Public Procurement 2021 Year in Review

mccarthy tetrault

Public procurement is a constantly moving target. Between the decisions of courts and tribunals, and updates to law and policy, it is important for purchasers and suppliers to stay informed of the latest developments in procurement law.

Last year was, in the procurement realm as elsewhere, more like 2020 than many people had hoped. The COVID-19 pandemic continued to disrupt supply chains and procurement efforts across the country. That said, procurement matters, and initiatives began to "unfreeze" and move forward with a return to something more closely approximating normal.

To help guide you through the developments in procurement law that occurred in 2021, we have prepared a careful analysis focusing on key developments in the case law arising out of the various provincial courts, the Federal Court, and procurement related administrative tribunals. To add to the lessons we learn from the case law, we have also prepared analysis on certain key innovations and developments in procurement policy and methods from Canadian public purchasers.

Table of Contents

Developments at the Federal Level

CHANGES TO PROCUREMENT POLICIES

In December 2017, the government announced that the bid evaluation for Canada's fighter aircraft procurement would include assessment of bidders' impact on Canada's economic interests. Section 9.3 of the federal government's 2021 budget reiterated and broadened the application of this policy to "major military and Coast Guard procurements going forward," noting that companies found to have prejudiced Canada's economic interests through trade challenges would have points deducted from their procurement bid score at a level proportional to the severity of the economic impact, to a maximum penalty. Any implementation of this measure (beyond what can be shoehorned within an existing, clearly justifiable criterion or justified on the basis of national security reasons) is likely to itself prompt trade challenges before international trade tribunals by disgruntled bidders.

On May 13, 2021, the new *Directive on the Management of Procurement* (Directive) entered into effect, replacing the *Contracting Policy* and Policy on Decision Making in Limiting *Contractor Liability in Crown Procurement Contracts*. The new Directive attempts to streamline the prior policies by moving to an approach focused on the key procurement principles of fairness, openness, and transparency, away from the prescriptive, process-directed requirements. The new Directive prioritizes the simplification of solicitations and solicitation documents, including by limiting the number of mandatory technical criteria to those determined to be essential. It also specifically provides that contracting authorities should, to the extent possible, take past performance into consideration when assessing the bidder's ability to deliver. Federal departments have until May 13, 2022 to transition to a full implementation of the new Directive.

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CASE LAW UPDATE

Decisions in 2021 also marked a retrenching with respect to the contracting authority's ability to set its own requirements for a bid in the Request for Proposals (RFP), without being subject to re-writing by courts or tribunals.

In *Heiltsuk Horizon Maritime Services Ltd. v. Atlantic Towing Limited*, 2021 FCA 26, the Federal Court of Appeal confirmed that an interpretation of an RFP requirement that goes beyond the text of the requirement and its stated assessment methodology will be unreasonable. The case arose from five judicial reviews of three decisions of the Canadian International Trade Tribunal (the Tribunal), relating to the criteria for mandatory requirement 12 (MR-12) of the RFP requiring that the bidders' proposed vessels "exert a minimum continuous bollard pull of no less than 120 tonnes when all required engine driven consumers

(shaft generators, etc.) are taken into account." In its second and third decisions, the Tribunal introduced a concept of "functional" bollard pull which was to be measured against a number of criteria not stated in the text of MR-12, effectively interpolating "its own idea of a more robust bollard pull test." The Court of Appeal sharply criticized this "highly problematic" decision by the Tribunal to "rewrite the procurement criteria or evaluation methods." The Court of Appeal set aside the decisions as unreasonable and directed the Tribunal to dispose of the related complaints in accordance with the court's reasons.

The Federal Court of Appeal confirmed that an interpretation of an RFP requirement that goes beyond the text of the requirement and its stated assessment methodology will be unreasonable.

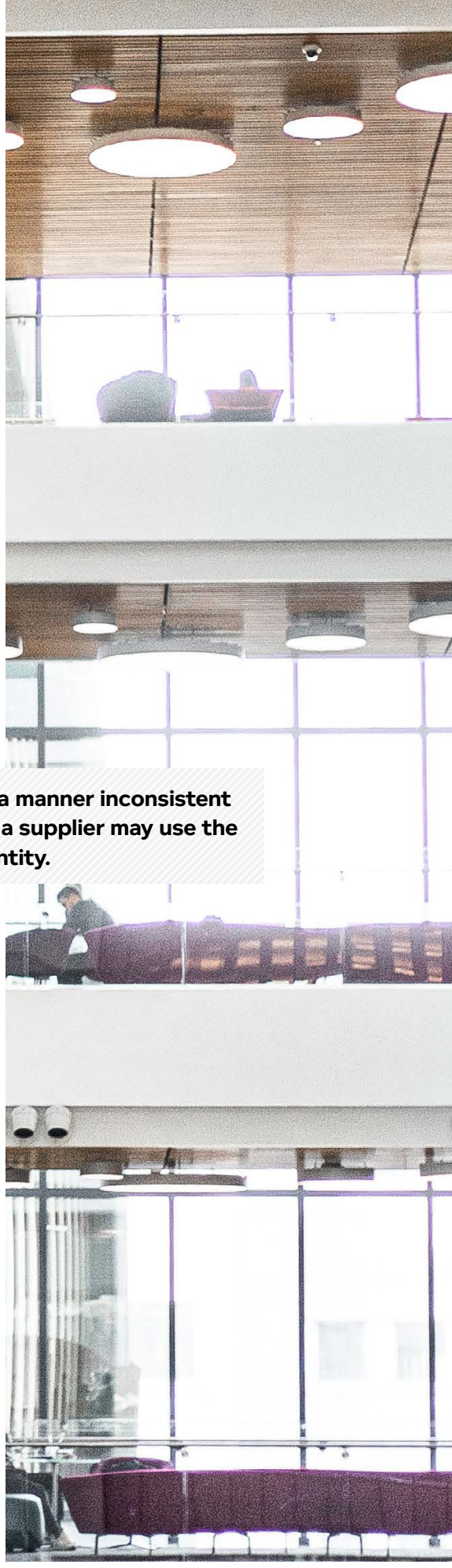
The Tribunal has also narrowed its reading of requirements in procurement solicitations. In *SL Ross Environmental Research Limited*, 2021 CanLII 44202 (CA CITT), the complainant took issue with the scoring of its bid on a request for standing offer, and argued, among other things, that its "well-deserved international reputation" in the field meant that it should have been given the benefit of the doubt with reference to the scoring of its prior experience. The Tribunal confirmed that the complainant's international reputation was not reasonably related to any of the rated technical criteria, and it was therefore an external factor not contemplated by the request for standing offer.

Similarly, in *Marine Recycling Corporation and Canadian Maritime Engineering Ltd.*, 2021 CanLII 3124 (CA CITT) the Tribunal considered a phased bid process that included multiple steps and opportunities for bidders to address any deficiencies identified by the Department of Public Works and Government Services (PWGSC). Once the procurement had been concluded and the contract awarded, the unsuccessful bidder notified the contracting authority of an objection regarding the contract award and the evaluation of its bid. The contracting authority cancelled the RFP rather than re-evaluate the bids after receiving this objection. Before the Tribunal, it argued that after considering the objections and reviewing the RFP, it had determined that the evaluation criteria and scoring methodology was ambiguous, leading to subjective bid evaluations that rendered the scores unjustifiable upon review. The Tribunal held that "PWGSC's concerns of subjectivity in the evaluation process due to ambiguity in the RFP were not sufficient grounds to cancel the RFP," and directed the contracting authority to re-evaluate the bids. Notably, it took no issue with the phased-bid process as set out in the RFP.

British Columbia, Alberta, Saskatchewan, Manitoba: Developments in NWPTA

The western Canadian provinces are all members of the regional New West Partnership Trade Agreement (NWPTA), a trade agreement created in 2010 that seeks to integrate the economies of Alberta, British Columbia, Saskatchewan and Manitoba. Unique in Canada, this regional block maintains its own Bid Protest Mechanism (BPM) to arbitrate disputes raised by suppliers in a manner similar to the adjudication of federal procurement disputes by the Tribunal. This provides an opportunity to examine not just the development of common and public law in these jurisdictions, but also how provincial bodies interpret the commitments under the trade agreements.

