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Public Procurement 2023 Year in Review

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In 2023, procurement law mostly entrenched prior trends in the case law. While the jurisprudence was light on completely novel developments, it is important for practitioners and in house counsel to pay close attention to these continuing trends to understand the scope of potential liabilities in any procurement situation. We also saw a number of key developments in the policy space, and interested parties (both purchasers and suppliers) should pay careful attention to this ever shifting area.

We have prepared a practical guide to important developments in procurement law over the past year in this Public Procurement 2023 Year in Review. In particular, we review the key changes in procurement policies and methods by Canadian public purchasers, as well as provide an in-depth analysis of new decisions from procurement related administrative tribunals/the Federal court, as well as various provincial courts.

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Key Developments at the Federal Level: Expansion of CITT Jurisdiction, Consultant Review, and DEI Support in Procurement

The federal procurement dispute area was relatively quiet in 2023. However, several major federal initiatives were announced that engage with the procurement arena and should be considered by interested parties moving forward.

There was a Federal Court of Appeal review of a decision of the Canadian International Trade Tribunal (the Tribunal), along with a key Tribunal decision emphasizing the importance of participation in the debriefing process and the necessity of gathering evidence supporting allegations of breach prior to initiating a complaint.

TERRA REPRODUCTIONS INC. V. CANADA (ATTORNEY GENERAL)[1] – THE IMPORTANCE OF TIMING AND COMPLETENESS

In a limited decision, the Federal Court of Appeal rejected an application for judicial review of the Tribunal's dismissal of Terra Reproductions' complaint. In the ordinary course, the Tribunal sets a very strict 10 business day limitations period for any complaint. Terra Reproductions had complained three days late.

The Court upheld the Tribunal's strict construction of the limitations period on the basis that it was founded upon the literal and defensible application of the Tribunal's regulations.

The Court also rebuffed attempts by Terra Reproductions to introduce new arguments regarding the limitations period that had not been made before the Tribunal. Importantly, the regulations provide for exceptions to the limitations period under exceptional circumstances, but the complainant had *not* raised those arguments before the Tribunal. When it attempted to do so for the first time on judicial review, the Court confirmed that parties are required to raise such matters at first instance and cannot introduce novel arguments for the first time on review, outside of very limited circumstances.

CHANTIER DAVIE CANADA INC. AND WÄRTSILÄ CANADA INC. V. DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES[2] – IGNORE THE DEBRIEFING PROCESS AND FISH FOR EVIDENCE AT THE TRIBUNAL AT YOUR PERIL

The Tribunal reaffirmed that bidders are not entitled to their preferred means of debriefing, and that bidders are required to participate in the debriefing process rather than attempting to sidestep it by going straight to the Tribunal.

In their complaint, Chantier Davie and Wärtsilä alleged that Canada had not met its debriefing obligations by offering written debriefing rather than the in-person debriefing they had sought. Instead of proceeding with a debriefing in writing, they brought a complaint to the Tribunal arguing that their bid was evaluated incorrectly and that Canada should have declared the winning bid non-compliant on the basis of the complainants' belief (unsupported by

1 2023 FCA 214.
2 2023 CanLII 6265.

evidence) that the winning bid did not comply with the invitation to tender. Chantier Davie and Wärtsilä then attempted to use the complaint process as a fishing expedition to obtain evidence that would make out their complaint.

The Tribunal rebuked the complainants, noting that it could not "allow this type of exercise to go on in a procurement review case because the bid challenge mechanism was not designed for [this] purpose." It emphasized that aggrieved bidders should not shy away from asking the government to explain and justify its decisions, and provide the relevant information and evidence, and should then use the access to information mechanism if they do not get satisfactory disclosure. The Tribunal mechanism is not to be used for evidence gathering — it examines only allegations that have demonstrated through evidence a reasonable indication of a breach of a trade obligation.

CONSULTANT REVIEW

Several major news stories regarding retaining consultants were front and centre in 2023, including the large contract awarded for developing ArriveCan, and the use of business management consultants. The federal government has committed to examining the use of consultants and the awarding of contracts to entities that subsequently subcontract all or nearly all of the actual performance of the contract, with specific measures to be announced.

DIVERSITY, EQUITY AND INCLUSION SUPPORT IN PROCUREMENT

Shared Services Canada has also announced a new initiative to encourage procurement awards to small- and medium-sized enterprises, as well as businesses led by women, visible minorities, and Indigenous Peoples in Canada.

The ScaleUp social procurement initiative, part of Shared Services Canada's Agile Procurement Process 3.0 initiative, has thus far awarded more than 15 contracts, ranging in value from C$10,000 to C$238,000. The majority of these contracts have been awarded to businesses owned or led by visible minorities and women.

This initiative provides an entry point for small businesses — especially for those from equity seeking groups — to the federal procurement market. These awards are only for small contracts that fall below the threshold for the application of Canada's trade agreement restrictions. Given the success of the program to date, it is likely that it will see continued salience and perhaps an expanded rollout.

