Public Procurement Law : 2020 Cases and 2021 Trends

mccarthy tetrault

2020 Key Cases and Updates in Public Procurement Law

The year 2020 saw many changes to how people and companies do business. It saw the closing of borders, stay at home orders, and massive disruption. Throughout the year we saw continued activity in the public procurement space: both in terms of public procurement by purchasing entities, and in new cases across Canada.

In the hopes of providing a “one stop shop”, we’ve outlined below some of the key developments and cases in procurement law from across the country. To that end we have highlighted a selection of trends from the Canadian International Trade Tribunal, the Federal Court, and the various provincial courts to provide insight into the evolution of procurement law through this tumultuous year.

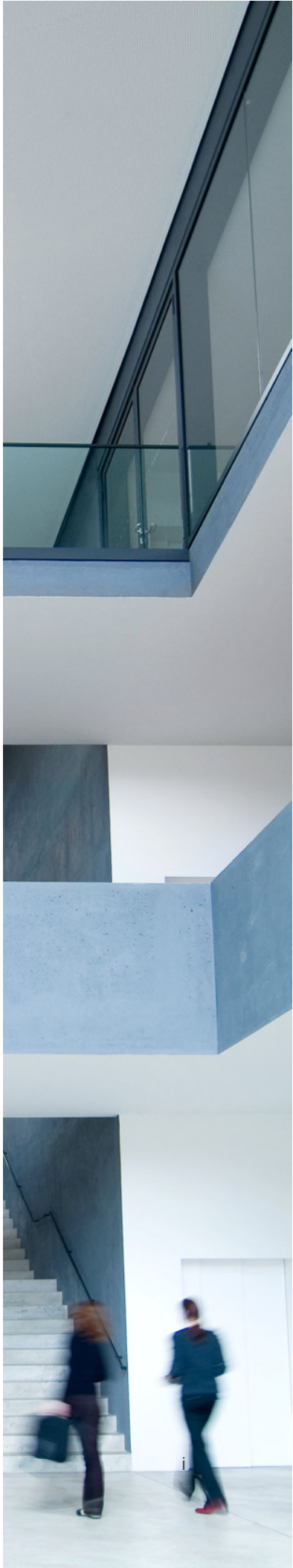

Table of contents

Broader Trends in CITT decision making December 2019-2020

The Canadian International Trade Tribunal ("**CITT**") has jurisdiction over complaints by bidders or prospective bidders for contracts with the Federal Government for the supply of goods or services in regards to whether the bid process is compliant with obligations under national and international trade commitments. A complainant may submit to the CITT for a "procurement inquiry" during which the Tribunal will determine whether the government agency has followed all its obligations under the relevant trade agreement(s). Although the CITT has narrow jurisdiction over Federal agencies, it has by far the deepest body of tribunal decisions on this topic. The CITT is, consequently, a highly persuasive body for determining trade obligations throughout Canada.

Over 2020, the CITT continued to affirm key pillars of its decision making process.

CITT incorporates the new Standard of Review

In 2020 the Supreme Court provided a new framework for assessing the standard of review for judicial review in *Vavilov*.[1] While this standard of review is specifically aimed at the judicial review process, the CITT had historically adopted the correctness/reasonableness framework from *Dunsmuir* in assessing decisions of the procuring entities in its procurement inquiries. In *AJL Consulting*,[2] the CITT integrated the approach taken by the Supreme Court in *Vavilov* into its procurement complaint analysis.

AJL Consulting made a complaint in regards to the Department of Agriculture and Agri-Food's ("**AAFC**") procurement of financial services related to Farm Debt Mediation Services. AJL was the sixth ranked bid. AJL argued that the AAFC had improperly interpreted its RFP by awarding offers to five, and not six bidders. AJL argued that the tender document was ambiguous in the number of bids that should be accepted by the AAFC, and that the AAFC had both wrongly and unreasonably interpreted the tender terms by only offering five contracts.

Pointing to its decision in *Heiltsuk Horizon,*[3] the CITT noted that the standard of review for a CITT procurement inquiry is reasonableness, and not correctness. The CITT reaffirmed that the Supreme Court of Canada's decision in *Ledcor Construction* – in which the Court found appellate courts should apply the correctness standard when reviewing standard form contracts – was not applicable to the CITT's inquiry process as the decision was in regards to a court, and not an administrative tribunal's, review of an administrative decision.

Further, the CITT then turned to the Supreme Court of Canada's decision in *Vavilov.*[4] The CITT particularly noted that, according to the Court's decision, "[a]dministrative decision makers are not required to engage in formalistic statutory interpretation exercises in ever case", and in addition, that a review of the reasonableness of a decision can still be conducted, even if the administrative decision maker provided neither a record or a written decision to explain its decision.

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[1] *Canada (Minister of Citizenship and Immigration) v. Vavilov* (19 December 2019), 2019 SCC 65 at paras. 101

[2] PR-2019-045.

[3] (18 October 2019), PR-2019-025 (CITT) [Heiltsuk Horizon] at para. 47.

[4] *Canada (Minister of Citizenship and Immigration) v. Vavilov* (19 December 2019), 2019 SCC 65 at paras. 101

The CITT found that the terms of the tender were not clear, but that there was sufficient evidence in the wording to support a reasonable interpretation that the tender allowed for only five contracts to be awarded.

The CITT's re-affirmation that it will continue to pursue a reasonableness standard as prescribed in *Vavilov* indicates that it will afford substantial deference to an administrative decision-maker interpreting its own RFP terms. Even if the language of the RFP is vague, the CITT will find an interpretation reasonable if there is *some* basis for in the RFP language.

