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Procurement Law Update – New Cases

1) *Mega Reporting Inc. v. Government of Yukon,* 2018 YKCA 10 (June 19, 2018)

Facts

Yukon issued a Request for Proposal ("RFP") for court reporting services.

RFP created a two envelope system. A bidder's response to mandatory requirements were set in one envelope, price submissions were set out in a second envelope.

If a bidder did not pass the mandatory requirements, the second envelope was not opened.

The RFP did not describe point allocations used by evaluators to assess the mandatory criteria. The RFP called for the supply of three references, not reference letters. The RFP contained a waiver of liability clause which stated:

> Except for a claim for cost of preparation of its Proposal or other costs awarded in a proceeding under a Bid Challenge Process as described in the Government of Yukon contracting regulations and contracting and procurement directive, each proponent, by submitting a Proposal irrevocably waives any claim, action or proceeding against the Government of Yukon, including without limitation any judicial review of injunction application or against any Government of Yukon employees, advisors or representatives for damages, expenses or costs including costs of proposal preparation, loss of profits, loss of opportunity or any consequential loss for any reason including any actual or alleged unfairness on the part of the Government of Yukon at any stage of the request for proposal process; if the Government of Yukon does not award or execute a contract; or, if the Government of Yukon is subsequently determined to have accepted a non-compliant Proposal or otherwise breached or fundamentally breached the terms of this Instructions to Proponents. (emphasis added)

The RFP was carried out pursuant to the Yukon's Contracting and Procurement Regulation and Contracting and Procurement Directive. The Directive provided that all procurement was required to be conducted in a fair manner and the Government of Yukon was required to observe procedural policies laid out in the Directive free of bias personal interest or conflict of interest.

Evaluators adopted an undisclosed point system pursuant to which bidders meeting mandatory minimum requirements achieved 50% of available points while those not meeting minimum requirements achieved less than 50%.

The evaluators made no notes and had no records of the basis upon which the evaluation decisions were made. At a debriefing, one evaluator told the plaintiff that it had failed to meet the mandatory minimum requirements because it did not supply "letters of reference".

The plaintiff was excluded from consideration on this basis.

The trial judge determined that the procurement was conducted unfairly and that the waiver of liability clause was unenforceable because it violated the public policy embodied in the Yukon Contracting and Procurement Regulation and Contracting and Procurement Directive to conduct procurements fairly.

The Court of Appeal reversed the trial judge.

Findings

The Court of Appeal applied the test in *Tercon Contractors Ltd. v. B.C.* to determine the enforceability of a limitation of liability clause. The three-part test under *Tercon* is:

1. Whether it as matter of interpretation the exclusion clause even applies to the circumstances based on the intention of the parties;

2. Whether the clause is unconscionable at the time the contract was made; and

3. Whether the Court should nevertheless refuse to enforce a valid clause because the existence of an overriding public policy outweighing the strong interest in the enforcement of private contracts.

On the first branch of the test, the Court of Appeal concluded that the clause was clear, and applicable to the circumstances.

On the second branch of the test, the Court of Appeal concluded that contractors, are sophisticated and are capable of deciding whether or not to enter into or to decline to participate in the procurement in the face of an exclusion of liability clause. "So long as contractors are willing to bid on such terms, I do not think it is the Court's job to rescue them from the consequences of their decision to do so. Therefore the waiver of liability clause was not unconscionable at the time it was made."

On the third branch of the test, the Court engaged in an elaborate analysis of whether there was an overriding public policy to defeat the application of the waiver of liability clause. The Court of Appeal noted that the Supreme Court of Canada in *Tercon* indicated that using public policy to override a limitation liability is something to be "invoked only in clear cases in which the harm to the public is substantially incontestable."

The plaintiff argued that the principles embodied in the Yukon Procurement Directive amounted to a public declaration that the Yukon would conduct its procurements fairly and would not deviate from the principles of common law fairness. This the plaintiff argued was an incontestable public policy which made the waiver of liability clause inapplicable as the waiver clause undermined the entire contracting regulation commitment made by the Government of Yukon in its Procurement Directive.