Ontario: Continuity of Prior Developments

Last year was relatively quiet with regard to procurement disputes or major news items in Ontario. However, there were several key developments in 2023 that confirmed and extended prior procurement jurisprudence, as well as the new unification of purchasing entities to provide for a true single point of access for most Ontario procurements.

TRANSDEV CANADA INC. V. THE REGIONAL MUNICIPALITY OF YORK[3] – THE ROLE OF TREATIES AND WHO IS A SERVICE PROVIDER

The first major procurement decision of 2023 was *Transdev Canada*. On its face, it appeared to be a relatively simple dispute. York Region had divided its transit system into two separate divisions — one aligned with the west and north quadrants (the West-North Transit Division) and another on the south and east quadrants (the South-East Transit Division). It first procured a service provider for the West-North Transit Division, and then followed with a separate procurement for the South-East Transit Division.

TOK Transit Limited (TOK) was awarded the contract for the West-North Transit Division in June 2022. In September 2022, York Region awarded the South-East Transit Division contract to Miller Transit Ltd. (Miller), which included TOK as a subcontractor in its bid. Transdev was the second-place bidder in the South-East Transit Division request for proposal (RFP) and brought this challenge.

The RFP in this case provided that no single entity could be the service provider for both divisions. Transdev believed that since TOK would effectively be performing the contracts in each division (as the contractor in one, and the subcontractor in another), the Miller bid should have been found to be non-compliant and eliminated. Transdev sought to have the contract quashed and the contract awarded to it (among other alternative remedies).

This decision addresses two key procurement issues. The first is the use of judicial review to challenge the decision of a procuring body — and, in particular, the use of the *Canadian Free Trade Agreement* (CFTA) to ground an argument of procedural unfairness. The Ontario Superior Court embraced the decision of the Ontario Divisional Court in *Thales DIS Canada Inc. v. Ontario*,[4] and accepted that the CFTA could be used to determine whether a decision made by a public body in the procurement context was reasonable.

The Superior Court noted that Transdev had not actually turned to considering how the actions of York Region or Miller had breached any of the requirements of the CFTA in relation to the RFP. The evidence by Transdev on this point turned on statements by third parties outside of the RFP process. The Court rightly determined that the analysis should be focused on the compliance of Miller and York Region in the course of the RFP itself.

The Court also rejected correctness as a standard of review for a treaty breach. Rather, drawing upon both *Thales and Canada (Minister of Citizenship and Immigration) v. Vavilov*,[5] the Court in *Transdev* held that treaty obligations

3 2023 ONSC 135 (*Transdev Canada*).
4 2022 ONSC 3166 (*Thales*).
5 2019 SCC 65.

feed into the conclusion of whether decisions were reasonable. As noted by the Court, this accords with the traditional deference granted to the procurement body in a judicial review, citing its earlier decision in *Bot Construction Ltd. v. Ontario (Ministry of Transportation)*.[6] It also accords with the traditional deference given to evaluators by the Canadian International Trade Tribunal (the Tribunal), when engaged in a review of whether a federal procurement has been conducted in accordance with Canada's trade agreement obligations.

Having dealt with the application of trade agreements, the Court then analyzed the reasonableness of the decision, which centres on the second key procurement principle addressed in this case: confirmation that the form of bid is paramount. The Court determined that "*the* Service Provider" (emphasis in original) is determined by looking at who is the contractor — regardless of whether a subcontractor would actually be performing the work.

This approach is consistent with a contract law approach, under which the only entity having privity with York Region would be the contractor. The contractor is ultimately "on the hook" to perform the contract and is answerable to the purchaser. It also fits with the usual trade agreement analysis by the Tribunal, where the 'supplier' is deemed to be the bidding entity, regardless of which entity will ultimately supply the contract.[7]

While the applicant was ultimately unsuccessful in this case, the Court's approval of *Thales* is a strong sign that the use of judicial review to challenge trade treaty breaches by Ontario entities is appropriate. We can expect that future litigants will be well aware of this path to challenge procurements that they believe breach these obligations.

2708266 ONTARIO INC. V. THE CITY OF TORONTO[8] – TERCON WILL NOT SAVE YOU

In another case continuing on from last year, the Ontario Superior Court had held that the City of Toronto (City) had improperly failed to award a contract to the winning bidder (2708266 Ontario Inc., also known as "Nelli"). However, the City had included a broad and robust limitation of liability clause in the request for tender (RFT). As the parties had not focused on the application of that clause during argument, Justice Black had directed that the parties prepare further submissions on this point.

6 2009 CanLII 92110.
7 See for example *Alion Science and Technology Corporation and Alion Science and Technology Canada Corporation (Re)*, PR-2018-043.
8 2023 ONSC 383.

The clause in question essentially carved out any liability for the City for matters arising from the RFT:

> "subsection 3.3.1 states that the City will have no liability to any bidder or prospective bidder for damages including direct, indirect, special or punitive damages, or for loss of profits loss of opportunity of loss of reputation arising out of or otherwise related to the RFT, participation of any bidder in the RFT process, the provision and availability or lack of availability or accuracy of the City Online Procurement System, or the City's acts or omissions in connection with the conduct of the RFT process, including the acceptance, non-acceptance or delay in acceptance by the City of any bid."

