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Public Procurement 2022 Year in Review

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In 2022, global commerce began to slowly recover from the effects of the COVID-19 pandemic, with supply chains and procurement efforts continuing to "unfreeze" and shift back to a more normal baseline. However, the Russian invasion of Ukraine, global security threats and a turn toward trade protectionism, as well as high levels of inflation brought new challenges on the procurement front. These conditions mark a significant, and likely to be lasting, change from the years of rising productivity and globalized 'just-in-time' supply chains that pre-dated the pandemic. Given the increasingly challenging environment in which purchasers and suppliers operate, it is all the more important to stay informed of the latest developments in procurement law, including law and policy updates as well as new decisions by tribunals and courts.

In this Public Procurement 2022 Year in Review, we have prepared a practical guide to important developments in procurement law that occurred in 2022. In particular, we review the key changes in procurement policies and methods by Canadian public purchasers, as well as provide an in-depth analysis of new decisions from procurement-related administrative tribunals/the Federal court, and various provincial courts.

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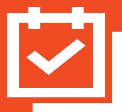
Key developments at the federal level

CHANGES TO PROCUREMENT POLICIES

In June 2021, Public Services and Procurement Canada (PSPC) announced that it would be making changes to the Contract Security Program (CSP). Changes to the personnel screening process were implemented under Phase 1 in October 2021. On May 2, 2022, PSPC implemented Phase 2 of its plan for changes to the CSP, which focused on the organization security screening process. The changes in Phase 2 refocus organization security screening efforts on active participants in a procurement process with a view to shortening processing times, reducing the administrative burden on industry, streamline the subcontracting process, and improve the competitiveness of Canadian industry in foreign defence and security markets. Through these changes to the CSP, PSPC intends to improve service standards and align the security screening process with those of like-minded foreign partners.

Last year also marked the transition to a full implementation of the new Directive on the Management of Procurement (Directive) replacing the Contracting Policy and Policy on Decision Making in Limiting Contractor Liability in Crown Procurement Contracts. While this initially entered into effect on May 13, 2021, federal departments had until May 13, 2022, to fully transition. The new Directive attempts to streamline the prior policies by moving to an approach focussed on the key procurement principles of fairness, openness, and transparency, and away from 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.



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In January 2022, the federal government also announced a comprehensive plan to diversify suppliers. The Supplier Diversity Action Plan lays out steps to increase the participation of businesses from underrepresented groups in federal procurement, including enhanced services to help underrepresented groups navigate the procurement system. One such service is a new coaching program for underrepresented suppliers that have had limited success in federal procurements. The coaching service was launched in May 2022, and will help suppliers address some of the most commonly perceived barriers in procurement, as well as bidding challenges they have previously faced.

NEW AND NOTEWORTHY DECISIONS

Federal case law in 2022 underlined the limits of the complaint process in procurements covered by the national security exemption, as well as reaffirmed

the powers of the Tribunal deference with which the Federal Courts will treat Tribunal decisions.

In *Thales Canada Inc.*, 2022 CanLII 26909, the Canadian International Trade Tribunal (Tribunal) addressed a complaint by Thales regarding a procurement by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND). Thales alleged that it was unable to submit its bid through no fault of its own, but rather because of a technical problem with the bid submission platform—Canada Post Corporation's "epost Connect". PWGSC refused to accept Thales' bid submission by email and accepted no responsibility for the technical failure of the epost Connect system. Thales argued that the circumstances it encountered were unfair and that PWGSC had acted contrary to its obligations under the Canadian Free Trade Agreement (CFTA) and the Canada-European Union Comprehensive Economic and Trade Agreement (CETA).

The complaint was ultimately dismissed pursuant to subsections 10(2) and (3) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* (Regulations). A national security exception (NSE) had been invoked for the procurement, and, as a result, it was excluded from all obligations of all trade agreements. In light of amendments to the Regulations in 2019, the Tribunal had no interpretive discretion in such circumstances and was required to dismiss any complaint, regardless of the underlying merit, where an NSE was invoked in the manner and time prescribed by the Regulations. Moreover, the Tribunal could not "lift the veil" to control for DND's rationale in invoking the NSE. The tone of the decision suggests that the Tribunal would have been minded to intervene were its hands not tied. The Tribunal noted that this was a missed opportunity to further investigate shortcomings with the epost Connect platform and encouraged PWGSC to examine the issues raised by Thales and to take any appropriate action.