The Court of Appeal disagreed. It noted that the obligations to conduct a bidding process fairly and transparently are as much for the benefit of those tendering and the public at large as they are for bidders. "The Government does not adopt statutes or regulations on tendering solely out of concern to protect vulnerable bidders but also to provide clear guidance so that parties can effectively bid and processes can be sufficiently competitive. Yet the Government, one of the parties whose interests the procurement principles are extensively supposed to advance and who in fact adopted them has come to the conclusion that the public policy interest motivating those principles should not override its ability to protect itself from liability through the expression of a waiver of liability clause."

Therefore the Court of Appeal concluded that despite the Yukon's Procurement Directive, it was free to insert a waiver of liability clause. The result, the plaintiff's case was dismissed.

Is this decision the correct one? How would it be applied in Nunavut? Consider the implication of the Canadian Free Trade Agreement and the procurement exceptions under the schedule pertaining to Nunavut as well as Nunavut's NNI policy. Would Nunavut's NNI policy and the residual applicability of the CFTA amount to a sufficiently overriding public policy to render a waiver of liability clause unenforceable in a Nunavut procurement?

2) *Maglio Installations Ltd. v. The City of Castlegar,* 2018 BCCA 80 (March 8, 2018)

Facts

The City issued an Invitation to Tender ("IT") bids for the construction of a swimming area. The IT required bidders to complete a Preliminary Construction Schedule ("PCS") and stated that time would be of the essence in completing the project. The IT also required bidders to confirm their ability to comply with certain construction milestone dates set out in the IT. Initially, the IT set out a series of specific milestone dates. However, the IT was amended with the result that a number of dates were converted into general time periods only such as "spring", "fall" or "winter". Further, the City indicated that other significant milestone dates would only be identified after the conclusion of the bidding process.

The IT contained a standard privilege clause which said:

> *The City reserves the right to reject any or old tenders, to waive defects in any bid or tender documents and to accept any tender or offer which it may consider to be in the best interest of the City.*

Maglio's bid complied with all requirements of the IT, including the provision of a PCS. A second bidder, Marwest, (which was awarded the contract), failed to include a PCS in its bid. Instead, its bid stated that it would submit a PCS after the City confirmed all of the milestone dates.

Maglio sued and argued that the terms of the IT made supplying a PCS mandatory. Maglio claimed that Marwest's failure to supply the PCS rendered its bid non-compliant and incapable of acceptance. The City could not accept Marwest's bid by using a privilege clause.

The City argued that the PCS, following amendments to the IT, was no longer a "material" or important requirement. The City had abandoned specific milestone dates

and indicated that it could not confirm milestone dates until conclusion of the bidding process. In this context, the City argued that the provision of a PCS had become immaterial. Furthermore, Marwest's bid contained a commitment to meet all milestones identified in the IT document. This, the City argued, made a PCS superfluous and satisfied the material commitment to provide a schedule which demonstrated conformance with such milestones as set out in the IT.

Findings

The Court of Appeal focused on identifying a "material" defect rendering the bid incapable of acceptance. If a bid is substantially compliant, minor defects or irregularities can be cured by way of a privilege clause or the reservation of rights to correct errors. "Material" defects which are inconsistent with a mandatory requirement render bids incapable of acceptance. The Court defined materiality as follows:

> Material non-compliance will result where there is a failure to address an important essential requirement of the tender documents, and where there is a substantial likelihood that the omission would have been significant in the deliberations of the owner in deciding which bid to select.

The Court of Appeal gave deference to the Trial Judge's findings and found that the Trial Judge pointed to contextual factors indicating that timing was a crucial aspect of the contract. The Trial Judge found that bidders were aware the project needed to fit within time windows of opportunity which made the duration of each stage of construction an objectively important part of a tenderer's proposal for consideration by the owner. The Trial Judge's conclusion that the timelines were fundamental to the performance of Contract B were supported by the surrounding circumstances and the terms of the IT. Therefore the plaintiff was successful. The City breached its contract by accepting Marwest's non-compliant bid.

Consider the correctness of this decision. The IT document was amended on multiple occasions to completely remove almost all specific milestone dates beyond the indication of very general time frames. The City indicated that a series of important milestones from

the point of view of completing any possible construction schedule would only be released after the bidding process was complete. In the circumstances, could a reasonable interpretation of the materiality of the supply of the PCS yield the opposite conclusion?