The Court turned to the tripartite test set out in *Tercon* to determine if the clause was applicable: i) does the exclusion apply; ii) did the parties engage in good faith; and iii) should the clause be voided for public policy reasons.

The Court upheld the broad limitation of liability clause. A likely driver of the analysis was that, while the Court held that there had been a mistake that resulted in unfairness, there was no finding of bad faith conduct that would represent a systemic issue.

In upholding a very broad limitation of liability clause, the Court provided a great deal of protection for public purchasers and significantly limits potential for recovery by aggrieved bidders outside of exceptional circumstances.

It also stressed the importance for potential litigants in considering whether it would be more beneficial to pursue a judicial review application rather than a claim for damages, as such a limitation of liability clause could not preclude remedies of a reviewing court.

SUPPLY ONTARIO – A ONE-STOP SHOP

Finally, Ontario has seemingly concluded its gradual process of merging its procuring entities into a single point for potential suppliers by integrating Supply Chain Ontario into Supply Ontario. Supply Ontario, a Crown agency created pursuant to the *Supply Chain Management Act (Government, Broader Public Sector and Health Sector Entities)* will now be the single procuring entity for:

- **Government entities:** ministries, provincial agencies, the Independent Electricity System Operator, and Ontario Power Generation and its subsidiaries.
- **Broader public sector entities:** such as school boards, publicly funded post-secondary educational institutions, children's aid societies, and shared services and group purchasing organizations that procure for these entities.
- **Health sector entities:** such as hospitals, the Ottawa Heart Institute, and shared services and group purchasing organizations that procure for these entities.

All activities of Supply Chain Ontario will now be folded into, and overseen by, Supply Ontario.

British Columbia: Forthcoming Opportunities – Major Infrastructure Projects

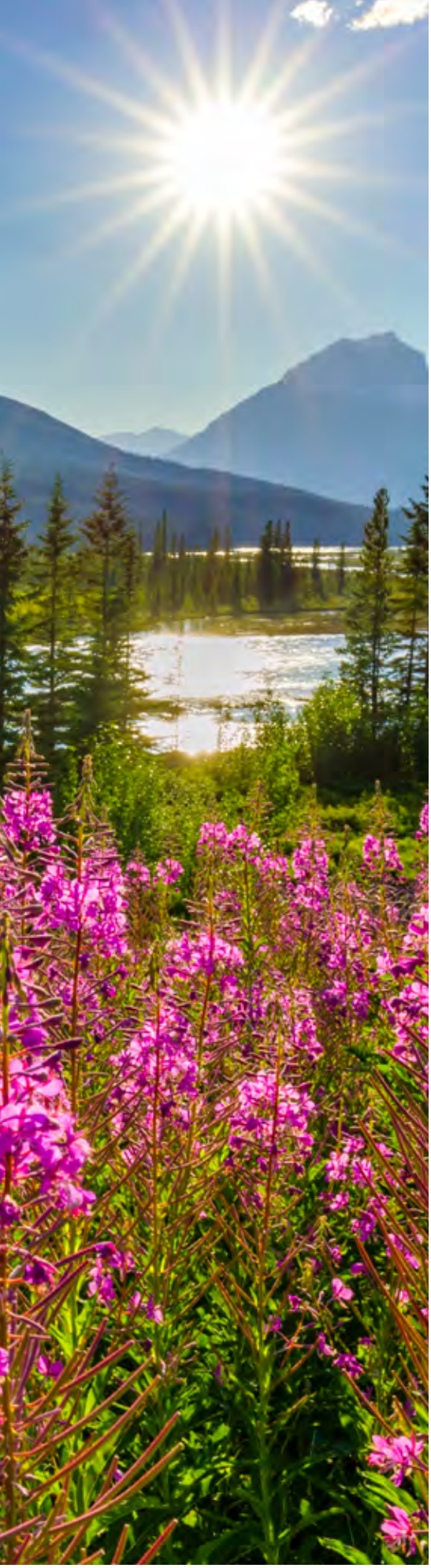
In October, Infrastructure BC, responsible for 76 completed projects across Canada representing C$28 billion in value since 2002, released the fall 2023 **BC Major Infrastructure Projects Brochure** (Brochure). With a continued focus on public infrastructure investments in British Columbia, the semi-annual Brochure addresses inquiries from the market and industry and is a forward-looking resource that enables infrastructure market participants, industry professionals, contractors, and subcontractors to proactively anticipate the financial and human resources required for upcoming major projects valued at more than C$50 million and up to C$1 billion. The Brochure breaks down the project sector, the project type (i.e., new build, renovation or expansion), and the capital cost. The listed projects range from the early planning phase to pre-procurement and active procurement stages.