If a supplier believes that a specific procurement was conducted in a manner inconsistent with the obligations under trade agreements governing the parties, a supplier may use the Bid Protest Mechanism to challenge the decision of the procuring entity. We review the two NWTPA decisions rendered in 2021, *West-Can Seal Coating Inc. v. Ministry of Highways and Infrastructure for the Province of Saskatchewan and In the Matter of a Complaint by Commercial Truck Equipment Corporation Against Beaver Emergency Services Commission*.



> **If a supplier believes that a specific procurement was conducted in a manner inconsistent with the obligations under trade agreements governing the parties, a supplier may use the Bid Protest Mechanism to challenge the decision of the procuring entity.**

WEST-CAN SEAL COATING INC. V. MINISTRY OF HIGHWAYS AND INFRASTRUCTURE FOR THE PROVINCE OF SASKATCHEWAN (MARCH 2021)

West-Can Seal Coating Inc. (West-Can), an Alberta based company, argued that the Ministry of Highways and Infrastructure for the Province of Saskatchewan (Ministry) had engaged in a pattern of discrimination against out-of-province suppliers, including for the supply of micro-surfacing of particular sections of highway. It alleged that the Ministry's approach resulted in 100% of micro-surfacing contracts tendered by the Ministry since 2017 being awarded to Saskatchewan bidders, to the detriment of West-Can, had made the low bid in those contracts and met all other relevant tender criteria. The Ministry denied the allegations.

The specific complaint at issue related to scoring processes the Ministry used to evaluate bids, including Work Zone Traffic Audits (WZTA), Contractor Performance Evaluation (CPE) and Community Benefits. In relation to the WZTA, the Ministry used West-Can's score from an audit that occurred in 2018, after which time the audit process had substantially changed. The arbiter found that West-Can was not provided with sufficient notice that the audit score would be used in future bid evaluations and was not provided with a meaningful opportunity to contest the score. Compounding this unfairness, after close of the bid but pre-contract award, the audit score of the local

bidder, Morsky Construction Limited (Morsky), was adjusted after it was recommended that West-Can be awarded the contract with a bid that was C$57,580 lower than Morsky. The arbiter found that the Ministry's conduct breached a number of Articles under the Canadian Free Trade Agreement (CFTA), including:

- Article 500: fair and open process;
- Article 502: treatment no less favourable than the best treatment one accords to its own suppliers;
- Article 507: evaluations based on conditions specified in advance of tender notices or documentation; and
- Article 515: the procuring entity must treat all tenders under procedures that guarantee fairness and impartiality.

With respect to CPE, the arbiter questioned the Ministry's failure to assign a CPE score to Morsky on the grounds that the Ministry and Morsky were engaged in ongoing litigation over Morsky's prior performance, which the Ministry alleged was deficient. The arbiter recommended that the Ministry consider issuing a CPE score based on the best judgment of its professional engineers.

Lastly, regarding the bid requirement for Community Benefits, the arbiter accepted West-Can's argument that the provision improperly encouraged the use of local labour and penalized contractors unable to obtain local labour. The arbiter found this breached Article 500 of the CFTA requiring fair and open access. The arbiter also found this breached Article 503, which prohibits a procuring entity from considering "local content or other economic benefits criteria that are designed to favour […] the suppliers of a particular Province or region of such goods or services."

The decision — which, in addition to making procedural recommendations for future procurements — also awarded West-Can both its costs in the action and its bid-preparation costs. It upholds the spirit of the NWPTA to integrate the economies of certain Canadian provinces, rather than provide unfair advantages for local economies.

COMPLAINT BY COMMERCIAL TRUCK EQUIPMENT CORPORATION AGAINST BEAVER EMERGENCY SERVICES COMMISSION (JULY 2021)

This case confirms the well-established principle that a procuring entity is not obliged to accept a non-compliant bid, even where it has the lowest price. In January 2021, Beaver Emergency Services Commission (BESC), which services a number of towns in Alberta, issued an RPF for a water tanker unit. A bidder, Commercial Truck Equipment Corporation (CTEC), advised BESC that there were several inconsistencies in the RFP, and raised potential bias given that the bid specifications were drafted by an employee of another bidder, Fort Garry Fire Truck (Fort Garry). The arbiter found that BESC appropriately issued a revised RFP which addressed all of CTEC's concerns.

The bid was ultimately awarded to Fort Garry. CTEC disputed the award on a number of bases, including that its bid had the lowest price and BESC was biased in favour of Fort Garry. Upon review, the arbiter found no bias and that the CTEC's bid was non-compliant in a number of respects, including the failure to submit the requested number of copies of its proposal. The tender documents expressly provided, "Failure to submit requested documents may result in your tender being rejected or zero points being assigned." The arbiter determined that this failure alone was a sufficient reason for BESC to reject CTEC's bid. In addition, CTEC failed to bid a tanker unit with a 3000 imperial gallon tank, a key specification of the bid.

While somewhat routine in nature, it is critical that consistent case law be developed under the NWPTA BPM in order to ensure that significant cases are properly decided in the future. This is especially important as we have seen cases in previous years that substantially depart from prior Tribunal case law on treaty interpretation without explanation or justification.

British Columbia: *Wastech* and a Novel Tort Attempt

WASTECH SERVICES V. GREATER VANCOUVER SEWERAGE AND DRAINAGE DISTRICT (2021 SCC 7)

Following the Supreme Court of Canada's seminal decision in *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, which we reported on in last year's review of public procurement law and trends, the Supreme Court released its decision in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, which further clarifies the nature and scope of the duty to exercise contractual powers in good faith.

In this case, Wastech Services Ltd. (Wastech), a waste transportation and disposal company, had a long-standing contractual relationship with Metro, a statutory corporation responsible for the administration of waste disposal for the Metro Vancouver Regional District. Under the contract, Wastech was to remove and transport waste to three disposal facilities in exchange for payment. Wastech was paid at differing rates depending on which facility the waste was directed to, which varied in distance. Among other things, the contract gave Metro "absolute discretion" to allocate waste between the facilities and did not guarantee Wastech would achieve its target operating profit.

The Court disagreed and found that the duty to exercise contractual discretion is breached "only where the discretion is exercised unreasonably, which here means in a manner unconnected to the purposes underlying the discretion."

In 2011, Metro reallocated waste from a disposal facility that was further away to one that was closer, which caused Wastech to miss its operating profit target by a large degree. Wastech alleged that Metro breached the contract and exercised its contractual discretion to allocate waste contrary to the requirements of good faith. The Court disagreed and found that the duty to exercise contractual discretion is breached "only where the discretion is exercised unreasonably, which here means in a manner unconnected to the purposes underlying the discretion." This includes circumstances where the exercise of discretion is "arbitrary or capricious," which was not the case in *Wastech*. To the contrary, the Court found that Metro's exercise of discretion was guided by the objectives of maximizing efficiency and achieving cost reductions, which was the point of providing Metro with discretion under the contract.

A full and in-depth analysis of *Wastech* and its potential implications in procurement and other contractual law can be found here.

FORCOMP FORESTRY CONSULTING LTD. V. BRITISH COLUMBIA (2021 BCCA 465)

The Court of Appeal of British Columbia considered a potential new tort of "blacklisting" in the context of procurement contracts. The plaintiffs, FORCOMP Forestry Consulting Ltd. (FORCOMP) and its principal had provided services to the provincial Ministry for several years, but had not been awarded a contract for some time. FORCOMP and its principal sued the province and several employees of the Ministry of Forests, Lands, Natural Resource Operations and Rural Development alleging that the employees: i) conspired among themselves to deprive the appellants of contracts and professional opportunities; ii) committed misfeasance in public office; iii) "blacklisted" the appellants from provincial contracts; and iv) breached the appellants' s. 2(b) Charter right to free expression. According to FORCOMP, the Ministry had taken these actions in retaliation for it exposing certain errors in the work done by the Ministry.

At first instance, the motions judge had granted a motion striking all four claims. FORCOMP appealed to the Court of Appeal. The Court of Appeal found that the plaintiffs had pleaded sufficient facts to make out a claim for conspiracy or misfeasance in public office, however it found that the plaintiff's claim for "blacklisting" was bound to fail as it was not an existing tort, and recognizing such a new tort would not "reflect an incremental development to an existing body of law."