Jurisdiction

The CITT's jurisdiction is tightly prescribed under its enabling statutes regarding what complaints it may hear. The CITT has routinely held that it can only hear complaints regarding covered procurements, and only hear complaints regarding the procurement process.

Procurements are only considered "covered procurements" where they meet the three tests set out in any related trade agreement: (1) that they be procurements for a covered entity; (2) that they be procurements for covered goods or services; and (3) that they be procurements valued at or above specific monetary thresholds.

However, in 2020 a case arose that sought to add a further restriction on the definition of "covered procurement" with regard to Canada's domestic trade agreement (formerly the *Agreement on Internal Trade,* presently the *Canadian Free Trade Agreement*): namely that the contract had to be performed within Canada. In *Newland Canada Corporation*,[5] Newland Canada Corporation ("**Newland**") filed two complaints at the CITT concerning a tender for the provision of hotel accommodations in Germany for Canadian Armed Forces members. Newland alleged that the DND awarded contracts to a successful bidder who did not meet the location requirements set out in an RFP.

In response, the government argued that the matter was barred as it was not a covered procurements. It noted that all of Canada's *international* free trade agreements exempted this type of procurement from any obligations under the trade agreements. With regard to the *CFTA*, DND argued that the agreement specifically covered procurement "within Canada". Since the contract would be performed *outside* Canada it was not covered.

While the CITT accepted that the international agreements were barred, it rejected Canada's approach regarding the CFTA. The CITT noted that the *CFTA* applied to a procurement made "within Canada" – meaning that the corporation is Canadian, the government agency Canadian, the contracts were concluded in Canada, the procuring entity was based in Canada, and the contract was governed by Canadian law. The fact that the service was ultimately provided abroad did not negate the applicability of the CFTA, or the jurisdiction of the CITT to hear the matter. Newland was ultimately successful in its complaint and was awarded lost profits.

We also saw further jurisprudence regarding the scope of the procurement process. In *J.A. Larue Inc.,*[6] the CITT again affirmed that it will **not** interfere in matters that it views as contract administration (rather than as part of the procurement process). In that case the complainant insisted that the winning bidder was only successful because it had offered technology that it knew was insufficient to meet the terms of the RFP.

The CITT determined that the only requirement was for the bid to conform to the essential requirements of the tender documents. The CITT noted that in previous cases where it intervened by finding that tenders had not

[5] PR-2019-054 and PR-2019-055.

[6] PR-2020-004.

been properly evaluated, were cases where the tender documentation required considerable detail to demonstrate compliance. In the present case, it found that the tender supplied the appropriate level of detail called for by the solicitation documents.

It finally concluded by noting that if the equipment provided did not meet the requirements of the RFP, then it was a matter of contract administration, and therefore outside of its jurisdiction. However, it should be noted that this is not necessarily correct as a categorical statement. The CITT has routinely held that it *can* intervene where bidders provide goods or services that would have been non-compliant with the RFP documentation – as accepting such goods or services could not be responsive to the RFP that was issued and must, instead, be an illegal sole source.

Timeliness

Historically, the CITT has always zealously protected the strict statutory limitations period established under the *Canadian International Trade Tribunal Procurement Inquiry Regulations.* Simultaneously it has also consistently barred complaints brought before they were ripe, for example complaints wherein the complainant had objected to the relevant procuring entity and had not yet received a final refusal of its objection. These twin trends, which both reflect an ultimate concern with timeliness of complaints, continued into 2020, with the CITT reaffirming the importance of carefully timing a complaint, to ensure that the CITT considers the actual substance of the complaint.

As described below, the CITT frequently dismissed complaints 1) that related to the late submission of a response to an RFP, 2) if the complaint was filed after the 10 day statutory complaint time limit, and 3) if a complaint was made prematurely before a federal agency had fully rejected a company's challenge to a procurement decision.

1. A response to an RFP must be submitted on the strict timeline outlined in the proposal document. The CITT will not require a government business to review an RFP application even if the proposal is minutes late[7]

2. The CITT will not hear any decision that was made outside the statutory 10 days which a complainant has to file an application with the CITT.[8] This is despite the fact that the CITT has acknowledged that the federal government often provides unclear guidance to unsuccessful bidders concerning the appropriate route to appeal a procurement decision. Bidders are expected to know their remedies and be prepared to act on them in a timely fashion.[9]

3. The CITT will also dismiss premature applications. A complaint will only be heard if, at the time of its filing with the CITT, the relevant government department had already responded that it will not re-consider its procurement decision.[10] Generally, however, the CITT will dismiss such complaints without prejudice to

[7] SoftSim Technologies Inc. - PR-2020-041; 2278089 Ontario Limited d.b.a. Snap Cab, https://decisions.citt-tcce.gc.ca/citt-tcce/p/en/item/470857/index.do

[8] WW-ISS Solutions Canada, https://decisions.citt-tcce.gc.ca/citt-tcce/p/en/item/459729/index.do; Seigniory Chemical Products Limited, trading as SCP SCIENCE, https://decisions.citt-tcce.gc.ca/citt-tcce/p/en/item/460176/index.do

[9] Nur Construction Ltd. - PR-2020-018

[10] Tangle Ridge Custom Crushing Ltd. - PR-2020-040; MediQuest Technologies Inc. - PR-2020-033; Melanite Group Ltd. - PR-2020-029; Kaméléons & cie Solutions Design inc., https://decisions.citt-tcce.gc.ca/citt-tcce/p/en/item/460785/index.do

the right to refile them once they become ripe – indeed at times the CITT will allow a filing of an essentially identical complaint incorporating the earlier premature record once the matter has ripened.

It is also important to make sure that a complaint is filed in regards to a still active contract. The CITT does not have the authority to postpone retendering, only to postpone the awarding of a *proposed* contract.