Infrastructure BC supports project planning, procurement management, design and construction oversight, contract administration, and project communication, and assists government entities and project owners in selecting the optimal delivery model for public infrastructure. Infrastructure BC is focused on providing timely and accurate information about projects in various development phases and introducing new procurement models to enhance the likelihood of successful outcomes. The Brochure promotes transparency, responsiveness and innovation as fundamental objectives within the dynamic and competitive realm of public infrastructure projects. The Brochure is a valuable reference for prospective proponents seeking information on upcoming infrastructure and significant construction opportunities in B.C. In addition, any public sector body in B.C. may provide projects to Infrastructure BC for inclusion in future Brochure publications.

BC HYDRO'S CALL FOR POWER

On June 15, 2023, BC Hydro **announced** it was moving forward with the development of a competitive procurement process to acquire more clean electricity. This will be BC Hydro's first call for power in 15 years and will target larger, utility-scale projects. BC Hydro expects to initiate a call for power in the spring of 2024 to acquire new sources of electricity as early as 2028. This may be followed by subsequent calls as the transition to clean energy continues to accelerate, and BC Hydro requires additional resources to electrify British Columbia's growing economy and meet the province's climate targets.

For more information on BC Hydro's call for power, please refer to our Power Group's previous post **on our website.** McCarthy Tétrault will continue to monitor this procurement process and will provide timely updates as they become available.



Alberta: Year in Review

AUDIT FINDS CITY OF EDMONTON WAS FAIR AND MINIMIZED RISK IN VALLEY LINE LRT CONTRACTS

Background

The City of Edmonton's (City) Valley Line is a 27-kilometre light rail train (LRT) line that will operate between southeast and west Edmonton (the Valley Line). The Valley Line is being constructed in two segments,[9] comprised of the C$1.8 billion southeast segment running from Mill Woods to downtown Edmonton (the Southeast Line), which opened for service on November 4, 2023 after almost three years of delays, and the west segment, a C$2.6 billion capital project running from downtown Edmonton to Lewis Farms (the West Line), which is still under construction. Both segments of the Valley Line are structured as public-private partnerships (P3s) with each private partner being responsible for designing and building their respective segment pursuant to separate project agreements (Project Agreements). The government of Canada made C$250 million of its C$400 million of funding conditional on the City using a P3 model.

The City's procurement process for the Southeast Line took place from 2014 to 2016 after completing preliminary designs in 2013. The private partner for the Southeast Line is responsible for designing, building, partially financing, supplying rail vehicles for, operating, and maintaining the Southeast Line. Construction of the Southeast Line began in 2016 and was originally scheduled for completion by December of 2020.

The City began the procurement process for the West Line in 2019. The City selected a private partner in 2020 and construction began in 2021. The private partner for the West Line is responsible for designing, building and partially financing the West Line while the City opted to procure rail vehicles directly. The City has yet to select a party to operate and maintain the line.

About the Audit

In 2023, following nearly three years of delays to the Southeast Line, the City conducted an audit (Audit) to determine if the LRT expansion and renewal branch (the Branch) is overseeing the Valley Line projects to meet the City's cost-effective and service delivery expectations. This occurred after nearly three years of delays to the Southeast Line.

The Audit was released on August 31, 2023 and considered whether:

— the P3 procurement was conducted in a fair, open, and transparent manner;

— the Project Agreements were designed to protect the City's interests and to clearly allocate risk between the City and the private partners; and

— the Branch is overseeing the project without taking on additional risk for the City.

The Audit did not cover the Valley Line's design, construction or any work and management performed by the private partners.

9 City of Edmonton, Office of the City Auditor, *Valley Line LRT P3 and Delivery Audit* (August 31, 2023), online: **https://www.edmonton.ca/sites/default/files/public-files/22508_Valley_Line_LRT_P3_and_Delivery_Audit.pdf?cb=1696503448**.

Findings and Recommendations

The Audit ultimately found that the Branch is overseeing the Valley Line project to achieve cost-effective solutions and improve service-delivery expectations, and that the City procured each private partner in a fair, open, and transparent manner. The Audit noted that while the Southeast Line experienced significant delays, the City expects costs to remain under the original capital construction budget and the Project Agreements clearly allocated risks, protected the City's interests, and set out effective requirements for communication.

The Procurement Process

The Audit found that the Branch procured each private partner in a fair, open and transparent manner and that the request for qualification (RFQ) and request for proposal (RFP) processes were in line with best practices for large P3 projects. Specifically, the RFQ was posted publicly, the Branch shortlisted the top three respondents based on the criteria of the RFQ, and the three highest scoring teams moved on to the RFP stage. The Audit also determined that in conducting the RFP, the City followed best practices by evaluating the proposals on a pass-fail basis with reference to design, technical, and financial categories. The City awarded the contract to the proposal with the lowest bid that passed each category.