It is important to note that the lack of a term for "blacklisting" does not fully resolve the matter, as the Court reinstated the remaining claims and has allowed FORCOMP to move forward. Much will turn on the specifics of the evidence. Purchasers should be attentive that their employees do not act in a manner that puts them at risk of this type of claim.

The Court found that the plaintiff's claim for "blacklisting" was bound to fail as it was not an existing tort, and recognizing such a new tort would not "reflect an incremental development to an existing body of law."

In addition, it is significant that this was an attempt to fit "blacklisting" into a tort. However, given that the ability to "blacklist" a supplier under the Trade Agreements is *very* narrow, suppliers that feel that they have been blacklisted should instead consider bringing a complaint regarding a particular solicitation they were denied via an appropriate remedial path (to the BPM in any NWPTA jurisdiction, to the Tribunal federally, or to seek judicial review in other jurisdictions).

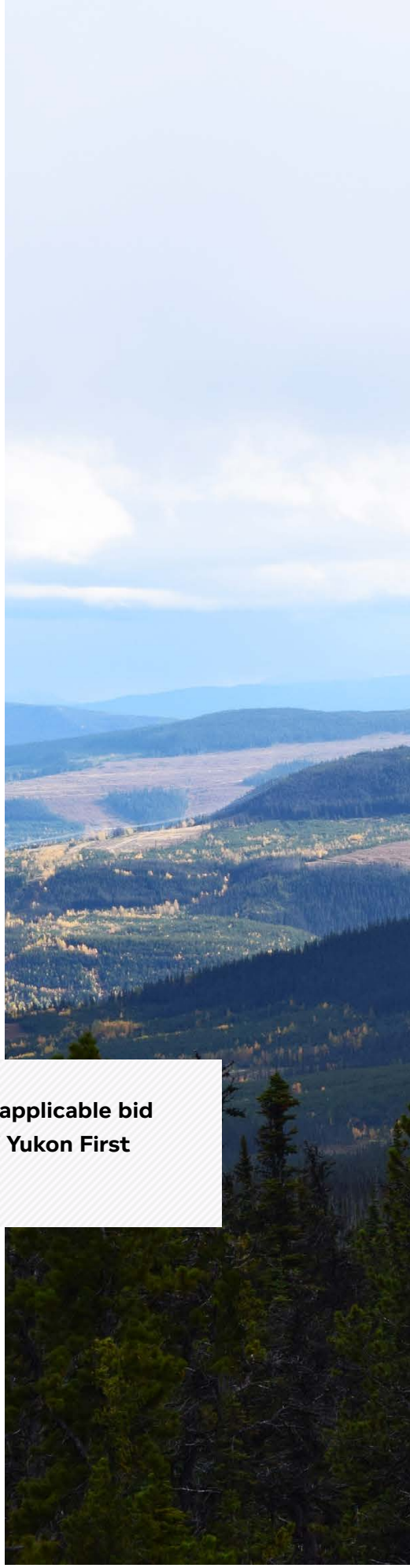
Yukon: First Nations Procurement Policy and Case Update

YUKON IMPLEMENTS FIRST NATIONS PROCUREMENT POLICY

The Yukon Government implemented a First Nations procurement policy that provides advantages to Yukon First Nations-owned businesses and businesses that employ First Nations workers when bidding on government contracts. It came into effect on February 22, 2021.

A verified Yukon First Nations business registry has been created and it is being managed by the Yukon First Nations Chamber of Commerce. Businesses that wish to be added to the registry must submit supporting documentation providing proof of Yukon First Nations citizenship and shareholder agreements. The registry allows Yukon First Nations businesses to advertise their goods and services to the public, governments and other businesses. A list of eligibility criteria can be found on the Yukon Government Services website.

Bid value reductions have also been implemented. This tool in the Yukon First Nations Procurement Policy reduces the value of bids that otherwise meet the applicable requirements for purposes of price evaluation and ranking only — the reductions effectively re-rank compliant bids to reflect increased participation by Yukon First Nations businesses and people. Eligible businesses may receive reductions between 5% and 15% on applicable bid or bid-component values during evaluation depending on the level of Yukon First Nations ownership and participation in the eligible businesses. A bid-value reduction of up to 15% will apply for the price of labour performed by Yukon First Nations People regardless of the bidder's status as a Yukon First Nations business. An additional 5% reduction is applied if the Yukon First Nations business is in a community other than Whitehorse and the contract activities will occur in the traditional territory in which the eligible business is located, in accordance with the specific procurement documents.



> **Eligible businesses may receive reductions between 5% and 15% on applicable bid or bid component values during evaluation depending on the level of Yukon First Nations ownership and participation in the eligible businesses.**

This measure is likely to be compliant with the CFTA and other trade agreements, as they generally create generous carve outs specifically targeted at allowing measures favouring the development of Indigenous businesses and businesses in remote and rural northern areas.

CASE LAW UPDATE

***45787 Yukon Inc./Mobile Solutions and Research Inc. v. ALX Exploration Services Inc.* (2021 YKSC 60)**

As a cautionary tale, the plaintiffs, 45787 Yukon Inc./Mobile Solutions and Research Inc. and Midwest Industrial Supply Inc. (collectively, MSRI) alleged that

the defendant, ALX Exploration Services Inc. (ALX) should not have won the contract and instead MSRI should have. In the process of (unsuccessfully) arguing against the need to provide ALX with a better and further Affidavit of Documents the plaintiffs alleged that ALX engaged in fraud with its co-defendant, Soilworks, so as to defraud the Government of Yukon. In a turn of events, the court instead ordered that the plaintiffs pay elevated costs given the fraud allegations were baseless and they could have had a damaging impact on ALX's reputation.

ALBERTA: LEGISLATIVE UPDATE

In December 2021, the Alberta government passed a new governance framework for the review and funding of capital projects, Bill 73: Infrastructure Accountability Act. The Bill also legislates the development of a 20-Year Strategic Capital Plan to help guide the government's infrastructure decisions long term. It came into force on December 8, 2021.

At a high level, the key changes introduced by the *Infrastructure Accountability Act* (Act) include the following.
The Act:

- establishes six criteria that the Alberta government must consider when evaluating a capital planning submission. Projects will be evaluated based on how they:
  - address health, safety, and compliance needs
  - align with government priorities and strategies
  - foster economic activity and create jobs
  - improve program delivery and services
  - consider life cycle costs and whether it will generate a return on investment
  - enhance the resiliency of communities;
- legislates a governance framework for developing the province's annual Capital Plan by outlining the roles and responsibilities for government ministries involved;
- formalizes a Deputy Ministers Capital Committee to advise on the Capital Plan; and
- legislates the development and release of a 20-Year Strategic Capital Plan, to be released within one year of the *Infrastructure Accountability Act* coming into force, and updated at least every four years.

The Six New Criteria

Under s. 3(c) of the Act, the Responsible Minister is required to "analyze and consider capital planning submissions, other than capital maintenance and renewal submissions, according to the criteria outlined in s. 4 and other criteria the Responsible Minister considers appropriate…." The six criteria noted above are set out under s. 4 of the Act, which appears to leave broad discretion to the Responsible Minister in complying with these provisions. The legislation does not provide for any public scoring or ranking system showing how projects are judged based on these criteria, nor does it provide any guidance on the relative significance of each criteria as compared to the others or any further criterion the Responsible Minister considers appropriate.

The 20-Year Strategic Capital Plan

The preamble to the Act provides that the "Government of Alberta is committed to infrastructure planning that is long term, priority based and strategic." Under s. 6(1) of the Act, the Responsible Minister "shall prepare and publish a 20-year strategic capital plan within one year of the coming into force of this Act and at least once every 4 years thereafter."

Pursuant to s. 6(2), each 20-Year Strategic Capital Plan "shall outline the government's long-term vision for meeting the infrastructure needs of Albertans over the following 2 decades" and provide "strategic long-term capital planning foresight through an analysis of long-term economic, demographic and other trends." It is unclear from the Act what kinds of metrics or projections may be required under the long-term plan and how the infrastructure needs of Albertans will be assessed.

A deep dive into these changes can be found here.