For example, in *Canadian Maritime Engineering Ltd.*, "**CME**" was awarded a contract by Public Works and Government Services ("**PWGSC**") for dismantling and disposal of a former vessel of the Department of Fisheries and Oceans. Within a month, the federal government terminated the contract, indicating there were issues with the RFP and that it intended to retender. CME objected to the termination of its contract, and requested that the CITT postpone the re-tendering and award of a new contract.[11]

The CITT determined it had no authority to offer the remedies sought by CME. The CITT noted that it was limited to an inquiry related to a "designated contract *proposed* to be awarded."[12] CME's contract had been awarded, and cancelled – and PWGSC had never retendered. As such, CITT had no contract to review, and no authority to award remedies.

As these cases demonstrate, the CITT has continued to stress the importance of its procedural timelines. Making sure that a complaint is filed on the right timeline, and when a government agency has completed certain procedural steps, is often dispositive of whether a complaint, that may be substantively valid, is considered by the CITT. It is important to consult counsel immediately when considering filing a complaint.

Remedies and Costs

The CITT has broad remedial powers, that can be used to rectify financial losses accrued by a company that was negatively impacted by an improperly conducted procurement process. Importantly, the appropriate remedy for an error on the part of the government made in good faith is re-solicitation and not the awarding of the contract to the complainant. However, the CITT may award bid preparation costs and reasonable costs to the party.[13]

When backed with credible economic and financial evidence, a claim for compensation for an improper procurement process can be made on a 'revenue-less-costs' methodology – in which a party who would have made profit from a government contract, but for improperly not being selected through the procurement process, tabulates their damages as the amount of the contract value reduced by their specific cost of overhead. The CITT has favoured this calculation methodology over a standardized industry-wide profit margin.[14]

Be careful in the order, frequency and volume of communications with the CITT and parties. In *Softsim,* the CITT cautioned a party that had been inefficient in its use of the Tribunal's files across multiple procurement claims. The Tribunal threatened to levy substantial indemnity costs against Softsim if it continued its conduct.[15]

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[11] Canadian Maritime Engineering Ltd. - PR-2020-044

[12] SOR/93-602 [Regulations], s. 30.13(3)

[13] Bluenose Transit Inc.; https://decisions.citt-tcce.gc.ca/citt-tcce/p/en/item/470559/index.do

[14] V Zero Corporation, https://decisions.citt-tcce.gc.ca/citt-tcce/p/en/item/485166/index.do

[15] SoftSim Technologies Inc.; https://decisions.citt-tcce.gc.ca/citt-tcce/p/en/item/485306/index.do

Federal Court of Appeal Upholds CITT Practice Regarding Jurisdiction

The Federal Court of Appeal ("FCA") grappled with a reasonably regular issue in CITT jurisprudence – the distinction between the procurement process and contractual performance. The CITT has repeatedly been clear that it lacks jurisdiction to consider issues of contractual performance, and is limited to only considering procurement processes. However, at times litigants have been able to argue that change orders or delivery of goods or services that were not exactly as set out in the solicitation amount to effectively constitute a new solicitation that was not properly bid.

Such a case arose in, 2019 FCA 307[16] where the Tribunal dismissed an appeal of a CITT dismissal of the complaint by Vidéotron regarding the award of a change order to Bell Canada or its affiliate to provide telecommunications infrastructure related to the G7 Summit held in La Malbale, Québec. Vidéotron had argued that the award constituted a contravention of the CFTA and NAFTA. The CITT had dismissed the complaint on several grounds, the most significant being that the award to Bell Canada appeared to be contemplated in clauses within the original contract which gave Canada the right to negotiated changes on an *ad hoc* basis (the "ad hoc clauses").

Despite attempts by Vidéotron to portray the judicial review as being one of procedural fairness (to attract a standard of review of correctness), the FCA held that this was ultimately a substantive issue. There was no fairness issue as Vidéotron knew the case it had to meet and had a full and fair chance to make that case.

When considering the substantive issues, the FCA held that (1) the CITT's original call for tenders specified that the Government of Canada's needs would fluctuate, indicating at the outset that Shared Services Canada ("SCC") envisioned it may require existing infrastructure to be improved; (2) the *ad hoc* clauses were sufficiently clear as to when they could be triggered: special needs of an exceptional nature, short-term requirements, emergencies or special events (3) the *ad hoc* clauses were sufficiently clear regarding each party's obligations; and (4) it was reasonable to conclude that SCC did not obtain new goods or services under the *ad hoc* clauses.

This increases the importance of paying careful attention to the resulting contract clauses within RFPs and the ability of purchasers to engage in change orders or procurement of additional goods and services during the lifetime of the contract. It also serves as a restriction on the ability of bitter bidders to essentially "create" a procurement process to challenge.

[16] **2019 FCA 307**

Ontario – New Procurement Body Established, but Little New Jurisprudence

2020 was marked, throughout Canada and the world, by procurement struggles stemming from the global COVID-19 pandemic. In Ontario, these struggles kick-stated the creation of a new centralized procurement agency meant to ensure supplies could better and more efficiently be sourced to supply multiple organizations. The government of Ontario has estimated that centralized procurement could generate savings of approximately $1 billion annually.

Supply Ontario, officially Centralized Supply Chain Ontario, was established on November 5, 2020 pursuant to O. Reg. 612/20 Centralized Supply Chain Ontario (the "**Regulation**") under the *Supply Chain Management Act (Government, Broader Public Sector and Health Sector Entities), 2019*.