In *Pacific Northwest Raptors Ltd.*, 2022 CanLII 27511, the Tribunal investigated a complaint concerning another procurement by PWGSC on behalf of DND. The matter involved a solicitation for aerodrome wildlife control services at a Nova Scotia air force base. In its complaint, Pacific Northwest Raptors Ltd. (PNWR) alleged various failures of PWGSC in evaluating its bid in accordance with the provisions of the RFP, including (1) that the evaluation was based on undisclosed criteria, (2) that the evaluation team failed to arrive at a consensus score as required by the evaluation methodology, (3) that the evaluation methodology used was less favourable to PNWR than it was to other bidders, and (4) that the evaluation results and level of disclosure provided by PWGSC raised doubts about the transparency and integrity of the procurement process.

The Tribunal dismissed most of PNWR's claim, but found that the allegation that the evaluation methodology

used was less favourable to PNWR than to other bidders was valid in part. One evaluator out of a three-person panel was of the view that three statements in PNWR's proposal constituted "red flags" demonstrating a less than total understanding of the work to be provided at the air base and, consequently, awarded fewer points in evaluating certain technical criteria in the bid. Upon investigation, the Tribunal found that the evaluation at issue was unreasonable and that there was no basis to find that PNWR demonstrated a misunderstanding of the work to be performed. Even if PNWR had been awarded full points for the criteria in question, the resulting increase in its score still would not have been sufficient for it to obtain the highest combined rating for technical merit and price required to win the contract. Nevertheless, the Tribunal concluded that PWGSC's failure to properly apply its evaluation methodology warranted a remedy. It recommended that PWGSC issue a new solicitation at the end of the one-year contract rather than exercising its option to extend the contract for a subsequent year.

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Pacific Northwest Raptors Ltd. v. Canada (Attorney General), 2022 FCA 76

In a separate claim involving a PNWR bid for wildlife control services at air force bases in Ontario, PNWR sought judicial review of two Tribunal decisions, alleging

breaches of procedural fairness and that the decisions were unreasonable. The Federal Court of Appeal dismissed PNWR's application in its entirety. The Court found no merit to the breach of fairness allegations and noted that it would be improper for PNWR to succeed on such a claim considering that it had not raised the fairness issue before the Tribunal and only argued a breach on appeal. Regarding reasonableness, the Court deferred to the judgment of the Tribunal for both decisions.

The Court emphasized that, in conducting an investigation, the role of the Tribunal is not to reevaluate a bid, but to determine whether the finding of the evaluators was reasonable.

The Court emphasized that, in conducting an investigation, the role of the Tribunal is not to reevaluate a bid, but to determine whether the finding of the evaluators was reasonable. In the first decision under review, the evaluators found that PNWR had failed to comply with mandatory criteria for the bid, and the Court determined that there was nothing in the record to support a finding that this evaluation was unreasonable. The Court found that the remedy imposed by the Tribunal in recommending the contract with PNWR be terminated and a new contract be awarded to the competing bidder was also reasonable. In this case, the standards for evaluation were clearly expressed in the RFP, PNWR was found to have not met the standards for certain mandatory criteria, and PNWR made no arguments as to why awarding the contract to the only competing bidder was unreasonable.

Ontario: a year of change

Procurement policies in Ontario followed the global trend inward, with the passage of new protectionist legislation intended to favour local businesses. On the other side, the Divisional Court confirmed that it would hear challenges to provincial procurement decisions under CETA, providing a new avenue of recourse for suppliers.

CHANGES TO PROCUREMENT POLICIES

In March 2022, the Ontario Government launched the Building Ontario Businesses Initiative (BOBI) to "reduce barriers and provide companies in Ontario with greater access to public procurement opportunities." The central plank of BOBI is the Building Ontario Businesses Initiative Act, 2022, S.O. 2022, c. 2, Sched. 2 (BOBI Act). Once in force (on a date to be named), the BOBI Act will require Ontario's public sector buyers to give preference to Ontario businesses when procuring goods and services under a certain threshold amount.

Not much is known about how the BOBI Act will be implemented, but its potential impact on procurements is significant. Ontario's own news releases describe the BOBI Act as a means of awarding contracts to Ontario businesses worth $3 billion annually by 2026. Businesses not given "preference" by the BOBI Act could stand to lose a considerable value in public contracts.