Manitoba: Social Procurement Policy and a Case Update

WINNIPEG EMBRACES SOCIAL PROCUREMENT

As part of its sustainable procurement program, the City of Winnipeg (City) is in the process of creating a social procurement policy, which aims to leverage the City's C$400 million annual purchasing of goods and services to create social value, such as providing opportunities for Indigenous and diverse businesses and social enterprises, as well as providing employment and skills development for equity groups and others who are marginalized. One aim is to acknowledge bidders who hire and train under-skilled workers by giving them additional points for these criteria.

However, Winnipeg must be careful in how it adopts these measures, and potential suppliers should be vigilant to know if they have a potential claim. It would be easy for a social procurement policy to drift into a discriminatory one that would violate Winnipeg's obligations under the CFTA and other procurement treaties. While there is some latitude for social procurement in these treaties, that latitude is neither broad nor absolute. This is somewhat different than the revised Yukon policy discussed above, as that policy is targeted at measures to assist First Nations and Indigenous communities, rather than disadvantaged groups more generally.

CASE LAW UPDATE

Capitol Steel Corporation v. The Government of Manitoba **(2021 MBQB 55)**
In respect of an action brought by the plaintiff, Capitol Steel Corporation (Capitol), the Court of Queen's Bench of Manitoba ordered that the defendant, the Government of Manitoba, pay to Capitol the remaining balance owed for the supply of steel girders.

Capitol sought a sum of C$489,808.48, which was reduced to C$414,808.48 as a result of a delay provision in the tender, which allocated a C$1,500 per day penalty for the late delivery of the steel girders. Capitol was 50 days late delivering and conceded that the delay provision meant they owed the Defendant C$75,000. The defendant argued that, in addition to the Delay Clause, the Liability for the Delay Clause authorized it to claim damages for the amount that subcontractors were seeking from the defendant as a result of the delay. The Government of Manitoba argued that these damages totalled C$405,756.24.

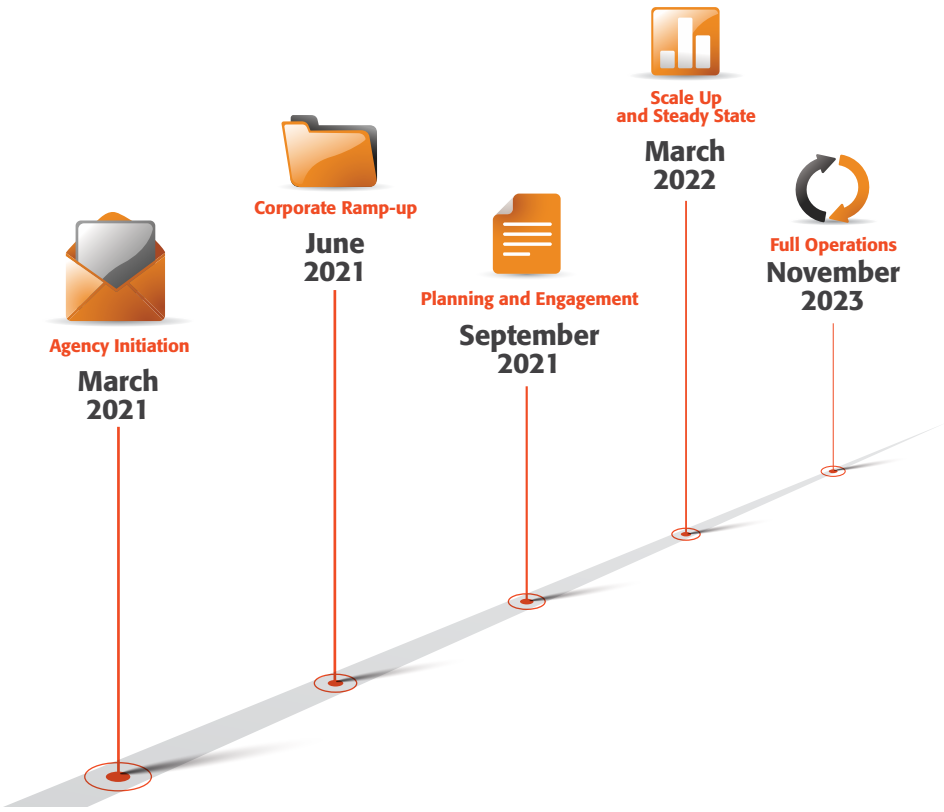
The court ultimately found that the liquidated damages clause and the liability for delay clause conflicted with one another and that they were irreconcilable. As such, since the defendant drafted both the tender and the contract, the defendant must bear the responsibility for it.

This case demonstrates how sometimes procurement drafting can get too cute or attempt to do too much. Drafters should ensure that any provisions they put into solicitation documents are crafted to work in harmony, and do not create potential windfalls for purchasers. Doing so puts purchasers at risk and opens them to the least favourable interpretation of both clauses.

Ontario: Novel Procurement Structures and the Application of *Wastech*

SUPPLY ONTARIO IMPLEMENTATION AND NOVEL P3 STRUCTURES

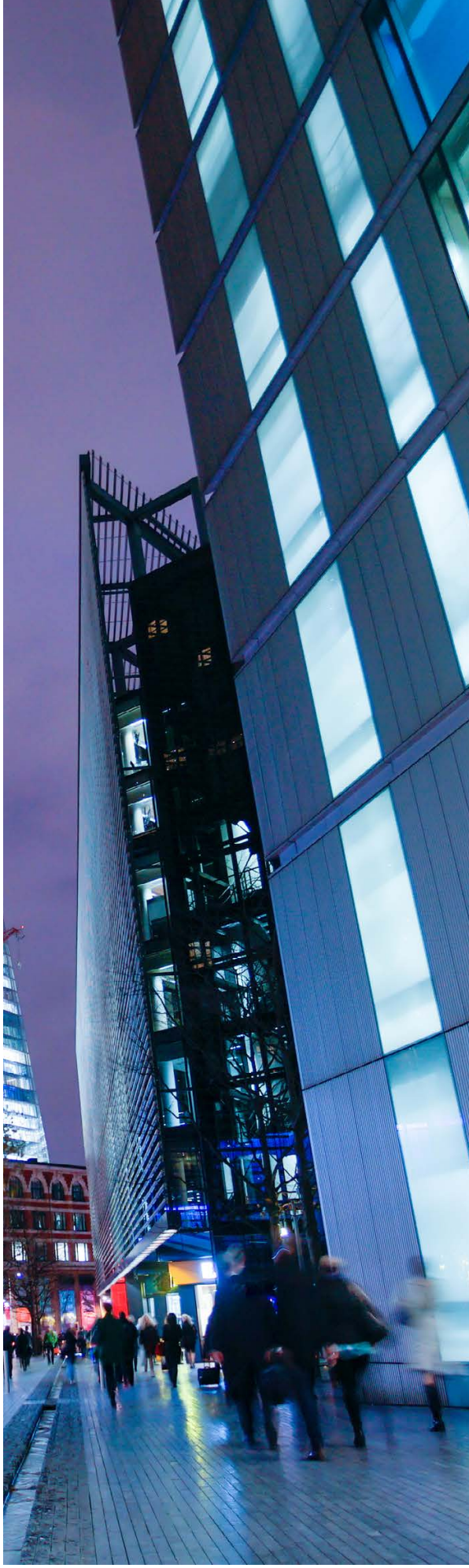
As we detailed in our *2020 Year in Review*, Ontario established Supply Ontario, a new centralized procurement agency that is responsible for providing supply chain management on behalf of government entities, broader public sector entities, and health care entities in the province.