Supply Ontario is responsible for providing and supporting supply chain management on behalf of (and collecting supply chain management and vendor performance data from) the following covered entities:

- "government entities", namely Crown in right of Ontario (including, any ministry of the Government of Ontario), a public body within the meaning of the *Public Service of Ontario Act, 2006*, the Independent Electricity System Operator, and Ontario Power Generation Inc. and its subsidiaries;

- "broader public sector entities", namely "boards" as defined in the *Education Act*, post-secondary educational institutions that receive regular operating funding directly from the Government of Ontario, children's aid societies, corporations a corporation controlled by one or more of these entities that exists solely or primarily for the purpose of purchasing goods or services for the entities, as well as any other entities prescribed for the purpose definition; and,

- "health sector entities", namely any person or entity that receives government funding to provide or support the provision of health services and is prescribed for the purpose of this definition (such as hospitals and clinics), as well as corporations controlled by any of these entities whose primary purpose is to purchase goods or services for those entities.

> **The Regulation also provides that Supply Ontario has the additional object of providing and supporting supply chain management in respect of personal protective equipment on behalf of entities other than government entities, broader public sector entities and health sector entities. This provision is aimed at managing the ongoing COVID-19 pandemic, as well as any future disease outbreaks, and centralizing purchases of relevant equipment, including for private sector entities.**

Supply Ontario may provide notice to any of the covered entities that it will provide or support supply chain management on behalf of that entity beginning on a specified date. Any entity receiving such notice must obtain the specified supply chain management service from Supply Ontario as of that date, subject to further notices from Supply Ontario

The Regulation also imposes a broad reporting requirement on the covered entities. Upon request, they must provide Supply Ontario:

1. Current inventories of any goods and future inventory requirements.
2. Current and future procurement activities.
3. Supply chain opportunities, contingencies and constraints.
4. Information about contracts related to the procurement of goods or services.
5. Any other information related to supply chain management or vendor performance that the Corporation specifies.

To date, the government has provided little guidance as to how this single supply chain is intended to operate. Business groups across the province have raised concerns that procurement under Supply Ontario will be dominated by Greater Toronto Area-based suppliers, owing to the scale at which such procurement is likely to be conducted.

Jurisprudence and novel cases

2020 was a sparse year for novel or noteworthy procurement jurisprudence in Ontario. Rather, decisions largely reaffirmed and applied classic principles of procurement law.

In *The Catalyst Capital Group Inc. v. Dundee Kilmer Developments Limited Partnership,* 2020 ONCA 272, the Ontario Court of Appeal dealt with an appeal of a ruling striking the plaintiffs claims against both the corporate defendant and Infrastructure Ontario. There were numerous claims made by the plaintiffs, including that of negligent misrepresentation. However, one important claim that had been struck was an attempt to assert that the "public law duties" of a public procuring entity could ground a civil claim. The lower court had struck this claim without leave to amend. This was upheld by the Court of Appeal, which found that the jurisprudence did not support the recognition of a new tort of "misconduct by a civil authority" in the context of a government tender. The Court did note that prior case law discussed the possibility of *administrative* remedies for breach of public law duties, but found that it was of no use in a civil claim such as that brought by Catalyst.

In *Facchini v. Canada (Attorney General),* 2020 ONCA 454, the Ontario Court of Appeal upheld the trial judge's decision to strike claims for negligent misrepresentation, negligence, and defamation relating to similar bids in a government procurement.

The plaintiff/appellant was a consultant to a third party, Corporate Research Group ("**CRG**"), which provided real property services to the government procurement agency, Public Works and Government Services Canada ("**PWGSC**").

PWGC issued a request for standing offers for the provision of real property advisory services. It advised, through answers to potential bidders, that consultants could appear on more than one bid and that a bidder could appear as a consultant on other bids. Both the appellant and CRG submitted bids containing identical sections and other content similarities. Standing offers were awarded to the appellant and CRG. After an investigation under the *Competition Act,* both the plaintiff and CRG were charged with bid-rigging. While CRG pleaded guilty, charges against the appellant were eventually stayed. The appellant then sued the government and government employee involved in the bid process for negligent misrepresentation, negligence, and defamation.

The Court of Appeal confirmed, as had been held by the trial judge, that the government owed no duty of care to the bidders, and that the ability to participate in multiple bids under the process did not relieve the bidders from their obligations under the *Competition Act.*

Newfoundland and Labrador

In *Triton Hardware Limited v. Torngat Regional Housing Association*, 2020 NLSC 72, the Supreme Court of Newfoundland reaffirmed that the discretion provided by a general privilege clause is limited, and does not permit an owner to choose a successful bidder on the basis of criteria not disclosed in the tender documents. It further confirmed that the dispute regarding the contract award was amenable to disposition by summary trial and summary judgment.

The defendant owner, Torngat Regional Housing Association ("**Torngat**") had requested bids for the supply of home construction materials. Triton Hardware Limited ("**Triton**"), the plaintiff, submitted the lowest compliant bid. Torngat, however, awarded the contract to another bidder with whom it had previously worked on the basis that (a) the price difference between the two bids was "negligible" and (b) Torngat had been satisfied with the prior performance of the other bidder. In doing so, Torngat sought to rely on the following privilege clause in its Instructions to Bidders: "**The awarding of the contract will be based on the lowest average price for quality material. **The Lowest of Any Quotes Will Not necessarily Be Accepted.*"**

The Court confirmed that while the privilege clause allowed Torngat to refrain from awarding the contract to any bidder at all, it did not permit Torngat to select a different bidder on the basis of criteria not disclosed in the tender documents. Rather, as made clear by the Supreme Court of Canada in *M.J.B. Enterprises Ltd v. Defence Construction (1951) Ltd*, [1999] 1 S.C.R. 619 and *Martel Building Ltd. v. R.,* 2000 SCC 60, the privilege clause could not be relied on to give preferential treatment to certain bidders on the basis of undisclosed terms as this would violated the implied obligation in such contracts to treat all bidders fairly. The Court awarded Triton its lost profits.