3) *Attorney General of Canada v. Supreme Crest Inc.*, 2017 FCA 2002

Facts

Public Works and Government Services Canada ("PWGSC") issued a request for proposal for seawater pumps for Halifax class frigates. PWGSC indicated that The Department of National Defence ("DND") needed the pumps urgently in order to keep the war ships fully operational. The Request for Proposal ("RFP") included a requirement that a bid provide a "shock testing certificate" for the pumps. However, the original equipment manufacturer for the existing pumps was exempt from providing such a certificate if it supplied the same pumps as previously certified and on the vessels.

A bidder supplying seawater pumps from another manufacturer objected to the procurement and requested that PWGSC remove the shock testing certificate requirement because it was impossible for any other manufacturer to meet the requirement within the time lines set out for the request for proposal which was issued in May of 2016 and set to close 62 days later in July. The evidence established that providing a shock testing certificate would take up to one year.

Findings

The Canadian International Trade Tribunal ("CITT") found the complaint was valid and that the structure of the solicitation was such that it created a biased technical specification favouring the incumbent bidder by unnecessarily excluding other suppliers. The CITT therefore recommended that the procurement be set aside and re-issued.

The Attorney General sought judicial review. The Federal Court of Appeal dismissed the review finding that the CITT's decision was reasonable.

In the case before the Court of Appeal, the respondent claimed that the shock testing certificate was a violation of article 504(3)(b) of the Agreement on Internal Trade (now CFTA). It argued that the terms of the RFP were biased in favour of the original equipment manufacturer which did not have to submit a shock testing certificate.

Article 504(3)(b) of the Agreement on Internal Trade prohibited the "biasing of technical specifications in favor of, or against, particular goods or services, including those goods or services included in construction contracts or in favor of, or against, the suppliers of such good or services for the purpose of avoiding the obligations of this Chapter."

PWGSC argued the shock testing certificate was a required and legitimate operational necessity and thus was not discriminatory.

Article 504(3)(c) of the Trade Agreement also prohibited excessively short time periods in the circumstances where "the timing of events and the tender process prevents suppliers from submitting bids". The CITT concluded that even if PWGSC did not deliberately intend to bias its technical specification or to violate the timing restrictions in the Agreement on Internal Trade nevertheless, the effect of its decision was to create a violation of the Trade Agreement.

The Court of Appeal found that whether or not PWGSC violated the specific provisions intentionally or inadvertently was immaterial. It it was objectively impossible for suppliers of equivalent projects to meet the timelines and no persuasive evidence was tendered to establish the necessity to supply the pumps within a short period of time.

The case illustrates the rigour with which courts and tribunals assess whether there has been biasing of technical specifications or procurement documents to favour an incumbent supplier.

4) *Everest Construction Management Ltd. v. Town of Strathmore* (2018) ABCA 74, February 2018.

Facts

Strathmore issued a Request for Proposal ("RFP") for work on a reservoir and pump station.

The RFP contained a privilege clause which provided that the "lowest or any bid will not necessarily be accepted".

The RFP also contained a discretion clause stating that Strathmore "reserved the right to accept any offer, waive defects in any offer or reject any or all offers".

The RFP contained a further version of a privilege clause whereby bidders "acknowledged" that Strathmore could "in its discretion" accept "any bid other than a low bid".

Bidders were instructed to provide information supplemental to the bid forms including:

a) A list of the bidders' qualifications with an acknowledgement from bidders that "we provide the following information in order that the owner may judge your ability to fulfill the contract requirements"; and

b) A construction schedule supplement in which the bidder was to insert a completion date for all steps in the project meeting the preferred date of the owner of December 31, 2012. This section too contained an acknowledgement from bidders that they provided the information relative to the construction schedule in order that the owner might assess our "ability to deliver the work and respond to critical timelines."

The lowest bids were from Everest and Graham Construction.

Everest submitted a bid price of $6,440,000 with a functional completion date of March 21, 2013 and an overall completion date of May 15, 2013. In its bidder qualification form, Everest included only one completed project as relevant experience. After a review, Strathmore decided to make further enquiries about Everest's experience.