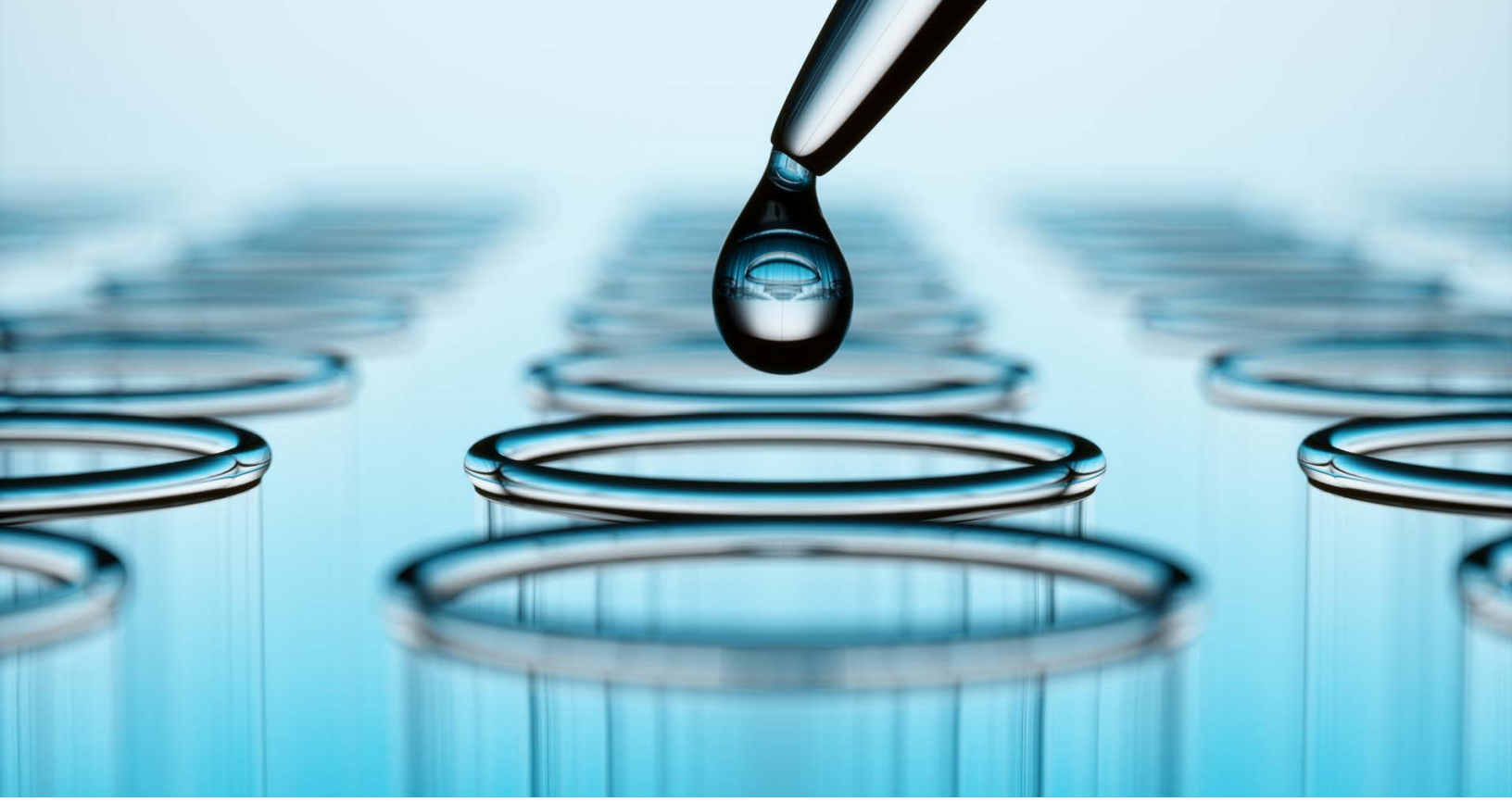


Supply Chain Ontario implementation timeline

In 2021, there were few updates from the provincial government about when Supply Ontario is expected to be operational and the details of how the agency is intended to operate. At the time of this publication, the most recent reports indicate that planning is still underway, and that the government has been engaging with stakeholders for input on the centralization process. On November 25, 2021, Supply Ontario released a progress report announcing that it had appointed a board of directors, CEO, and interim leadership team, and that it aims to be fully operational by November 2023. As operationalizing Supply Ontario remains a work in progress, stakeholders will want to keep a watchful eye as the rules and processes continue to evolve.

In addition to the continued implementation of Supply Ontario, the government also made strides in modernizing and innovating its approach to public-private partnership (P3) projects. In October 2021, the Ontario





Government and Infrastructure Ontario announced a new, Progressive P3 procurement strategy. The new strategy focuses on the early design phase of the project, during which both sides will work together to meet project requirements, including design, pricing, and risk, before entering into a final Project Agreement. Three Ontario hospital projects that are currently in pre-procurement will use the new procurement strategy. In an October 2021 Q3 Market Update, Infrastructure Ontario reported that the introduction of the progressive approach is directly related to the characteristics of the three upcoming hospital projects in relation to size or complexity, or their physically remote location. According to the province and Infrastructure Ontario, the benefits of the progressive strategy for government and taxpayers include enabling price certainty, helping to lower financial risks for all parties, and fostering innovation and collaboration.

CASE LAW UPDATE

Stericycle ULC v. HealthPRO Procurement (2021 ONCA 878)

The Ontario Court of Appeal had its first opportunity to apply the principles set out in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District* (2020 SCC 45) to the procurement context. The dispute revolved around a procurement by HealthPRO, which then allowed its members, including the Public Health Services Authority of British Columbia (PHSA) — which co-ordinates services for more than 1,000 public medical facilities in British Columbia, to select a medical waste disposal services supplier. The procurement was conducted nationally by HealthPRO and structured to allow its members to leverage buying power as a group, and hence realize greater cost efficiency than if they had negotiated individually.

The procurement was structured as a "multi-supplier procurement" to allow for the potential award of one or more supplier contracts with HealthPRO. Its members could then select from the awarded contracts a "primary" supplier to provide them with at least 80% of that member's service needs, and a "secondary" supplier for up to 20% of the member's service needs. The award of a contract by HealthPRO was not a guarantee to any supplier that they would be selected. The decision as to which awarded HealthPRO contract to sign onto, if any, and when, was made by each individual HealthPRO member. The contracts also had a "paper" start date of June 1, 2020, but members had the right to start receiving services at any point during the contract term.

The Ontario Court of Appeal had its first opportunity to apply the principles set out in Wastech Services Ltd.

HealthPRO ultimately awarded two contracts: one to Daniels Sharpsmart Canada Limited (Daniels), and one to the incumbent service provider Stericycle ULC (Stericycle).

PHSA selected Daniels as its primary supplier and it was intended that Daniels would begin providing services as of December 1, 2020. Although Daniels had said in its bid that it would be ready to begin providing services as of June 1, 2020, due to delays caused by the pandemic PHSA did not make its supplier selection until shortly before June 1, 2020. As a result, Daniels needed some time to arrange facilities and services in British Columbia after the selection was made. In the meantime, PHSA relied on a clause in Stericycle's existing incumbent contract, which required Stericycle to continue to provide services for up to six months after the end of the prior contract at the prior contract prices, to facilitate transition to a new supplier.

On appeal, Stericycle argued that HealthPRO and/or PHSA engaged in bid repair and breached contractual duties of good faith and honest performance in selecting Daniels as the primary supplier and allowing it to begin providing services on December 1, 2020, given Daniels was not ready to provide services on the June 1, 2020 "paper" contract start.

The Court rejected all claims by Stericycle and dismissed its appeal. Importantly, the Court applied *Wastech* to the Contract A/Contract B procurement framework and confirmed that duties of good faith are only owed by and to the *parties to the contract*. Where there is no privity, there could be no duty. In this case, PHSA's selection of Daniels as primary supplier was made under the contract awarded to Daniels, and Stericycle was not a party to Daniels' contract. HealthPRO and PHSA could not owe any duty to Stericycle under the Daniels contract, and accordingly it had no standing to complain. The Court went on to find that even if a duty was owed to Stericycle, there was no breach of the duty of good faith. The Court agreed that "it would be commercially unreasonable to require a prospective new supplier [here, Daniels] to make the significant financial investment required to provide services in a province without a guarantee of being selected as a service provider."

The Court applied *Wastech* to the Contract A/Contract B procurement framework and confirmed that duties of good faith are only owed by and to the parties to the contract. Where there is no privity, there could be no duty.

Inzola Group Limited v. City of Brampton (2021 ONCA 143)

The plaintiff in this case was an unsuccessful bidder in a Competitive Dialogue RFP for a project to construct an extension to city hall. The City of Brampton (City) had taken steps to ensure that political decision makers were removed from the process — there was little if any ability for the council to influence the selection of the winning bidder.