British Columbia – Ensure Proper Insurance

In *Nelson v. British Columbia*, 2020 BCSC 479 the Supreme Court of British Columbia affirmed that the owner of a procurement process is not liable for any negligent acts of the contract owners where the contractor is considered an independent contractor.

In this case, the plaintiff sued British Columbia for damage done to his property as a result of a debris flood released from the Columbia & Western Rail Trail ("**CWRT**") embankment. BC Tourism was responsible for the initial purchase of the CWRT. However, BC Tourism was dissolved and its assets were transferred to British Columbia. The CWRT is built on an embankment. It redirected flow of a creek through a flume which passed under the railway returning the creek to its natural course (the "**Crossing**"). Central to the litigation was a culvert and related repairs done at the Crossing (the "**Culvert**").

The plaintiff submitted that the Province was negligent in the installation, maintenance and inspection of the Culvert. The Province submitted that it could not be held liable for actions of independent contractors it hired to inspect, repair, install and maintain the Culvert pursuant to a procurement process.

Shortly after acquiring the CWRT, Tourism BC put out a request for proposal for ""'Rails to Trails Project Management for Construction Improvements for the CWTR from Castlegar to Farron." Katim Enterprises ("**Katim**") was the successful bidder. White Contracting was awarded a contract as an excavator/operator to carry out Culvert inspection, cleaning, and repairs.

The Court determined that the plaintiff signed a waiver excluding all claims by the plaintiff against the Province related to damages caused by flooding or erosion. However, in the alternative, the Court considered whether the plaintiff's claim was otherwise barred because Katim and White Contracting were independent contractors pursuant to the contract signed as a result of the procurement process.

The evidence at trial revealed that Tourism BC did not inspect the Crossing or decide what to do about it; all these decisions were made by Katim, White Contracting, and Pennco. The British Columbia Supreme Court held that British Columbia could not be liable for the actions of Katim and White Contracting as they were independent contractors. The contract between Katim and Tourism BC contained a warranty that Katim was "an independent contractor and not the legal agent, employee, partner or representative" of Tourism BC. Further, Katim and White Contracting were both required to have comprehensive general liability insurance and add Tourism BC as a named insured.

> **This underscores that project owners should ensure that the awarded contract contains a warranty that the successful bidder is an independent contractor and requires general liability insurance.**

Alberta – When Must a Bid Comply & Negligent Misrepresentation

In 2020, we have taken a closer look at two particular procurement related cases for what they can tell us about general principles of the subject matter. The first relates to questions of the timing of compliance of bids and the second with negligent misrepresentation claims against purchasing entities for the content of their RFPs.

With regard to the former, in *Aquatech v. Alberta (Minister of Environments and Parks)*, 2019 ABQB 62, affirmed 2020 ABCA 153 the Alberta Court of Appeal affirmed the Alberta Court of Queen's Bench's decision dismissing an application for judicial review. At issue was the tendering process used by Alberta Environment and Parks to solicit bids for a contract for the operation, monitoring and servicing of water and wastewater services in the Kananaskis Region of Alberta. Aquatech had previously provided these services for 16 years but lost the bid at issue.

Aquatech sought judicial review of the Ministry's decision to award the bid to H2O Innovations ("**H2O**"), arguing that H2O did not comply with the requirements of the RFP in that it failed to provide the names of five certified operators who would perform day-to-day services under contract. The Ministry argued in response that the staffing requirement applied to contract performance once the contract was awarded but did not apply to the bids during the evaluation process.

The Alberta Court of Appeal affirmed the chambers judge's holding that the relevant provisions did not require bidders to have five certified operators at the time of the bid, nor did it require them to name five such operators. Bidders could comply with the mandatory requirement by undertaking in their proposals to have five certified operators at the time the services were performed. In the alternative, the Court of Appeal held that this type of non-compliance fit within the narrow category of non-compliances that may be waived as a minor non-compliance. Aquatech's appeal was accordingly dismissed.

This decision provides strong guidance that when drafting an RFP, project owners should be careful to distinguish requirements that apply during the evaluation process from those which apply once the contract is awarded to avoid challenges to the RFP's interpretation. Additionally, it serves as a reminder that where an RFP has a discretion clause, noncompliance can be waived only where a bid is substantially compliant and the noncompliance is minor

In the case of the latter, in *Maple Reinders Constructors Ltd. v. Canada*, 2020 ABQB 58, Maple Reinders Constructors Ltd. ("**Maple**") sought summary judgment regarding a request for proposals issued by Public Works and Government Services Canada for the design and construction of two buildings. The request for proposals was amended to add a geotechnical report concerning the subsurface soil conditions at the proposed construction site by Nichols Environmental (Canada) Ltd. (the "**Nichols Report**").

As the project progressed, Shelby Engineering, who had been retained by Maple to provide materials testing and foundation installation, determined the values in the Nichols Report were too high. As such, the project was paused and Maple had to redesign the foundations at a greater expense to accommodate the actual values.

The Alberta Court of Queen's Bench held that the Nichols Report constituted a representation made to Maple about the subsurface conditions and that Maple relied upon this representation in the bidding process, which was reasonable and appropriate to do.

Maple was awarded damages to compensate for the extra costs incurred as a result of the inaccurate Nichols Report. Bidders and purchasing entities must remember that successful bidders can sue in damages for misrepresentation in the RFP where the contractor reasonably relied on the representation and the misrepresentation cost the contractor additional money to complete the contract. Project owners should be careful to ensure all representations in the RFP documents are accurate, including all subsequent amendments to the RFP.