Further, the text of the BOBI Act itself is very limited. The statute sets out a broad goal to "give preference to Ontario businesses, in accordance with the regulations" to be issued by the Lieutenant Governor in Council. The content and framing of these regulations is as yet unknown, and will likely be the focus of lobbying efforts by stakeholders. Interested parties will need to wait until promulgation to learn the threshold amount under which the Act will apply, as well as other key information, including the goods and services to which the Act applies, the definition of an Ontario business, and the manner in which "preference" will be given to Ontario businesses.

Depending on the threshold value adopted by regulation, the BOBI Act may contravene the non-discrimination provisions of international and interprovincial free trade agreements. But it should be expected that Ontario will purposely set the value threshold at a level below its obligations under the CFTA and the other trade agreements.

Even if the BOBI Act is ultimately of limited application, it provides a strong signal that the Ontario Government intends to take a more protectionist bent with its public procurement strategy into the future.

CASE LAW UPDATE

Ontario litigants finally have a tested avenue of litigating their trade-related disputes with the provincial government following the June release of *Thales DIS Canada Inc. v. Ontario*, 2022 ONSC 3166. Thales concerned the non-discrimination provisions of the Canada-European Union Comprehensive Economic and Trade Agreement (CETA). At issue was whether Ontario breached those non-discrimination provisions when it required bidders for a drivers' license and health card contract to produce card stock in a "secured facility in Canada." The Divisional Court found that it had.

The plaintiff was the multinational security company Thales, one of the bidders on the license and health card contract. Thales wished to produce card stock for the contract at its facility in Gdansk, Poland. It complained that the requirement to produce card stock in Canada, written into Ontario's Request for Bids (RFB), amounted to discrimination under CETA, and lodged that complaint with Supply Chain Ontario's Director of Program and Policy Enablement. Ontario, in response, alleged that CETA's public safety exception permitted it to impose the Canadian facility requirement. The Director sided with Ontario, finding that CETA's public safety exception permitted Ontario to insist on production in a Canadian facility. Thales applied for judicial review of the decision, as well as judicial review of the RFB itself.

To begin, the Divisional Court found it could review both the decision and the RFB. That finding resolves the question of what avenue a litigant ought to pursue to challenge a provincial procurement decision for its incompatibility with CETA — something that has been unclear since CETA came into force. It also adds some important caveats, too. When reviewing the decision of a Director, the court may only grant relief of *certorioari, mandamus*, or prohibition. In addition, the court may only review an RFB if it was issued pursuant to a decision that is more public than private in nature: for instance, when the RFB's issuance was a matter of public interest, or a mandatory government directive caused it to be issued.

Having established its authority to review the decision and the RFB for incompatibility with CETA, the Divisional Court

went on to consider the merits of Thales' challenge. The Divisional Court found that the Ministry's decision to issue the RFB was unreasonable because there was no evidence to show the Ministry had considered CETA before issuing an RFB with a domestic production requirement. Similarly, the court found the Director's decision to dismiss Thales' complaint to be unreasonable, because there was no proof that the Director had considered whether producing card stock domestically was really "necessary" (the standard required by CETA) to protect the alleged public safety interest at stake.

Having established its authority to review the decision and the RFB for incompatibility with CETA, the Divisional Court went on to consider the merits of Thales' challenge.

Corbett J. wrote a strong concurrence, agreeing that the RFB was unreasonable, but going further than the majority by denying the Director's jurisdiction to dismiss Thales' complaint in the first place. According to Corbett J., a person with jurisdiction to adjudicate CETA disputes would need to be an "impartial administrative or judicial authority that is independent of its procuring entit[y]," per Article 19.17.4 of CETA. If the Director were not impartial (as Ontario conceded), then she had no authority to render decisions about CETA compliance. Corbett J. would have quashed her decision for lack of jurisdiction.

Corbett J. went on to opine, in very strong terms, that Ontario's "flagrant and inexplicable" failure to appoint proper CETA adjudicators was the real cause of the dispute in *Thales*. Ontario had decided to leave decisions on trade compliance to decision-makers without any expertise in international trade law, like the Director. The obvious consequence was that these decision-makers could not appreciate the kinds of evidence and proof relevant to the trade-related decisions, and were not qualified to decide these issues.

Thales is a high-impact case. Litigants finally have clear guidance on whether judicial review is available when a provincial procurement decision is alleged to have violated a treaty. Furthermore, both the majority and concurrence raised serious concerns about the Ontario Government's process for adjudicating CETA disputes, which is likely to reverberate in policy debates in the future.