Graham's bid was for $6,474,000 with a completion date of December 31, 2012 (the date which Strathmore indicated was its preferred date). Graham listed six relevant projects.

Although Graham's price was not the lowest, Strathmore awarded the contract to Graham relying on various factors identified by its in-house engineer including:

1. Graham's completion date complied with Strathmore's preferred completion date;

2. Everest's longer completion time resulted in increased costs to Strathmore which were likely to be greater than the difference between the two bids;

3. Graham could bring to bear more overall experience with similar projects;

4. Everest did not provide a complete equipment suppliers list.

Everest sued complaining that it was the lowest bid and according to the contract A principles, it was required to be awarded the contract.

The trial judge rejected Everest's claim and dismissed the action.

In the Court of Appeal, it was accepted by the parties that the contract A, contract B scenario applied and that duties of fairness and reciprocal obligations arose pursuant to which the procurement was to be conducted. In this context, it is accepted law that a privilege clause can be used, but not to depart from the fundamental contents of an RFP or to accept a non-compliant bid or violate the process.

Everest complained that Strathmore did not fairly disclose to bidders that it would use "experience" and the anticipated completion date and costs associated with a potential

later completion date as a basis to evaluate bids. Using undisclosed evaluation criteria is unfair and a breach of contract A. Everest claimed that the information sought in the RFP document was simply check-list items to check off that a bidder had some experience and was committed to some completion date but did not indicate further use of the material would be made.

The Court of Appeal disagreed. It found that bidders' acknowledgements that past experience, as well as a commitment to a completion date, were matters which could be evaluated by Strathmore in the assessment was important. This together with the relevant privilege clause gave proper discretion to Strathmore to select a bidder other than the bidder with the lowest price.

An owner is entitled to take a "nuanced view of costs" and the ability to assess costs at a more detailed level and not necessarily to accept the lowest priced bid is implicit in the discretion afforded to an owner by a privilege clause. In this case, taking a more nuanced view of costs meant adjusting the quoted price upwards to reflect the expected cost of a later completion date and this was an acceptable exercise of the discretion of the owner.

Accordingly, the Court of Appeal found that Strathmore assessed information with respect to price, and experience as matters which were appropriate to the exercise of its privilege clause discretion.

Everest also complained that Strathmore did not investigate Graham's experience and that the City credited Graham with project experience which arose from its associated entities and partners, not Graham itself.

The Court of Appeal found there was no duty to investigate whether a bidder was able to comply with its bid commitments and representations

Moreover, it was established at trial that Strathmore had extensive knowledge of the experience of all Graham entities as a result of Graham entities' past work on Strathmore projects.

The Court of Appeal found that there was persuasive authority supporting the proposition that an owner may rely on information it already has acquired through past experience with a bidder when evaluating bids. In the circumstances, Strathmore was not required to investigate Graham's past experience and could rely on its own previous interactions with Graham as a basis of accepting its submission.

The case demonstrates the difficulties associated with using a privilege clause and why, privilege clauses must be drafted carefully to provide appropriate discretion to an owner to take into account circumstances which may not appear to be obvious.

5) *Kaymar Rehabilitation Inc. v. Champlain Community Care Access Centre*, 2018 ONCA 76 (January 30, 2018).

In 2013 Champlain Community Care Access Centre ("CCCAC") issued an RFP for the provision of physiotherapy, occupational therapy and social work services. The RFP resulted in four bids being received including the plaintiff's. The plaintiff's bid was not accepted. The plaintiff commenced an action against CCCAC contending that it accepted a non-compliant bid of a competitive bidder, Carefor.

Kaymar alleged that CCCAC designed the RFP process to unfairly favour its competitor, Carefor and that CCCAC did not properly evaluate Carefor's qualifying experience in providing therapy services with the result that Carefor's bid should have been excluded.

The RFP contained a schedule A "data sheet" used by CCCAC. The RFP called for bidders to provide therapy services and indicated that bidders were required to submit their financial and experience information in accordance with the RFP data sheet and schedule C to demonstrate that they had the required experience and financial position. The RFP described general experience requirements for bidders:

1. Respondents shall provide evidence that the respondent itself has been actively engaged in services described in the data sheet in a community setting *or, if set out in the data sheet the required equivalent experience, for not less than the amount of time during the period set out in this RFP.*

2. For the purpose of assessing experience for this RFP process, "services in a community setting" means services provided in such locations as homes, schools, the workplace and CCCAC clinics but excludes services provided in an institutional setting. *"Equivalent experiences" were defined as three years delivering professional services* in a community setting within the past five years.