> **What makes this power particularly important is that it arises in tort, and not contract. As such, it is not bound by the "Contract A/B" framework, and can arise even if a purchaser uses a negotiable or "non-Contract A" style of procurement.**

Manitoba – Bid Bonds Continue to be Problematic

In *Her Majesty the Queen v. Intact Insurance Company*, 2019 MBQB 190, the Province of Manitoba ("**Manitoba**") sought damages from Intact Insurance Company ("**Intact**") pursuant to the terms of a bid bond provided from Intact to Line West Ltd. ("**Line West**") ("**Bid Bond**"). Line West submitted a response to a tender request from Manitoba for the application of pavement marking paint to highways ("**the Bid**"). Line West was the successful bidder. The issues were decided on a motion for summary judgment.

The Special Provisions of the tender stated that the contract would not be awarded to the successful bidder without submission of the Contractor's Certification Form ("**CCF**"). The Special Provisions also stated that failing to submit the CCF within 3 business days upon written request may result in forfeiture of the bid bond (if applicable) and/or a declaration that the bidder be ineligible for future tenders. The Special Provisions also stated that it is encouraged, but not necessary, for all bidders to submit the CCF with their bid.

The Bid contained a CCF which was signed but not completed; Line West did not check off that it had one of the required safety program certifications for the CCF. At the time, Line West did not have any of the prerequisite safety program certifications identified in the CCF.

Line West was advised it was the successful bidder. The notice letter advised Line West that it was required to register for work in Manitoba, to submit a COR letter of equivalency and to submit a fully executed copy of the CCF.

Line West did not submit the complete CCF and advised Manitoba that it was unable to acquire COR equivalency in Manitoba. Manitoba subsequently awarded the contract to the next lowest bidder.

The Court found that on its face the Bid contained no error and was in compliance with the tender documents as the Special Provisions made clear that the CCF was not required to be submitted at the time of the bid. However, it was a term and condition of Contract "B" that Line West, as the successful bidder, submit a fully executed CCF. Since Line West failed to do so, Manitoba was unable to award the contract to Line West. Ultimately, Line West knew or ought to have known that it was required to submit the CCF and declare that it had one of the required safety program certifications. Line West submitted the bid knowing that failure to submit the CCF within three business days of a written request may result in forfeiture of the bid bond and/or the plaintiff declaring the bidder ineligible for future tenders.

The Court was also satisfied that Contract "A" was entered into as the Bid was compliant on its face. Thus it was acceptable for Manitoba to initially accept the Bid. The terms of the Bid Bond were satisfied and Manitoba was entitled to advance a claim on the Bid Bond as it did.

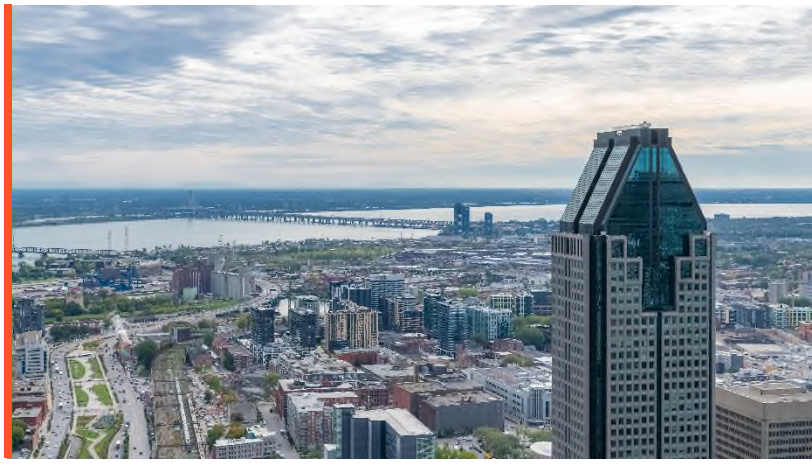
Lastly, Intact submitted that Manitoba was required to award the contract to the next lowest bidder within thirty days after the date on which the bids were opened, which it failed to do. Therefore, Intact argued that all bidders including Line West were relieved of any obligation to enter into Contract B. The General Conditions ("**GC**") stated that: "... If no award is made within thirty calendar days of the date on which tenders were opened then all bidders will automatically be relieved of any obligation to enter into a Contract with the Department."

The Court rejected Intact's argument, finding that the meaning of the GC was to relieve bidders of any obligation to enter into a contract if no award was made within 30 days. In this case, an award was made to Line West, and thus the above provision of the GC did not apply. Further, the Court found accepting Intact's submissions would allow a bidder to purposely delay advising that it was refusing to enter into Contract B to relieve itself of any obligations to do so. It would have the effect of absolving Line West of any liability or damages arising from a failure to comply. As a result, the Court held that such a finding would be inconsistent with the plain, primary and natural meaning of the clause in the entire context of all the words in the tender and would be inconsistent with the integrity of the tendering process.

Québec – Impact of Irregularities in a Bid & Judicial Review of a Debarment Decision

In 2020, we have taken a closer look at two cases providing guidance on the interpretation of major and minor irregularities in a bid, as well as the first judicial review of a decision rendered by the Autorité des marchés publics.

Guidance on Interpreting Non-Compliance vs Minor Irregularities



In *City of Montreal v. EBC Inc.*, 2019 QCCA 1731, the Court of Appeal upheld a Superior Court's decision awarding $1.5 million in damages to the second-lowest bidder in a call for tenders for the construction of a multi-million multifunctional sports complex in the presence of a major irregularity in the lowest bidder's submission.