Oversight of the Procurement Process

The Audit found that in performing procurement in a fair, open, and transparent manner, the City ensured all participants had the same access to information, were treated equally, and were evaluated on uniform criteria. The City oversaw procurement by:

- establishing a general oversight committee for each line;
- establishing a relationship review committee to monitor, manage and assist with real, possible or perceived conflict of interest, and other unfairness;
- establishing an evaluation due diligence committee to ensure diligence throughout the evaluation of the procurement process; and
- engaging external fairness monitors for each line to ensure procurement was conducted in a fair, open, and transparent manner.

Project Agreements

The Audit determined that the Project Agreements for both lines clearly allocated risks, protected the City's interests, and set out effective requirements for communication. Beyond the transfer of risk to the project company inherent in a P3 structure, the Project Agreement for the Southeast Line further reduced the City's risk by contemplating that the project company was responsible for rectifying any issues with the delivery or functionality of rail vehicles. The Audit also noted that allocation of risk by category (design, build, finance, vehicle procurement, operate, maintain and communications) for each line shifted much of the risk to the project company for each line, rather than with the City, as would have been the case with a traditional contract.

Communication and Control

While the transfer of risk necessitates some reduction in control over the project, the City protected its interests by including clauses in the project agreements such as:

- a warranty period until 2050 for the Southeast Line;
- specifying thresholds for costs per hour in respect of lane closures, which, if exceeded, allow the City to reduce the payments made to the project company;
- specifying additional payment reductions tied to lane closures that have negative impacts on transit;
- specifying payment reductions for damage to trees;
- including financial holdbacks and requiring the project company to pay a daily amount for each day construction is delayed beyond the target completion date in the West Line project agreement; and
- including provisions that eliminate monthly payments accounting for 33.3% of the construction value over the 30-year operational life of the Southeast Line for months in which the Southeast Line is delayed.

Wrap-up

The Valley Line procurement process and Audit results provide insight into how public procurement may be structured with sufficient oversight and transparency to ensure a fair, open, and transparent process resulting in the selection of the most cost-effective, qualified proponent. The Audit also illustrates the benefits of structuring project agreements to transfer the majority of risk to the project company, while ensuring that the public entity's interests are protected.

ALBERTA GOVERNMENT'S ACTION PLAN TO REFORM PROCUREMENT PROCESSES

On October 27, 2023, the Alberta government announced its **Action Plan** for procurement and project delivery opportunities. This announcement is the latest step toward reforming Alberta's procurement processes, which were targeted for potential costs savings by a panel of independent experts in a **report released in August 2019**. The panel suggested establishing a procurement council of government and industry actors and refreshing the policies for major procurements. In response, the government contracted a third-party consultant to conduct a study on procurement models from a variety of jurisdictions and recommend improvements to the Alberta model. The study, **published in 2021**, examined the applications of a "category management" approach in determining which goods and services should be left to the discretion of individual ministries or standardized under a central process.

Alberta's current procurement processes are guided by the **Procurement Accountability Framework** (PAF). In 2022, the Auditor General of Alberta published its Report on Alberta Infrastructure Procurement Processes, which we examined in **last year's procurement review**. The Auditor General's report contained a series of recommendations to address critical breaches of the PAF, trade agreements and obligations, and the common law.

Proposed Model

The Action Plan adopts the 2021 study's suggestions by implementing a "hybrid-centralized" model, drawing on observations from Australia, Ireland, the United Kingdom, and provinces across Canada. The practical elements of this model could include:

- developing consistent strategies for categories of common spending across ministries;
- establishing province-wide master agreements for centralized categories;
- allowing other provincial entities to develop sub-agreements under the master agreements; and
- setting standards of practice for non-centralized categories to follow.

This approach seems to align with the recommendations for increased standardization and consistency from the **Auditor General's 2022 report**. However, the government is still in the early stages of this process and has yet to share further detail on what these categories will be or how they will be managed.

Impact on Procurement Strategy

The Action Plan was released in the wake of public calls for the Auditor General to review the province's privatization of medical laboratory testing. The Office of the Auditor General has separately confirmed that it will be auditing the related procurement and contracting processes. The results are expected to be released in early 2024 and will very likely impact the province's implementation of new procurement strategies. According to the Action Plan announcement, the Alberta government is committed to industry and community collaboration in its progress toward standardized procurement processes. Preventing future procurement uncertainty will require striking the delicate balance between flexibility and consistency to support equitable and efficient business dealings. As we head into 2024, we expect to see further development on this topic as the Action Plan crystallizes into tangible regulatory change.

ALBERTA NO LONGER USING P3 APPROACH AS PREFERRED WAY TO BUILD SCHOOLS

The Alberta government has signalled that it will be moving away from relying on public-private partnerships (P3s) for the construction of public facilities, including schools.[10] The 2019 Alberta budget promised 24 new school projects throughout the province, and Prasad Panda, then minister of infrastructure, announced that the UCP government intended to build five of the schools as P3s. This announcement came shortly after former Premier Jason Kenney announced that the province intended to focus on pursuing the P3 approach to funding and building public infrastructure.