The RFP did not define "professional services". However, during the RFP process, CCCAC was asked to define professional services and it stated:

> Under the general experience requirement in the RFP data sheet professional services refers to experience providing healthcare services in a community setting, through any of the recognized regulated health professionals in Ontario other than physiotherapists, occupational therapists and social workers.

There was no dispute that at the time it submitted its bid, Carefor had provided "professional services" within the meaning of the RFP. Similarly, there was no dispute that Carefor had not provided "therapy services".

The plaintiff argued that on a fair construction of the RFP, the term "professional services" was not broad enough to allow Carefor to qualify under the RFP if it did not have the experience in the requisite specific areas.

The Court of Appeal concluded that the RFP gave priority to the information in the data sheets and the defined experience equivalent exceptions. The experience equivalent section of the data sheet opened the door to bids from applicants that had experience in providing "professional services" even though that may not have been specific experience in providing the identified therapy services. The Court of Appeal concluded that by bidding, Kaymar effectively accepted that experience equivalence was permitted by the RFP and that bidders were allowed to satisfy the constituent elements of relevant experience criteria through experience equivalence by identifying professional services within the community as defined.

6) *Muhammad Farid v. The Queen*, 2017 FCA 247 (December 13, 2017)

PWGSC issued an RFP. The plaintiff was the only respondent to bid. PWGSC rejected the plaintiff's bid on the ground that its price was too high. The Federal Court Trial Division dismissed an action that followed. The plaintiff appealed. The plaintiff alleged that PWGSC failed to comply with the terms of the tender by failing to accept its proposal, and that it refused to accept its proposal based on undisclosed criteria.

The RFP stated that a "responsive bid will be recommended for award of the contract" – language that the appellant claimed required PWGSC to award the contract to it. The RFP also contained a standard privilege clause allowing PWGSC "to reject any or all bids received", even a "recommended" bid, and also to "cancel the bid solicitation at any time and to re-issue the bid solicitation in its discretion."

The Court of Appeal concluded that the internal budgetary considerations of PWGSC were an appropriate factor to use as a matter of discretion afforded by the privilege clause.

PWGSC was not under a legal duty to disclose its budget and therefore no duty arose to disclose its budget as a criteria for evaluation.

7) *TDC Broadband Inc. v. Nova Scotia (Attorney General)*, 2018 NSCA 22

In September 2006, the Government of Nova Scotia issued a request for proposal seeking an internet service provider to implement broadband services in a pilot project area. TDC Broadband ("TDC") filed a proposal but was not successful.

The following summer Nova Scotia issued a further RFP to provide similar broadband services. In its RFP document, Nova Scotia disclosed confidential information which had been submitted to it in TDC's original 2006 proposal.

The trial judge found that Nova Scotia had breached confidence by disclosing confidential information of TDC.

A significant issue arose at trial on the appeal as to the value of the confidential information and how to assess damages.

The Court of Appeal noted that damages in this area may be assessed in a variety of ways such as fair compensation or on an indemnity basis as well as an account of profits or calculation of loss. In assessing damages, the Court must attempt as far as possible to restore the plaintiff monetarily to the position it would have been had it not been for the defendant's wrongful conduct. The Court of Appeal noted that appropriate damage calculations can be conducted based on one or more of the following formats:

1. The confider's lost profit;

2. Valuation of consultant's fee which would be generated in producing the information;

3. Depreciation of value of the information as a consequence of breach and disclosure;

4. Development costs in acquiring the information;

5. Capitalization of an appropriate royalty;

6. Market value as between willing sellers and buyers.

The trial judge assessed the market value of the information and the diminution in its value because of disclosure at $125,000. The Court of Appeal agreed.

This case represents the Court's flexibility in assessing damages in the novel, emerging tort of the breach of confidence and the danger of misusing confidential information in the purchasing context.