As key requirements of the RFP process, bidders were required to execute a confidentiality agreement, contact only the City's purchasing division and agree to refrain from making any representations in public. The plaintiff refused to sign the confidentiality agreement and, after being rebuffed, took the issue up publicly with the city council and the media. Inzola was then eliminated as being non-compliant and damaging the integrity of the process. The plaintiff brought a claim for lost profits. The claim was dismissed by the Ontario Superior Court with C$3.08 million in costs.

Last year saw the appeal of that decision. The Ontario Court of Appeal rejected the appeal in its entirety. It upheld the process, which eliminated Inzola and upheld the entirety of the costs order (including additional costs for the Court of Appeal proceedings).

This decision reinforces the importance of keeping procurement processes and evaluations insulated from political interference. The proper behaviour in this context strongly supported the litigation position of the City and provided a substantial shield against any claims. It also highlights the heavy cost that can be borne during litigation, as the C$3.08 million costs award was reflective of partial indemnity costs only.

Québec: Current Legislative Developments and Case Law Review

BILL 12 : IMPORTANT AMENDMENTS TO THE ACT *RESPECTING CONTRACTING BY PUBLIC BODIES*

At the time of publication of this Public Procurement 2021 Year in Review, the Québec government released Bill 12 which aims at promoting Québec-based and responsible purchasing by public bodies, strengthening the integrity regime for businesses and increasing the powers of the Autorité des marchés publics. We will separately report on details and implications of this important piece of legislation that has been proposed by the Québec government.

CASE LAW UPDATE

***Ville de Sherbrooke c. Sherax Immobilier inc.*, (2021 QCCS 5018)**

In *Ville de Sherbrooke c. Sherax Immobilier inc.*, the City of Sherbrooke (the City) was held liable for misleading Le Groupe Axor Inc. (Axor) and its subsidiary Sherax Immobilier Inc. (Sherax) into contracting on terms set out in tender documents that it knew were erroneous. The Québec Superior Court found that the City had breached its pre-contractual obligations arising from the general duty of good faith and ordered it to pay C$2.7 million.

Axor was awarded a public-private partnership contract with the City in 2006 to design, build and operate an indoor soccer centre for a 40-year period. After the construction phase, Sherax was to lease the finished soccer centre to the City's sports organizations. In the tender documents, the City estimated that the sports organizations could lease the soccer centre for close to 5,000 hours per year, but called on the bidders to conduct their own market research with respect to the soccer centre's financial viability. The evidence showed that the City's estimate of the soccer centre's reservation needs was the basis for Axor's financial proposal.

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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 soccer 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 main issue was therefore in what context can a breach of the duty to inform during a public call for tender process lead to liability for losses when the financial

viability of a project turns out to be significantly different from initial estimates.

The Court held that the City failed to declare its intention not to provide the additional financial assistance to the City's sports organizations without which it knew that a substantial portion of the 5,000 hours per year would not materialize. The use of the words "estimated" and "indicative" in the tender documents could not absolve the City of liability. The City could not mislead Axor into contracting on terms that it knew were erroneous, particularly since the duty to inform on the part of the City was deemed, in the circumstances of a partnership, to be more "intense" by the Court than in the usual case of a fixed price contract. The Court also found that the short deadline for submitting the bids — less than two months — did not allow Axor to conduct proper market research to verify the City's estimate.

The Court ordered the City to pay to Sherax approximately C$2.7 million, representing its lost profits over 13 years for the rental of the soccer centre for a number of hours much lower than what had been estimated in the tender documents.

Birtz Bastien Beaudoin Laforest Architectes c. Centre hospitalier de l'Université de Montréal (2021 QCCS 795)

In *Birtz Bastien Beaudoin Laforest Architectes c. Centre hospitalier de l'Université de Montréal*, the Superior Court awarded damages to two consortiums of architects and engineers following an unilateral modification of the service agreements by the client.

In 2006, the University of Montreal Hospital Center (CHUM) launched a public call for tenders for architects and engineers in the context of the planned construction of a new hospital. At the time of the initial tender, CHUM had not yet determined whether the project would be delivered under a traditional model or as a public-private partnership (P3). The exact scope of the consortiums' involvement in the project was also not fully determined at the onset of the call for tenders. The tender documents provided significant responsibilities for the consortiums including elaborating the general design and construction direction of the project, design and planning, preliminary estimates, cost-controlling methods and verification of the conformity of the work to the plans and specifications.

The two consortiums signed service agreements with CHUM after their tenders were accepted. Two days after their entry into force, a government decree confirmed that the project would be delivered as a P3. More importantly, CHUM subsequently decided to amend the service agreements by significantly reducing the consortiums' responsibilities, and transferring the removed responsibilities to the private partner to be selected for the project. The two consortiums initiated proceedings against CHUM.

The Court concluded that the amendments were abusive and contrary to the requirement of good faith. Although the service agreements contained a unilateral modification clause in favour of CHUM, the amendments changed the fundamental nature of the service agreements as the responsibilities that were transferred to the private partner to be selected for the project formed the core of the contractual relationship with the consortiums. The Court also concluded that CHUM knew, at the time of the initial call for tenders, that the work to be performed by the consortiums could be significantly reduced in the future or even entirely eliminated. As a consequence, CHUM created false expectations and should have disclosed the uncertainty as to the scope of work to be performed. The Court added that it was contrary to the duty of information and collaboration.

The Court ordered CHUM to pay to the two consortiums a total of C$12 million in damages for unbilled professional fees representing the profits of which they had been deprived.

9150-2732 Québec inc. c. Ville de Montréal, (2021 QCCS 2899)

In *9150-2732 Québec inc. c. Ville de Montréal*, the Québec Superior Court ruled that a city cannot launch a public call for tenders, review the bids submitted and then negotiate a contract directly with a bidder's competitor for the same services while maintaining the ongoing call for tenders process.

In 2018, the City of Montréal (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 reserve clause in the tender documents and cancelled the call for tenders. The same 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.

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The Court agreed with TMD's position. Relying on the long-established "Contract A/B" framework, the Court found that the City could not invoke the reserve clause in the tender documents since a Contract A was formed with TMD following the opening of the bids. While the City had the option to launch a call for tenders or to negotiate directly with a contractor, it could not do both at the same time. In other words, the standard reserve clause included in all of the City's calls for tenders does not entitle the City to leverage bargaining power from the bids to negotiate with the parties outside the call for tender process.

The Court awarded damages in the amount of C$1.98 million to TMD, representing lost profits, as TMD would have been awarded the two contracts in 2018 and 2020 but for the illegal negotiations with Transvac and the subsequent withdrawal of the City. The City of Montréal has appealed the decision.

9090-5092 Québec inc. (Coffrages Saulnier) c. Procureur général du Québec, (2021 QCCS 2378)

In *9090-5092 Québec inc. (Coffrages Saulnier) c. Procureur général du Québec*, the Québec Superior Court granted Coffrages Saulnier's claim for payment of work performed under protest following a public call for tenders where an amendment to the tender documents made less than 24 hours before the bid submission date created confusion as to the scope of work to be performed.

In 2016, Coffrages Saulnier was awarded a contract by the National Assembly of Québec (NAQ) following a public call for tenders for a project entailing the construction of a visitors' centre for the Parliament Building, in Québec. On the eve of the scheduled bid submission date, NAQ provided the bidders with two addenda in which the word "foundations" was removed from one section of the specifications for clarity. Coffrages Saulnier misunderstood the addenda to mean that the formwork needed for the foundations was excluded from the call for tenders — which it was not — and it therefore withdrew the related costs from its bid. Due to this confusion, Coffrages Saulnier's bid was the lowest bid and NAQ awarded the contract to Coffrages Saulnier.

NAQ requested that Coffrages Saulnier perform the work for the foundations formwork, which it did under protest. Coffrages Saulnier then filed suit to reclaim the costs associated with this work which amounted to C$824,606, claiming it was excluded from the contract. NAQ argued that the addenda did not create a contradiction with the existing tender documents and that in light of the entirety of the call for tender documentation, it was clear that the foundations formwork was not excluded from the scope of work. NAQ raised the negligence of Coffrages Saulnier, arguing it should have asked questions about the scope of the addenda before submitting its bid.

