "would turn the law on its head" (para 274) and eliminate the distinction between an RFP and a tender. The Court stated that this would lead to more and expensive litigation. The Court concluded that if Inzola established liability, it would only be entitled to reliance damages but not expectation damages.

Finally, the Court addressed how it would quantify expectation damages if it was in error. The Court concluded that there was only a 20% chance Inzola would become the Preferred Respondent. The Court also concluded that if Inzola was successful, it "would have realized a profit margin comparable to the profit margin Dominus was able to realize" (para 285).

The Court dismissed the action.

Inzola filed its appeal with the Ontario Court of Appeal on February 11, 2019. The final outcome on the issues raised depends on the appeal proceeding. ■

Alberta Court finds company's pledge to satisfy mandatory requirements sufficient to maintain company's compliance with procurement

In *Aquatech v Alberta (Minister of Environment and Parks),* 2019 ABQB 62, the Alberta Court of Queen's Bench (Court) found that the assurances of a proponent that it would have the mandatory resources

in place if awarded the government contract was sufficient to ensure compliance with a Request for Proposals.

Background

The Alberta Minister of Environment and Parks (AEP) issued a Request for Proposals for a contract involving the monitoring and servicing of water and wastewater facilities in the Kananskis region in Alberta (Contract).

H2O Innovations Inc. (H2O) and Aquatech Canadian Water Services Inc. (Aquatech) both submitted bids and were on a short-list to receive the Contract. Both companies were experienced, Aquatech had held the Contract for the last 16 years and H2O operates 37 water and wastewater facilities in 11 provinces and states, but not in Alberta.

H2O was awarded the contract. Primarily due to it submitting the cheaper bid. Aquatech claims that H2O's bid was non-compliant with the mandatory bid requirements and that AEP awarded the contract to a non-compliant bidder.

Aquatech argued that because H2O did not provide the names of five in-house certified operators that would be available to fulfill the Contract H2O's was non-compliant. H2O conceded that it did not provide the five names but instead provided detailed information about its organization, staffing and generally their ability to fulfill the mandatory requirements.

Aquatech applied to the Alberta Court of Queen's Bench (Court) for judicial review of AEP's decision to award the Contract to H2O. Aquatech requested that the Court strike down AEP's decision to award the Contract to H2O or to order a new bidding process.

Decision

As a preliminary matter, the Court determined whether AEP's decision was subject to judicial review. In coming to its decision, the Court noted that services for water treatment plants is important and effects a "broad segment of the public". The public dimension of the matter led the Court to determine that AEP's decision was subject to judicial review.

The central issue in this case was whether H2O's omission of not including the names of the five in-house service providers in its bid made the bid non-compliant. The Court reviewed the wording of the RFP and the surrounding circumstances to answer the question of whether H2O's bid was compliant or not.

The part of the RFP that requests the names of the service providers is a table with the title "Mandatory Requirements and Desirable Provisions – Proposed Resources". The Court found that the request for the five names of service providers was not a mandatory requirement but rather a desirable provision. The Court determined that the actual requirement was for the bidder to ensure that they would supply the five in-house service providers if awarded the Contract. The Court noted that H2O provided significant detail regarding how it would recruit and ensure qualified individuals would be hired to meet all requirements.

Additionally, the Court noted that requiring bidders to have Alberta certified workers would disadvantage companies that did not have operations in Alberta. The Court found that it would be commercially unworkable for even large experienced companies to hire operators before being awarded the Contract.

Finally, the Court found that the RFP's preamble states that the failure to satisfy a mandatory requirement "may" result in the rejection of a proposal. This permissive language allows the AEP discretion in determining who can and who will be awarded the Contract.

The Court's final conclusions, were that the RFP never indicated that the service providers had to be in place at the time of a company's proposal and that H2O's assurances that the five service providers would be provided if they were awarded the Contract was sufficient. In summary, H2O's bid was compliant. The Court dismissed Aquatech's application for judicial review. ■

Court affirms there is no duty of fairness owed during pre-contractual stage

In *CG Acquisition Inc. v P1 Consulting Inc.*, 2018 ONSC 4089, the Ontario Superior Court of Justice affirmed that during the pre-contractual stage of a request for proposals, proponents are not owed a free standing duty of fairness outside of the contractual obligations that may arise in later stages of the procurement.

Background

On September 4, 2014, Ontario Infrastructure and Lands Corporation (IO) issued a Request for Proposals (RFP) for the sale and redevelopment of land along the Toronto waterfront. The successful company would purchase and develop the land. The development

would include a new LCBO head office and flagship store. The IO and the LCBO were together the Sponsors of the RFP.