However, in December 2022, Nathan Neudorf, the minister of infrastructure at the time, indicated that the P3 model would not be the preferred method for building schools going forward and cancelled a plan to build six new P3 schools. It was noted that P3s only save the public money in cases where project costs exceed C$100 million. Schools typically cost between C$10 and C$90 million to build. Accordingly, to save money, governments have traditionally entered into P3 contracts to construct "bundles" of schools that share similar designs and construction processes. However, the cost-saving measures created by bundling can create obstacles including an inability to cater designs to an individual community's needs, such as building schools in combination with other public facilities — including, for example, libraries, arenas, and recreation centres. When schools are constructed by P3s, there is generally little room for flexibility and an inability to modify design plans to incorporate changes or additions that would benefit individual communities. It is also challenging to find

10 Canadian Broadcasting Corporation, "Alberta no longer using P3 approach as preferred way to build schools" (2022), online: **https://www.cbc.ca/news/canada/edmonton/alberta-no-longer-using-p3-approach-as-preferred-way-to-build-schools-1.6697233** (*CBC*).

partners for P3 projects in remote communities, which limits competition and potentially increases bid prices. The nature of P3 contracts, which can be long-term and include private maintenance agreements extending for up to 30 years after construction is complete, leave school boards powerless to make changes even where maintenance work is being done to a poor standard or being completely ignored.

Industry leaders have expressed a desire to provide individual school boards with the ability to manage construction for their own school projects. This will require the provincial government to provide upfront capital to build new schools. In the short term, this may increase Alberta's debt, but the government's hope is that it will allow for an overall decrease in public spending and new schools that cater to the needs of specific communities, providing stakeholders like students, teachers, staff, and school boards, with more control over their facilities. Notably, the **Alberta School Capital Manual** for the 2023/24 school year, still lists P3 as a common delivery system for school construction, along with design-bid-builds and design-builds.

INCREASED EMPHASIS ON SOCIAL PROCUREMENT IN WESTERN CANADA

Social procurement is a process that allows governments, institutions and other purchasers the ability to use their purchasing power to effect change and promote social, environmental, and cultural goals. The City of Calgary's (City) Social Procurement Policy is an example. When near-equal bids are received, the City uses factors such as social equity, a commitment to the green economy and commitment to reconciliation with First Nations to select the winning supplier. Currently, 53% of City contracts are going to the proponent that has a higher rating on the City's **Social Procurement Questionnaire**.

While the City's Social Procurement Policy requires potential suppliers to respond to opportunities in an honest, fair and comprehensive manner, there are weaknesses in the process. Proponents can easily just tick a box on certain items, and there have been instances where suppliers have stretched the boundaries of ethical conduct. In response to this, the City's supply management business unit audits suppliers under the policy, and the questionnaire requires supporting documentation or

certifications. A second-stage compliance process has been in place since 2020.

The policy gives a slight advantage to businesses with a stronger social focus, with 5-10% of the weighting attributed to the result of the social questionnaire. However, traditional considerations like cost and quality are still weighed more heavily and the City has **stated** that there is no evidence that social procurement increases the City's own costs. This emphasis on creating a more holistic approach to bid submissions means a shift in focus from simply looking at lowest cost to looking for an overall, well-rounded bid submission. Moving forward, companies responding to RFPs and other bid processes may want to consider structuring their businesses to address issues that are growing community priorities, for example, incorporating the use of eco-friendly and green supplies, utilizing local resources to derive social benefit to the community, or increasing internal diversity in their employee base.

One city in Canada has already taken the holistic bid approach one step further by creating a procurement policy aimed at advancing reconciliation efforts with Indigenous businesses. The City of Regina (City) approved an **Indigenous Procurement Policy** in February 2023. Its purpose is to stimulate Indigenous entrepreneurship, business and economic development, providing Indigenous vendors with more opportunities to participate in the economy. The policy is aimed at significantly increasing the rate of procurement from Indigenous suppliers to achieve a minimum of 20% of the total value of the City's procurement contracts being held by Indigenous vendors.

The term "Indigenous Vendor" as a business is defined within the policy. Whether a sole proprietorship, a co-operative, a non-profit or a joint venture, the key aspect is that a majority (50% or 51% depending on the legal structure) of the business be beneficially owned by Indigenous persons for it to constitute an Indigenous Vendor.

The movement toward Indigenous procurement policies appears to be spreading countrywide. While none of the following currently have Indigenous procurement policies in place, the federal government, Toronto, Vancouver, Edmonton, and Saskatoon have all hinted that such a policy is likely on the horizon. While social procurement considerations may still play a relatively small role in overall procurement processes in Canada, incorporating social procurement considerations into their business model may give bidders a slight edge on an equally priced bidder. We expect to see social procurement continue to grow in Western Canada and nationally.

Québec: Case Law Review and AMP's Report on the Contract Management Review

VILLE DE SHERBROOKE V. SHERAX IMMOBILIER INC. (2023 QCCA 554)

In *Ville de Sherbrooke v. Sherax Immobilier inc.*, the Court of Appeal confirmed in part the **Superior Court judgment rendered in 2021**, which was discussed in our **2021 annual publication**. The Court of Appeal confirmed that the City of Sherbrooke (the City) breached its duty to inform and its pre-contractual duty of loyalty and collaboration towards Le Groupe Axor inc. (Axor) and its subsidiary Sherax Immobilier inc. (Sherax).