The Court agreed with Coffrages Saulnier and concluded that NAQ had failed in its duty to provide adequate information. By providing bidders with last minute addenda, NAQ had created an ambiguity where none existed. Although the plans and specifications were not modified, striking the term "foundations" in one section of the specifications caused confusion. As for the lack of diligence by Coffrages Saulnier, the Court rejected the argument by recalling that the addenda had been communicated the day before the bids were due, thus leaving Coffrages Saulnier little time to review the specifications in detail.

New Brunswick

***Xerox v. SNB*, (2021 NBQB 26)**

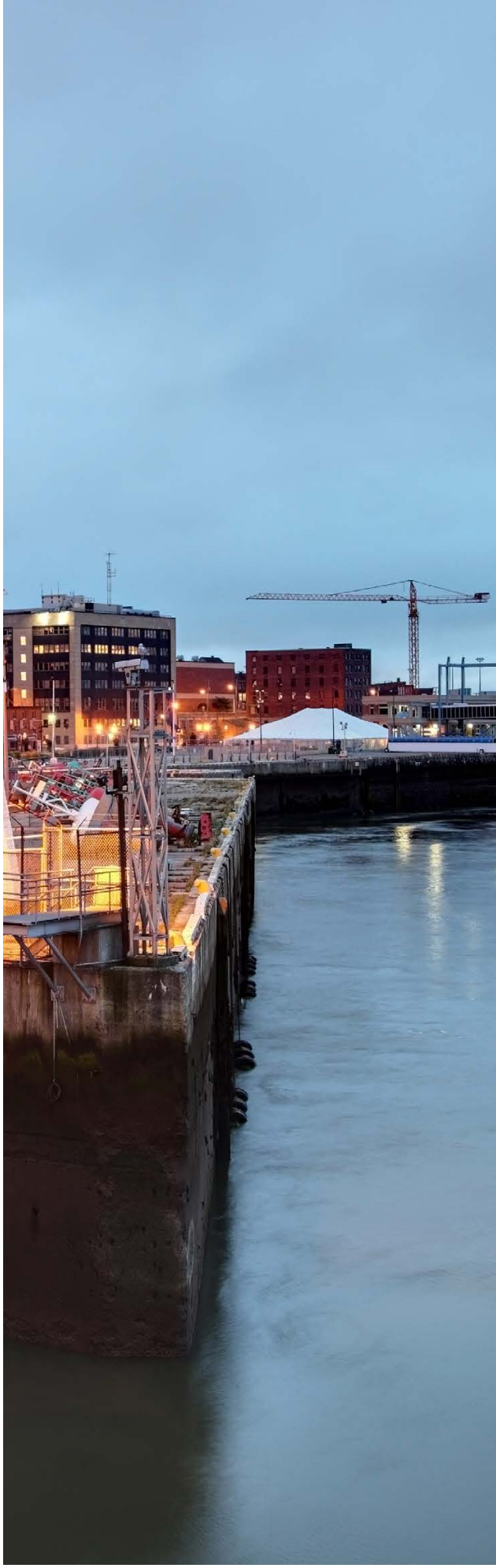
Pursuant to its application for judicial review of a contract award, the plaintiff unsuccessful bidder brought a procedural motion seeking production of documents relating to the evaluation of the proposals, namely "copies of all submitted proposals, copies of scoring sheets, the successful proponent's proposal, the aggregate technical score of the successful proponent and the consensus evaluation report." The unsuccessful bidder argued that the requested material was necessary to ensure the parties to the application for judicial review and the reviewing court had access to the entire record that was before the evaluating team when it made its decision. The contracting authority argued that it had met its requirements under the *Procurement Act* of New Brunswick by conducting a debrief and providing the unsuccessful bidder with debrief materials relating to its bid (and indeed that it went further than required by providing the consensus score sheets as well).

The Court of Queen's Bench agreed, holding that the contracting authority had met its disclosure obligations pursuant to s. 148 of the *Procurement Act* and that the authority had, in fact, exceeded its obligations. It declined to provide any additional disclosure to the unsuccessful bidder.

While the unsuccessful bidder argued that New Brunswick was bound by certain commitments under the *Canadian Free Trade Agreement* to create an independent review body to adjudicate disputes under the treaty, and provide that the procuring entity shall respond in writing to the challenge and disclose all relevant documents to the review body, the Court did not address this argument. Notably, the documents the unsuccessful bidder was seeking are routinely granted by the Tribunal in federal disputes — as a necessary part of adjudicating whether a bid process was fair is the treatment of other bidders.

This may reflect the significantly differing policy principles between the Tribunal and the courts generally. While courts favour an "open court" principle which leads to transparency and open access to records, the Tribunal favours protection of confidential information and has extensive powers (which are liberally used) to protect confidence in the system. The default to a strong confidentiality regime allows for more open production of bid documentation without influencing or undermining the integrity of the bid submission system. It may be that the only way to allow for adequate, treaty-compliant productions is to have such a default confidentiality regime in place for these types of disputes.

Should provinces continue to be deficient in meeting CFTA obligations to create treaty adjudication bodies (such as the BPM noted above), consideration should be given to amending procedural rules to implement an automatic confidentiality regime that would allow disclosure while protecting the bid process.

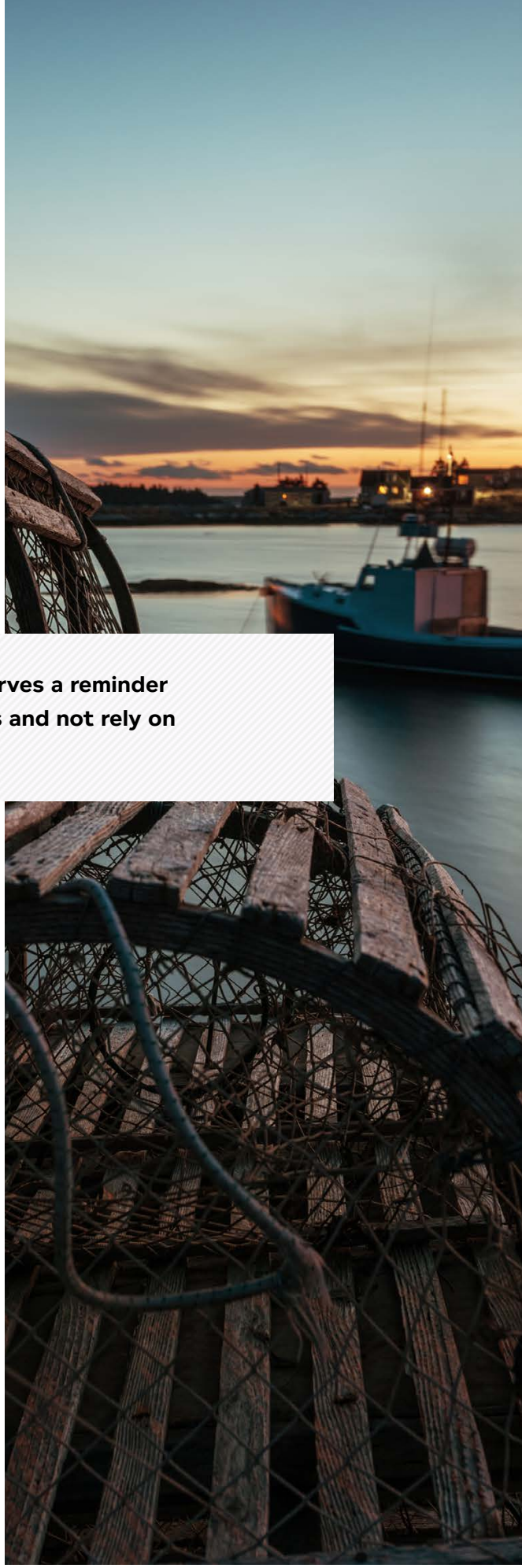


Nova Scotia

***Geophysical Services Incorporated v. Canada (Attorney General)*, (2021 NSSC 77)**

A recent decision of the Supreme Court of Nova Scotia serves a reminder that bidders are expected to monitor publicly posted RFPs and not rely on the contracting authority to alert them as to posting. The case concerned an RFP for seismic mapping research to delineate the limits of Canada's continental shelf (UNCLOS survey work), which was posted on the usual government tendering website.