Alberta: Auditor General's report recommends improvements to procurement oversight

The most important procurement law development in Alberta in 2022 was the release of the Report of the Auditor General on Alberta Infrastructure Procurement Processes (AG Report) in June. This review was prompted by the fact that Alberta Infrastructure had undertaken over 2700 construction procurement projects, with a combined total value of approximately $4.5 billion, from 2016 to 2020. Given the magnitude of the expenditure, the Office of the Auditor General undertook an audit to ensure that Alberta Infrastructure's procurement processes were competitive and fair and Albertans were obtaining value for money spent.

The Auditor General reviewed a sample of the 175 contracts that were awarded by the Capital Project Delivery Division of Alberta Infrastructure between January 2016 and December 2020, with a total value of $1.1 billion. These contracts were for the construction of schools, health facilities, and other government-owned facilities. This audit revealed that Alberta Infrastructure had failed to comply with the Government of Alberta's Procurement Accountability Framework (PAF), trade agreements and obligations, and the common law in key respects. The AG Report made a number of recommendations for improvements. Further failure to address these issues may adversely impact the fairness, transparency, and integrity of Alberta's public procurement regime.

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FINDINGS & RECOMMENDATIONS

Soliciting Documents and Posting

A key recommendation from the AG Report was that Alberta infrastructure "improve its controls to ensure solicitation documents and posting periods comply with trade agreements". The audit found that Alberta Infrastructure did not consistently comply with the posting period requirements for solicitation documents stipulated by the various trade agreements. For example, under some agreements, a minimum 25-day posting period is required for construction procurements over $9.1 million. Of the 17 RFQs matching these criteria that were sampled, only nine had been posted for the minimum 25 days. In addition, Alberta Infrastructure had no guidelines stipulating the posting period required after an addition or modification was made to a solicitation document. In some instances, Alberta Infrastructure had issued an addendum modifying the specifications of a construction project two days or less before the posting period closed.

While the procuring entity may refer to producers, suppliers, or manufacturers in design specifications, the solicitation documents must indicate that it will consider equivalent services. The AG report notes that Alberta Infrastructure would frequently include manufacturers in design specifications but was inconsistent in stating that equivalents were acceptable. In fact, in some instances, it expressly stated that equivalents would not be allowed.

Critically, the AG Report also expressed concern over the solicitation document approval mechanism, as certain documents were approved despite not meeting the requirements of various trade agreements while for others, there was no evidence to suggest that any approval mechanism had been applied at all.

Receiving Submissions

The audit also discovered that the control system used to verify whether or not bid submission forms are received before the bid submission deadline was not operating effectively. Although the audit did not reveal that Alberta Infrastructure had improperly disqualified or accepted any bids because of these deficiencies, there were instances where bid submission forms that were misplaced, contained inaccurate information, were improperly reviewed and verified, or not reviewed within a timely manner. The AG Report accordingly recommended that Alberta Infrastructure take steps to ensure that the control systems in place to ensure bid submissions are submitted on time are operating appropriately.

Protecting Confidentiality

The audit found that Alberta Infrastructure does not limit employee access to procurement information based on the information required by the employee in order to perform their job responsibilities in relation to the procurement. In addition, although bids are not supposed to be reviewed until the procurement closes, Alberta Infrastructure does not have the capability to identify if an employee has opened electronic bid submission forms received via email prior to the closing. The AG Report recommended that Alberta Infrastructure improve their systems for limiting access to procurement information in order to ensure confidentiality.

Evaluating Proponent Submissions

The Auditor General further requested that Alberta Infrastructure improve its submission evaluation controls related to ensuring compliance with proposal requirements, identifying conflicts of interest, and providing thorough documentation The PAF, applicable trade agreements, and Canadian common law require that Alberta Infrastructure disqualify submissions that do not conform with the

requirements of the solicitation documents. However, the audit revealed that Alberta Infrastructure was inconsistently disqualifying proponents who submitted noncompliant submissions in response to RFPs. In eight out of 58 procurements sampled, the proponent failed to use Alberta Infrastructure's legal name on the bid bond; however, only one proponent was disqualified. Further, it was found that proponents were not being properly disqualified for conflicts of interest.

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Another concern was that Alberta Infrastructure only requires proponents to disclose any potential conflicts of interest but does not require proponents to make a declaration that they do not have any conflicts of interest. Alberta Infrastructure had also consistently applied its evaluation process in reviewing RFQs. However, it was determined that there was inadequate documentation provided in performing these evaluations in order to justify the different scores.