In 2006, the City entered into a public-private partnership agreement with Axor for the design, construction and operation of an indoor soccer centre (the Centre) for a 40-year term. After the construction phase, Sherax was to lease the finished Centre to the City's sports organizations. In the tender documents, the City estimated that the sports organizations could lease the Centre for close to 5,000 hours per year but called on the bidders to conduct their own market analysis with respect to the Centre's financial viability. The evidence at trial showed that the City's estimate of the Centre's reservation needs was the basis for Axor's financial proposal.

The tender documents suggested that the City would fund the sports organizations to meet the rental hours per year as estimated in the tender documents. However, it was demonstrated during the trial that the City never intended to do so and refrained from disclosing its intentions to Axor prior to signing the contract. Ultimately, due to lack of funding, the sports organizations ended up leasing the Centre for far fewer hours per year than what had initially been estimated by the City in the tender documents and relied on by Axor.

The Court of Appeal agreed with the Superior Court's conclusions that the City had breached its duty to inform and co-operate by failing to disclose to Axor that the organizations' ability to rent the Centre depended on the City's financial assistance, and that it had no intention of providing subsidies beyond what was necessary to ensure the minimum guaranteed rental that would enable Axor to obtain an income of C$400,000 per year for 10 years. The use of the words "estimated" and "indicative" in the tender documents could not absolve the City of liability.

With regard to Axor's duty to inform itself, the Court of Appeal held that Axor was justified in relying on the City's estimates. Axor had little time between the issuing of the call for tenders and submitting its bid, and the preparation of the bid required a significant amount of work. Hence, Axor could not have conducted a proper market analysis to validate the City's estimate. In addition, even if it had conducted such analysis, the organizations could only have confirmed the City's own estimate. Finally, the Court of Appeal reiterated that where the owner is a municipality that has a specific expertise, the contractor can assume that the information provided in the tender documents is adequate and sufficient. The Court of Appeal therefore upheld the trial judge's conclusion as to the City's liability towards Axor, for a total amount of C$2,170,063.55 representing Axor's loss of profits.

VILLE DE MONTRÉAL V. 9150-2732 QUÉBEC INC. (2023 QCCA 567)

In *Ville de Montréal v. 9150-2732 Québec inc.*, the Court of Appeal confirmed that a municipality cannot launch a public call for tenders, review the bids submitted and, in parallel, negotiate a contract directly with another service provider for the same services while maintaining the ongoing call for tenders' process. The **2021 Superior Court decision** was also discussed in our **2021 publication**.

In 2018, the City of Montréal (the City) launched a call for tenders for the removal and disposal of snow within city limits. At the opening of the bids, 9150-2732 Québec inc. (TMD) was the lowest bidder. However, the City decided that the bid was too high and negotiated a contract with another company, Transvac, for the same services. When an agreement in principle with Transvac was approved by City council, the City invoked the standard reserve clause included in the tender documents and cancelled the call for tenders. A similar situation occurred in 2020. TMD sued the City, arguing that it could not engage in negotiations with competitors in parallel to an active call for tender process.

At trial, the City argued that it could negotiate a mutual agreement contract with Transvac pursuant to s. 575.3(3) of the *Cities and Towns Act* (the CTA), which provides that the tendering provisions do not apply to a contract for the provision of bulk trucking services. The Superior Court ruled that this exception must be interpreted restrictively, and that the City had to either proceed by a call for tenders, or enter into a contract by mutual agreement, but not both simultaneously, and held the City liable for the damages caused to TMD.

The Court of Appeal agreed with the Superior Court and concluded that the presence of a reserve clause in the tender documents does not allow a city to avoid the tender process and accept non-compliant bids or to breach its obligations to treat all bidders equally, fairly and in good faith. Nor does a reserve clause permit the application of an undisclosed condition in the tender documents. The call for tenders did not include any indication allowing the City to negotiate or enter into a contract by mutual agreement at the same time as the tendering process. Moreover, according to the Court, the purpose of the CTA is to ensure a transparent process that gives all bidders an equal chance. Thus, municipalities cannot rely on the exception provided for in s. 573.3(3) of the CTA to simultaneously launch a call for tenders and negotiate a contract by mutual agreement. The Court of Appeal confirmed that TMD was entitled to be compensated for the loss of profit it suffered as a result of not obtaining the contracts, for a total amount of C$1.98 million.

L.A. HÉBERT LTÉE V. VILLE DE LORRAINE (2023 QCCS 1020)

In *L.A. Hébert ltée v. Ville de Lorraine*, the Superior Court held that the Ville de Lorraine (the City) was entitled to not require that the lowest bidder hold an authorization from the Autorité des Marchés Publics (AMP), even if there was a requirement to that effect in the call for tender documents, since the bid's value was below the threshold of C$5 million required by the *Act Respecting Contracting By Public Bodies* (the ACPB).