The plaintiff, a party who had not submitted a proposal, commenced a claim against the defendants, the winning bidder and the contracting authority, alleging that they had (among other things) negligently inflicted economic loss and conspired against the plaintiff by failing to notify the plaintiff of the RFP.



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The plaintiff did not submit a proposal. Two proposals were received, each of which involved the use of a foreign-flagged ship. The successful bidder inquired whether the *Coasting Trade Act* (CTA) would apply to the UNCLOS survey work, as it provides that where "coasting trade" is being accomplished by a non-Canadian flagged ship, that ship must seek a licence from Transport Canada. This in turns triggers a notification to the owners of Canadian flagged ships, who may then object to the issuance of the licence on the basis that they have a Canadian-flagged ship suitable for the work.

The successful bidder was provided with an email chain from a previous year whereby Transport Canada indicated that the CTA did not apply to UNCLOS survey work pursuant to a Department of Fisheries and Oceans (DFO) exemption and because the work, taking place outside Canadian waters, did not meet the definition of "coasting trade" set out in the CTA. An amendment to the contract was made to clarify that the project was being jointly commissioned by the DFO.

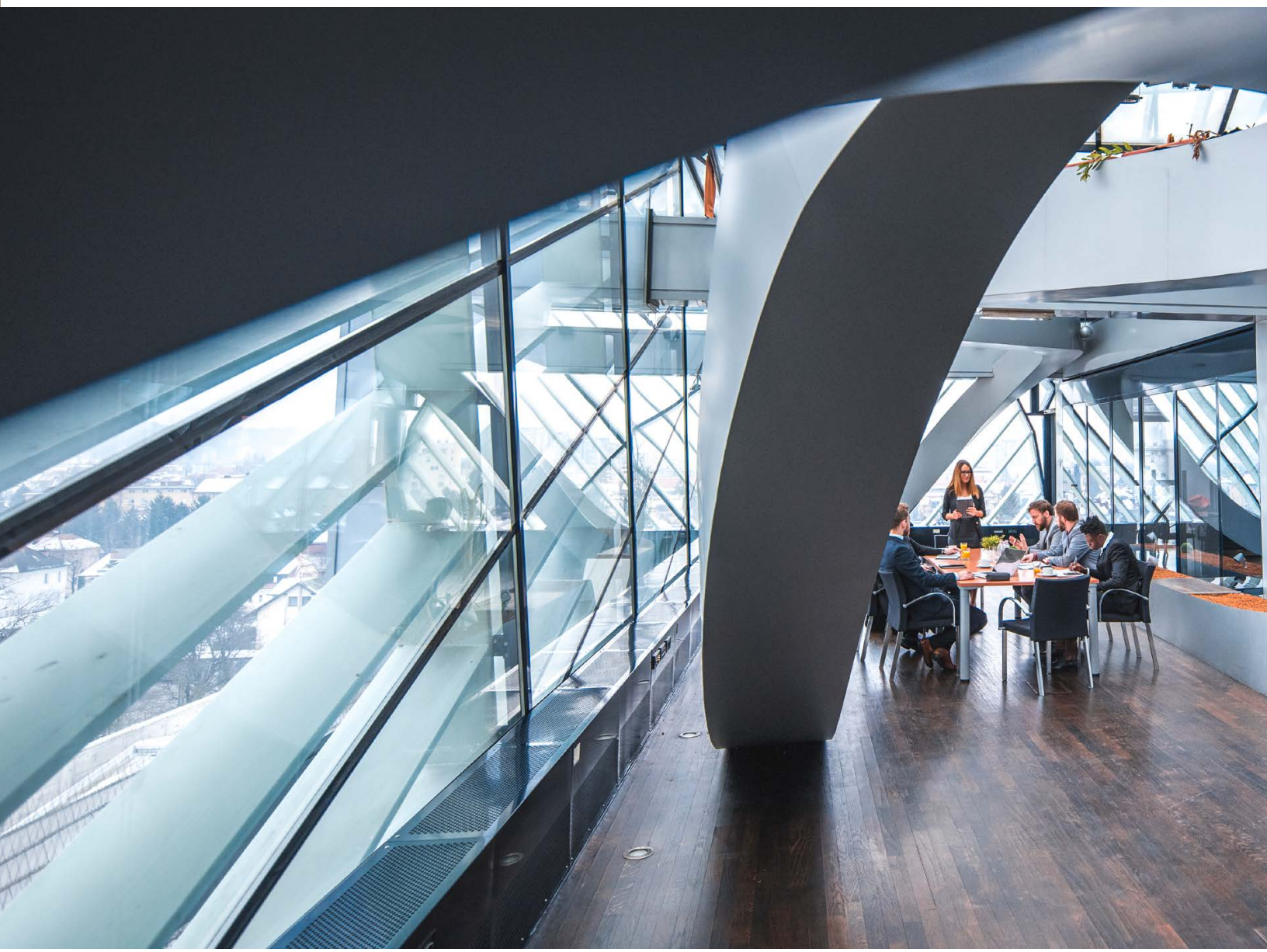
The plaintiff began to inquire why it had not been given the opportunity to bid on the contract as it owned the only Canadian flagged ship that was equipped to do this type of work. The plaintiff learned of the contract amendment including DFO as a "jointly commissioning" party to the project and argued that this was done to avoid the application of the CTA to the project. The plaintiff commenced a claim against the defendants, the winning bidder and the contracting authority, alleging that they had (among other things) negligently inflicted economic loss,

conspired against it, and committed malfeasance in public office. The defendants moved for summary judgment.

The Court granted summary judgement on the negligence claim, finding that the defendant's job was to manage the RFP process fairly... this was accomplished.

The Court granted summary judgment on the negligence claim, finding that the defendant's job was to manage the RFP process fairly on behalf of the federal government and that by posting it on the usual government website, this was accomplished. Though the plaintiff attempted to argue that it should have been directly notified of the RFP, the Court found there was no duty of care to the plaintiff in this regard. However, the Court was not prepared to grant summary judgment on the conspiracy claim and found there to be material questions for trial.

This decision brings the common law standard of diligence into alignment with that followed by the Tribunal, which requires bidders to remain aware of publicly posted RFP materials. Bidders cannot use excuses to argue they did not need to keep abreast of novel opportunities posted by the government. Potential suppliers should therefore keep up to date on new offerings, and potentially create automated tickler systems or other automated information feeds to ensure no opportunities are missed.



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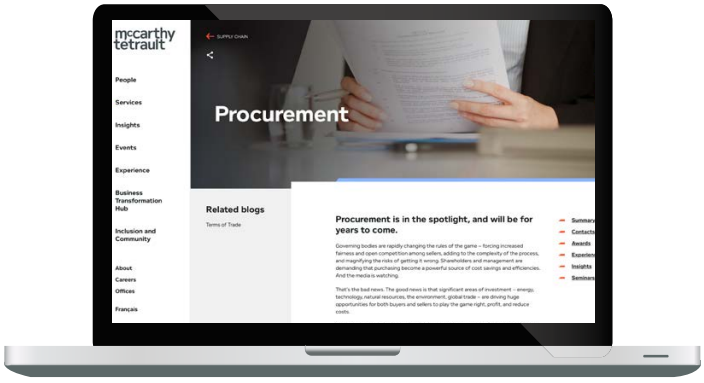

mccarthy tétrault

VANCOUVER
Suite 2400, 745 Thurlow Street
Vancouver BC V6E 0C5

CALGARY
Suite 4000, 421 7th Avenue SW
Calgary AB T2P 4K9

TORONTO
Suite 5300, TD Bank Tower
Box 48, 66 Wellington Street West
Toronto ON M5K 1E6

MONTRÉAL
Suite 2500
1000 De La Gauchetière Street West
Montréal QC H3B 0A2

QUÉBEC CITY
500, Grande Allée Est, 9e étage
Québec QC G1R 2J7

NEW YORK
55 West 46th Street, Suite 2804
New York, New York 10036
United States

LONDON
1 Angel Court, 18th Floor
London EC2R 7HJ
United Kingdom