British Columbia and Saskatchewan: updates on key caselaw

In last year's publication, we reported on *FORCOMP Forestry Consulting v British Columbia*, 2021 BCCA 465. In that case, the Court of Appeal of British Columbia considered a potential new tort of "blacklisting" in the context of procurement contracts. The Court of Appeal upheld the motion judge's decision to strike the claim as bound to fail given that it was not an existing tort, and recognizing such a new tort would not "reflect an incremental development to an existing body of law." Having been twice denied, FORCOMP sought leave to appeal to the Supreme Court, which was dismissed with costs. That being said, as noted last year, FORCOMP has been allowed to move forward with the remaining clams for conspiracy and misfeasance in public office.

We also reported last year on the dispute between West-Can Seal Coating Inc. (West-Can) and the Ministry of Highways and Infrastructure for the Province of Saskatchewan (Ministry). West-Can alleged that the Ministry had engaged in a pattern of discrimination against out-of-province suppliers, specifically calling out the Ministry's scoring and evaluation processes. West-Can commenced an arbitration pursuant to the Bid Protest Mechanism (BPM) under New West Partnership Trade Agreement (NWPTA). The arbiter held that the Ministry had breached a number of Articles under the Canadian Free Trade Agreement (CFTA) and awarded West-Can its costs in the arbitration and its bid-preparation costs.

The Ministry then brought an application for judicial review, seeking an order quashing or setting aside the arbiter's order on the basis that the arbiter breached principles of procedural fairness and rendered an unreasonable award. In particular, it asserted that the arbiter breached the principles of procedural fairness and rendered an unreasonable award by (1) exceeding the scope of the arbitration, (2) failing to give the Ministry an opportunity to respond to West-Can's evidence and arguments, (3) considering irrelevant evidence and failed to consider relevant evidence; and (4) rendering a wholly unreasonable decision.

In its February 2022 decision, *Saskatchewan (Highways) v West-Can Seal Coating Inc.*, 2022 SKQB 43, the court noted that the parties had elected to govern their arbitration under the BPM, which provided only a limited right of judicial review extending only to clauses 46(1)(c) and (f) through (i) and subsection 46(8) of *The Arbitration Act*, 1992 (SS 1992, c. A-24.1) if the government entity is from Saskatchewan. However, the court held that the three procedural fairness issues raised by the Ministry fell within the limited right of judicial review, while the reasonableness of the decision did not. The court reviewed the procedural fairness issues on a correctness standard and held that the arbiter was correct in that he proceeded in a procedurally fair manner. While it did not decide the issue of the reasonableness of the decision as it fell outside the court's jurisdiction, it noted that it would find that the arbiter delivered a decision that falls within the description of a reasonable decision in *Vavilov*. West-Can was awarded the costs of the application.

This decision indicates that the courts will uphold the integrity of the BPM arbitration process, and increases the utility and appeal of that mechanism to suppliers seeking review of governmental decisions that provide unfair advantages for local economies. It should also give public procurement authorities pause before adopting a parochial approach.

Québec : Legislative Developments and Case Law Review

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

On June 2, 2022, Bill 12, *An Act mainly to promote Québec-sourced and responsible procurement by public bodies, to reinforce the integrity regime of enterprises and to increase the powers of the Autorité des marchés publics* (Bill 12) was assented by the National Assembly of Quebec. By amending the *Act respecting contracting by public bodies* (the Act), Bill 12 aims to increase the economic development of Québec and its regions and to support sustainable development, create a public procurement innovation space and to strengthen the safeguards for monitoring the integrity of businesses. Bill 12 also introduces prompt payment and dispute settlement measures with respect to public construction work contracts. The below are only selected highlights of the new amendments to the Act introduced by Bill 12.