In February 2013, the City of Montreal, Borough Saint-Laurent ("**BSL**"), issued a call for tenders for the construction of a $50 million multifunctional sports complex. The tender documentation included a "proof of competence" clause, pursuant to which every bidder was required to submit a list of work of a similar nature and scope that it had carried out over the previous five years. At the opening of the tenders, Unigertec Inc. ("**Unigertec**") was the lowest bidder. Prior to the awarding of the contract, the second-lowest bidder, EBC Inc. ("**EBC**"), wrote to BSL's Procurement Officer, pointing out that Unigertec lacked the experience and competence to carry out the contract. Following verifications, the Officer indeed noted that the list of projects submitted by Unigertec were not projects that had been carried out by the company itself, and did not contain completion dates. As a result, the Procurement Officer requested Unigertec to provide an additional list to attest its competence to carry out the work. Unigertec provided an additional list of seven projects, none of which was similar to the project contemplated. Based on an internal legal opinion of the city, BSL nonetheless decided to disregard the "proof of competence" clause and awarded the contract to Unigertec, notwithstanding the irregularity in its bid. EBC filed an action for damages against BSL, claiming that the contract was unlawfully awarded to Unigertec.

The Superior Court granted EBC's suit. It found that Unigertec's failure to comply with the "proof of competence" clause was a major irregularity as opposed to a minor one which BSL could disregard, and as a result, Unigertec's bid should have been rejected. Given that EBC was the second-lowest bidder and proved that its bid met the competency requirements, the Superior Court awarded it $1,550,000 in damages as unrealized profits.

The Court of Appeal upheld the Superior Court's decision, concluding that it made no reviewing and palpable error in its analysis. The Court of Appeal noted that a public body must reject any bid with a major irregularity, but retains discretion with respect to minor irregularities. A major irregularity is defined as a breach of an essential or substantial requirement of the call for tenders that affects the equality between bidders and the integrity of the process. The interpretation of whether a requirement of the tender is essential or substantial requires

consideration of the tender documents and the context. In analyzing the context, consideration must be given to the nature, scope and circumstances of the project for which the tender is being issued, other provisions and requirements of the tender from which it might be concluded that a particular requirement is of major importance, public tendering practices, the conduct of the contracting authority and the public interest.

In this case, the Court of Appeal agreed that the proof of competence was a mandatory requirement of the call for tenders given the language and the nature of the clause (i.e. the obligation to provide a proof of competence for a major construction project) and the conduct of the public body (i.e. the fact that BSL regarded the clause as mandatory until receipt of a legal opinion advising it that the requirement could be disregarded). On this point, the Court of Appeal further noted that BSL breached the principle of fairness between bidders by offering to Unigertec only the opportunity to correct its bid by providing a second list of projects to attest its competence.

The same issue also arose in *Entreprises QMD Inc. v. City of Montreal*, 2020 QCCS 3 – albeit with a different result. In this case, the Superior Court dismissed a suit brought by the second-lowest bidder in a call for tenders for the renovation of an arena, finding that an alleged irregularity in the lowest bidder's submission was only minor.

In May 2015, the City of Montreal issued a call for tenders for the renovation of an arena in Outremont. *Addendum No. 4* to the call for tenders provided a specific requirement with regard to the authorization to enter into a public contract (an "**Authorization**") delivered by the Autorité des marchés financiers ("**AMF**"):[17]

> **"[art. 34.1] [translation] The bidder must, on the date of submission of its bid, hold an authorization to contract issued by the Autorité des marchés financiers. *It must send a copy of his authorization to the City of Montréal with his tender, failing which its tender will be automatically rejected.* [emphasis added]"**

At the opening of the tenders, Norgéreq ltée ("**Norgéreq**") was the lowest bidder. However, Norgéreq failed to include with its bid a copy of its Authorization, as required by *Addendum No. 4*. The City decided to override the irregularity and awarded the contract to Norgéreq following the reception of the Authorization. The second-lowest bidder, Les Entreprises QMD Inc. ("**QMD**"), sued the City, arguing that Norgéreq's failure to provide the Authorization should have resulted in the immediate rejection of its bid. QMD claimed $813,780 in damages as unrealized profits.

Reviewing the principles and criteria discussed by the Court of Appeal in *City of Montreal v. EBC Inc*, the Superior Court found that Norgéreq's failure to provide a copy of its Authorization along with its submission was a minor irregularity, in respect of which the City could exercise a discretion to disregard it. The Court distinguished this situation from the failure to *hold* an Authorization at the time of submitting a bid, which would constitute a major irregularity for public policy reasons. The Court acknowledged that the wording of art. 34.1 of *Addendum No. 4* suggested that the transmission of a copy of the Authorization concurrently with the bid constituted an essential requirement. However, the Court noted that the wording of the clause alone was not determinative, in that all the other relevant criteria suggested that the requirement was not substantial, namely:

(a) A provision in the tender documents providing that the City could allow a bidder to correct its submission to the extent that the correction did not affect the bid price;

[17] This process is now overseen by the Autorité des marchés publics.

(b) The absence of impact of the irregularity on the bid price and the integrity of the process;

(c) The fact that the irregularity could easily be remedied by consulting the online public register held by the AMF – which the City did;

(d) The public interest, considering the significant experience of Norgéreq and the low bid price; and

(e) The conduct of the City, which consistently qualified the irregularity as minor from the opening of the tenders.

As can be seen, in this case, the Superior Court favoured a flexible and contextual approach over the apparent clear wording of the clause at issue.

Judicial Review of a Decision rendered by the Autorité des marchés publics

In *Entreprises JRMorin Inc. v. Autorité des marchés publics*, 2019 QCCS 4669, leave for appeal denied 2020 QCCA 87, Les entreprises JRMorin Inc. ("**JRMorin**") sought judicial review of a decision rendered by the Autorité des marchés publics ("**AMP**") on April 25, 2019, which resulted in the registration of JRMorin in the *Register of enterprises ineligible for public contracts*,[18] preventing it from bidding on and entering into any public contract or subcontract as provided for in section 21.2.0.0.1 of the *Act respecting contracts of public bodies* ("ACPB").