P1 Consulting Inc. (P1) was hired by the Sponsors as a third-party Fairness Monitor for the RFP process. P1 performed an advisory and monitoring function and did not make decisions. The Sponsors were responsible for making the decisions.

On April 17, 2015, CG Acquisition Inc. (CG) submitted a proposal in response to the RFP. In its proposal CG included ERA Architects Inc. as a resource. The issue of including ERA in the proposal was that ERA was listed as an ineligible person in the RFP. Therefore, ERA's inclusion made CG's proposal noncompliant. The Sponsors decided to disqualify CG because it had breached the conflict of interest and ineligibility provisions of the RFP by contacting and adding ERA to its proposal.

CG requested that the Sponsors reconsider their decision to disqualify CG on the basis that the inclusion of ERA was a mistake. The Sponsor's agreed to reconsider the decision but in the end decided to uphold its original decision to disqualify CG.

The Sponsors took issue with the fact that in its proposal CG stated that it had extensively interviewed ERA employees and had carefully selected the design team. After its disqualification, CG then claimed that it had only one phone call with an employee of ERA. This discrepancy made the Sponsors think that CG's inclusion of ERA was deliberate.

CG brought this action claiming that for the reconsideration decision it was owed a duty of fairness which was breached by P1, IO and the LCBO's (together the "Defendants") negligence. Specifically, CG claims the RFP did not contain a written complaint process, CG was not contacted regarding the reconsideration, there was no investigation, and that P1 was excluded from the reconsideration process.

Decision

The Court determined that none of the three Defendants owed CG a duty of fairness. The Court went further and found that "no such freestanding duty exists independent of a contractual duty unless the RFP documents explicitly provide to the contrary". Therefore, unless CG submitted a compliant bid giving rise to a contractual duty, it was not owed a freestanding duty of fairness. CG admits that it never submitted a compliant bid.

The Court further noted that even if there was a duty of care owed to CG by the Sponsors then the Court would still find that there had not been a breach of that duty. The Court found that CG's complaints were hindsight observations that could have made the process more effective but fell short of negligence.

Finally, the Court found that a limitation of liability clause found in the RFP was sufficient in protecting the defendants from tort liability. Interestingly, the Court determined that the limitation of liability clause also protected P1 who was a subcontractor of the Sponsors.

The Court determined that it would frustrate sound commercial practices and justice for the Sponsor's subcontractors to be exposed to liability when the Sponsors were protected by the limitation of liability clause. The Court considered that P1 was not in a position to contract with RFP proponents and that P1 was hired to observe and provide its opinion to the Sponsors.

Having concluded that the Sponsors did not owe a duty of fairness to CG, that if there was a duty it was not breached, and that the RFP's limitation of liability protected the Defendants, the Court dismissed CG's action and awarded the Defendants their costs for the action. ■

B.C. Court of Appeal finds that failure to include a preliminary construction schedule in a bid is a material defect

In *Maglio Installations Ltd. v. Castlegar (City),* 2018 BCCA 80, The British Columbia Court of Appeal (Court) found that the failure to include a preliminary construction schedule (PCS) was a material defect that could not be forgiven by the discretion clause.

Background

The Corporation of the City of Castlegar (Castlegar) issued an invitation to tender bids for the construction of a recreational swimming area. The invitation to tender required the completion of a preliminary construction schedule (PCS) and also emphasized that "time would be of the essence"(para 5). The invitation to tender allowed Castlegar to waive defects in the bid. The invitation to tender also set out a number of milestone dates that bidders had to comply with. However, Castlegar changed the milestone dates numerous times throughout the bid period.

Maglio Installations Ltd. (Maglio) submitted a fully compliant bid, including a PCS. Marwest Industries Ltd. (Marwest) did not submit a PCS, and stated the PCS would be submitted once the final dates were confirmed, and agreed to comply with the milestone dates. Castlegar accepted Marwest's bid.

The summary trial looked at whether the discretion clause enabled Castlegar "to forgive Marwest's failure to submit a PCS" (para 20). The trial judge noted that only non-material defects could be waived. The trial judge cited the following two step test from *Graham Industrial Services Ltd. v. Greater Vancouver Water District,* 2004 BCCA 5 for determining whether a defect is material (para 23):

> "First, […] the court must assess whether the bid's non-compliance relates to an important or essential element of the invitation to tender. Second, the court must determine whether a substantial likelihood exists that the non-compliance would be a significant factor in the deliberations of a reasonable owner."