In December 2019, the City issued a call for tenders for work related to the stabilization of a creek. In January 2020, L.A. Hébert ltée (Hébert) submitted its bid and ranked as the second-lowest bidder. The contract was ultimately awarded to 9267-7368 Québec inc. (9267), which had the lowest bid with an amount of C$4,213,795.

However, the tender specifications stipulated that all bidders needed to hold a valid authorization to contract from the AMP at the time of the bids' submission. Hébert held this authorization, but not 9267. Hence, Hébert argued that 9267's bid had to be rejected because it did not comply with one of the essential requirements of the call for tenders.

According to the Superior Court, s. 21.17 of the ACPB requires that project owners and bidders obtain an authorization from the AMP only if the contract has a value equal to or greater than C$5 million, which was not the case with 9267's bid. The Superior Court added that a municipality may not impose requirements more restrictive than those imposed by the government. It is the responsibility of the government, not of municipalities, to impose the authorization of the AMP when investments are below the threshold it determined. Consequently, when a municipality issues a call for tenders for services below the established threshold and wishes to require an authorization from the AMP, it must make a request to the government under s. 21.17.1 of the ACPB, which may grant it by adopting a decree.

The Court concluded that the requirement to hold an AMP authorization did not apply to 9267's bid, since its value was below the minimum threshold. Moreover, as the City had not applied to the government to impose the authorization of the AMP, the condition set out in the specifications was contradictory to the ACPB and the decree. The City was therefore obliged to select the lowest bid, which it did, and could not reject it on the ground that it did not have an AMP authorization. Therefore, Hébert's action was dismissed.

9006-9311 QUÉBEC INC. (DEVCOR (1994)) V. VILLE DE BOISBRIAND (2023 QCCS 2109)

In *9006-9311 Québec inc. (Devcor (1994)) v. Ville de Boisbriand*, the Superior Court provided guidance on the municipality's ability to correct errors in the bid forms.

In February 2019, the Ville de Boisbriand (the City) issued a call for tenders for the conversion of a church into a cultural creation centre. Three companies responded to the tender, including Plaintiff 9006-9311 Québec inc. (9006) and Groupe Piché Construction inc. (Piché). 9006 was initially the lowest bidder, and the price difference between 9006 and Piché, the second-lowest bidder, was only C$14,245.15. Following the bid opening, the City corrected what it considered to be calculation errors in the bids of 9006 and Piché. As a result of the City's corrections, Piché became the lowest bidder and obtained the contract.

The Court had to determine whether the City was liable for the damage suffered by 9006 as a result of awarding the contract to Piché, and whether Piché's bid was non-compliant with the tender documents.

The Court concluded that the City was not entitled to make corrections to Piché's bid, as the general specifications of the call for tenders that allowed the City to correct calculation errors did not apply in this case. The error corrected by the City was that there was a systematic difference of 11.9% between the price per unit and the total price for the same items. The effect of correcting the error was to subtract nearly C$20,000 from the total bid price of Piché. The Court explained that the systematic difference between the price per unit and the total price was due to an error made by Piché when filling out the form, which probably omitted to include its profit in the price per unit. The City could not consider that this error was a calculation error and was not justified in modifying Piché's bid form. The contract should therefore have been awarded to 9006.

9006 also contended that Piché's bid was not compliant since certain essential documents (e.g., pages from the addenda) were missing. The Court concluded that the tender documents clearly indicated the list of documents to be attached to the bid, and that this was an essential condition of the call for tenders. Thus, Piché's bid was indeed non-compliant since the irregularities raised by 9006 were major.

AMP'S REPORT ON THE CONTRACT MANAGEMENT REVIEW

In November 2023, the AMP released a report on the review of contract management by the Ministère des Transports et de la Mobilité Durable (the MOT). The review covered 10 areas of the MOT activities and was based on more than 2,500 contracts and 200 meetings with MOT representatives, deputy ministers, experts, contractors and other interveners.

The report sets out 16 recommendations addressed to the MOT to ensure better management of its public contracts. They include:

— Use clear instruments with respect to the obligations related to the planning of maintenance work on bridges to ensure, among other things, a better planning and project management to avoid that the MOT finds itself in urgent situations where it awards contract by mutual agreement;

— Use required instruments and appropriate control measures to ensure the respect of the MOT's contractual obligations related to the execution of contracts, including for contract amendments and work progress monitoring;

— Use instruments to support the preparation of the MOT's contractual process to publish its call for tenders in a timely manner taking into account certain considerations, such as availability of competitors; and

— Put in place the appropriate control measures to ensure proper and rigorous monitoring of contractors' compliance with their contractual obligations and uniform enforcement of penalties and pecuniary withholding.

We will closely monitor the application of these recommendations by the MOT in the upcoming months.

FOR MORE INFORMATION, PLEASE CONTACT THE PROCUREMENT GROUP AT McCARTHY TÉTRAULT

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