JRMorin is a company doing business in the field of excavation and installation of piping and achieves the major part of its sales through public contracts, none of which are above 1M$ for service contracts and 5M$ for construction contracts. JRMorin's sole shareholder is 9164-2405 Québec Inc., a management company that also owns Jacques & Raynald Morin Inc.

In August 2016, JRMorin applied to the AMP for an authorization to enter into a contract with a public body, which would have allowed it to be registered in the *Register of authorized enterprises* and to bid on larger public contracts. In August 2018, the AMP sent JRMorin a notice of refusal based on section 21.27 of the ACPB and section 5 of the *Act respecting administrative justice* ("AAJ"), on the grounds that JRMorin and Jacques & Raynald Morin Inc. were related enterprises under the control of the same persons, and that the latter had been under investigation by the Commission de la construction du Québec ("**CCQ**"). According to the AMP, the information provided by the CCQ showed that Jacques & Raynald Morin Inc. did not meet integrity requirements to be authorized to contract with a public body. It decided that because the companies were related, the same had to apply to JRMorin.

The Superior Court granted JRMorin's judicial review application. It found that AMP contravened the rules of natural justice, both in the process leading up to the decision and in the decision rendered. The Court determined that the AAJ applies to the AMP, which consequently must act fairly. It added that compliance was all the more important because the AMP does not hold formal hearings. Its decisions are final, without appeal and substantially affect the plaintiff.

In the present case, these rules of fundamental justice and fairness were violated. Neither JRMorin nor Jacques & Raynald Morin Inc. had been found guilty of an offense. On the contrary, Jacques & Raynald Morin Inc. and the CCQ entered into an out-of-court settlement. As this settlement was confidential, the AMP relied solely on the

[18] In French, the *Registre des entreprises non admissibles aux contrats publics*.

information provided by the CCQ regarding the integrity of Jacques & Raynald Morin Inc. However, the Court found that the AMP should have allowed JRMorin to challenge the allegations of the CCQ by obtaining information from it as well.

Moreover, the notice issued to JRMorin did not comply with the requirements of the AAJ: It provided JRMorin only with information that, following the refusal of the application, the company was to be registered in the *Register of enterprises ineligible for public contracts* for a period of five (5) years. It did not include information about the consequence of the inscription in the register, which not only denies the company the right to be awarded contracts above $1M for services contracts and $5M for construction contracts, but also prohibits it from obtaining any public contracts below these thresholds.

> **In short, the AMP violated its duty to act fairly towards JRMorin and its decision did not meet either the correctness and the reasonableness standards.**

The Supreme Court and Callow

As a final note, while not a procurement case, there has been some discussion on the impact of the Supreme Court of Canada's decision in *C.M. Callow Inc. v. Zollinger,* 2020 SCC 45 in the procurement context.

The crucial issue in *Callow* is the necessity of contracting parties to conduct their relationship in good faith with one another. In the context of *Callow* itself, the parties had two contracts, one for winter maintenance and another for summer maintenance. The winter maintenance contract could be terminated on ten days' notice. The defendants (and respondents before the Supreme Court) had decided early in 2013 to terminate the contract, but kept this information secret while "stringing along" the plaintiff (and appellant) contractor, allowing it to believe that it would renew the winter maintenance contract.

The Court determined that this behavior between two contracting parties was impermissible and violated a principle of good faith performance of contracts. This has led to the question as to whether a similar principle would apply to procurement context: could parties in a procurement be subject to any obligations under *Callow*.

From our perspective at a high level the answer depends somewhat on the type of procurement. If a procurement is structured as a "non-Contract A" negotiable RFP, then *Callow* is unlikely to have any impact. The critical factor in *Callow* is that the parties were already in a contractual relationship. It was distinct from the principles in *Bhasin* for avoiding bad faith in negotiations. Given that "non-Contract A" RFPs necessarily have no contractual relationship between procuring entity and bidder, the *Callow* principle should not apply.

With regard to classical Contract A procurements, *Callow* would be applicable (as between compliant bidders and the purchaser), but is unlikely to have a major impact given the pre-existing good faith obligations that already exist. It is difficult to see how the obligations under *Callow* would be more intrusive than the *Ron Engineering* duties. In cases where bids are cancelled following bid close but prior to contract award there may be some additional scope for the application of *Callow*. In such cases, compliant bidders may make analogous arguments that they have essentially been "strung along" by the purchaser. This type of argument will have to be more closely examined in the future.

mccarthy tétrault

VANCOUVER

Suite 2400, 745 Thurlow Street
Vancouver BC V6E 0C5
Tel: 604-643-7100
Fax: 604-643-7900

QUÉBEC CITY

500, Grande Allée Est, 9e étage
Québec QC G1R 2J7
Tel: 418-521-3000
Fax: 418-521-3099

CALGARY

Suite 4000, 421 7th Avenue SW
Calgary AB T2P 4K9
Tel: 403-260-3500
Fax: 403-260-3501

NEW YORK

55 West 46th Street Suite 2804
New York NY 10036
UNITED STATES
Tel: 646-940-8970
Fax: 646-940-8972

TORONTO

Suite 5300, TD Bank Tower
Box 48, 66 Wellington Street West
Toronto ON M5K 1E6
Tel: 416-362-1812
Fax: 416-868-0673

LONDON

1 Angel Court, 18th Floor
London EC2R 7HJ
UNITED KINGDOM
Tel: +44 (0)20 7786 5700
Fax: +44 (0)20 7786 5702

MONTRÉAL

Suite 2500
1000 De La Gauchetière Street West
Montréal QC H3B 0A2
Tel: 514-397-4100
Fax: 514-875-6246