The trial judge found that with regards to the first step, the PCS requirement was "front and centre in the document" (para 24) and that the invitation to tender stressed the importance of time. The trial judge next looked at the second step, and concluded that the PCS would likely be significant in the owner's deliberations because, based on the invitation to tender, it was clear that there was a limited time in which to complete the project. The trial judge concluded that the absence of a PCS could not be waived and thus there was a breach of Contract A between Castlegar and Maglio.

Decision

The Court began by noting that when a materially compliant bid is submitted, Contract A is formed and therefore owners can only use discretion clauses to forgive minor defects in otherwise substantially compliant bids.

The Court found that Castlegar did not demonstrate that the trial judge made "an extractible error of law" (para 54). The Court concluded that the trial judge appropriately set out the correct legal framework and considered the relevant factors and did not make an error in concluding that the "PCS was neither redundant nor useless" (para 60). Specifically, the Court found the trial judge correctly reasoned that while the milestone dates changed, there was sufficient information to provide a PCS and the PCS would have been an important factor in the reasonable owner's decision making process.

The Court found that the trial judge's reliance on the "time is off the essence" clause was misplaced, but there was still ample evidence to support the conclusion that timing was important to the Contract B.

The Court concluded that the trial judge did not err in finding that the PCS was material and dismissed the appeal. ■

Federal Court of Appeal finds reconsideration of bids following the award of a contract falls under the CITT's jurisdiction

In *Valcom Consulting v Canada,* 2019 FCA 1 the Federal Court of Appeal (Court) determined that the Canadian International Trade Tribunal (Tribunal) had authority to determine a complaint under s. 30.11 of the *Canadian International Trade Tribunal Act* (Act) which related to reconsideration of bids after a contract had been entered into.

Background

The Department of National Defence (DND) issued a Request for Proposal for the services of a senior technician. DND received several bids, but determined that Valcom Consulting Group Inc. (Valcom) was the only compliant bid. Valcom was awarded the contract. Two other bidders complained and, as a result, DND terminated the contract with Valcom, in accordance with the contract's terms. On March 10, 2017, DND proceeded with another solicitation process, and awarded the contract to someone else on May 2, 2017.

On February 3, 2017, Valcom filed a complaint with the Canadian International Trade Tribunal. The Tribunal's jurisdiction is set out in under s. 30.11 of the *Canadian International Trade Tribunal Act* and states that: "a potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint".

The Tribunal determined that the complaint related to the procurement process and thus it had authority to consider the complaint. The Tribunal also concluded that the DND breached several articles of the applicable trade agreements, recommended that the

new solicitation be cancelled, and the contract awarded to Valcom.

Decision

The Court began by examining the standard of review. The Court noted that the question at issue was "whether this particular complaint relates to the procurement process" (para 20), which was a question of mixed fact and law, and thus should be reviewed on a reasonableness standard.

Next, the Court looked at whether the Tribunal had the authority to determine the complaint under s. 30.11 of the Act. The Attorney General argued that the Tribunal did not have jurisdiction to decide the complaint because the procurement process ended when the contract was awarded to Valcom, and thus, the subsequent process related to contract administration was not within the jurisdiction of the Tribunal. The Tribunal agreed that contract administration was beyond the scope of its jurisdiction. However, the Tribunal determined the complaint related to the procurement process as "the procurement process continued in this case when DND reconsidered some of the bids after the contract with Valcom had been entered into" (para 24). The Court found the Tribunal's conclusions were reasonable.

The Court also found that the Tribunal's recommendations with respect to remedies were reasonable. The Attorney General argued that the Tribunal did not have authority to recommend the remedy it did as the Tribunal only has authority with respect to the initial tender, and not the subsequent tender entered into by DND. The Court rejected this submission. The Court stated that "remedies should address the harm that arises from a defective procurement process, which is what the Tribunal's recommendations do" (para 30). The Court also recognized that there is a wide range of remedies provided in the Act. The Court found the Tribunal's recommendations with respect to remedies were within a range of reasonable alternatives. However, the Court also noted that this submission was improper as it was raised by the Attorney General for the first time on judicial review.

The Court dismissed the application for judicial review. ■

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Procurement Law Newsletter

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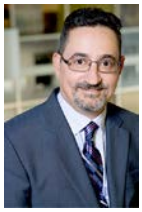

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