Prompt Payment and Dispute Settlement Measures

Bill 12 aims to remedy the persistent payment delays for construction work done on behalf of public bodies subject to the Act. Pursuant to the provisions of Bill 12 amending the Act, in order to be considered valid, requests for payment will have to be done in compliance with the terms and conditions determined by regulation[1], such as the requirement to include the contractor's name and address, a description of the work, the period during which the work was carried out and the sum of money to be paid. A party will not be in default to pay if no valid request for payment has been made and, further to receipt of a valid request for payment, to the extent it disputes a payment request, such party will be required to express a refusal to pay within the time determined by regulation. Further, a party is required to pay the sums claimed by means of a valid request for payment within the time determined by regulation, unless such party has expressed its refusal within the prescribed refusal period. It is expected that once the regulation is adopted, specific cases will be contemplated where a party may make a withholding or deduction from a sum of money payable, notwithstanding its failure to provide a refusal within the required time period. If a payment dispute occurs, such dispute may be settled by a third-person decider, selected by the parties to the dispute or as otherwise determined by the regulation. The decision rendered by a third-person decider is binding on the parties until either a judgment by a court of general jurisdiction is made or an arbitration award is rendered on the same subject matter. The Minister of Justice will be responsible for designating the persons or bodies or associations responsible for certifying the third-person deciders and only such persons may act as third-person deciders.

Development of Québec's Regions and Sustainable Development

Bill 12 amends the provisions of the Act to include a new objective, which is the use of public contracts as a lever for the economic development of Québec and its regions. Consequently, a public body must favour making a regionalized public call for tenders or favour procurement of Québec goods, services or construction work, where a contract is not subject to an intergovernmental agreement. The public body must record the circumstances or reasons

[1] As of the date of this publication, no regulation has been adopted.

considered if it does not make a regionalized public call for tenders or favour procurement of Québec goods, services or construction work.

Furthermore, public bodies are now required to conduct an evaluation of procurement requirements that advances the pursuit of sustainable development before the tendering or awarding process for a contract. Public bodies must give priority to including in the tender documents or the contract, as applicable, at least one condition relating to the responsible nature of the procurement, from an environmental, social or economic perspective. Such a condition may take the form of an eligibility requirement, technical requirement, criterion for quality assessment or preferential margin. Public bodies must record the circumstances or reasons considered if they do not include such requirement. The Conseil du trésor has the authority to direct public bodies to include in their procurements one or more conditions relating to the responsible nature of a procurement, from an environmental, social or economic perspective.

Public Procurement Innovation Space

Eliminating the "lowest compliant bidder" rule was heavily debated in Quebec in recent years and, although this rule remains, the Act was amended to create a public procurement innovation space pursuant to which, in order to achieve the government's objectives set out in the Act, the Chair of the Conseil du trésor may waive traditional rules applicable to tendering and awarding contracts. Such objectives include fighting climate change, improving the representation of Indigenous businesses and promoting innovation. For example, the Chair of the Conseil du trésor may determine the procurement through which a public body must grant a premium in the form of a preferential margin to enterprises that comply with more stringent environmental or climate change-related standards than those provided by applicable law or the tender documents, issue invitations to tender to acquire a prototype, use procurement modes involving competitive dialogue where there is a need to procure innovative goods, services or construction work or grant a premium in the form of

a preferential margin to Indigenous businesses or to businesses that would involve Indigenous persons in the performance of the contract.

INTEGRITY OF ENTERPRISES

The amendments to the Act introduced by Bill 12 increase the Autorité des marchés publics' (AMP) powers to strengthen the integrity regime of businesses contracting with public bodies. The Act provides for a universal obligation for any business that is party to a public contract or subcontract to meet the "high standards of integrity that the public is entitled to expect from a party to such a contract or subcontract". When entering into a contract with a public body or submitting a bid, all businesses must now provide declarations recognizing the standards of integrity and undertaking to take all measures necessary to meet those standards throughout the duration of the contract. The declaration of integrity will be in the form determined by regulation.

Moreover, further to the amendments to the Act introduced by Bill 12, any business that either holds an authorization to contract with a public body or is a party to a public contract or subcontract, is subject to the oversight of the AMP. The AMP's oversight powers are further expanded to include the power to require a business to provide any document or information enabling the AMP to verify whether the business meets the standards of integrity and impose corrective, oversight or monitoring measures on any business that fails to meet the standards of integrity.

Lastly, Bill 12 also introduced a new regime for monetary administrative penalties in the Act pursuant to which the AMP may impose monetary administrative penalties of up to $10,000.

CASE LAW REVIEW

MPECO inc. C. Ville de Sainte-Agathe-des-Monts, 2022 QCCA 916

In *MPECO inc. c. Ville de Sainte-Agathe-des-Monts,* the Court of Appeal confirmed that the word "expenditure", for the purposes of determining whether an authorization from the Autorité des marchés financiers (AMF)[2] is necessary under the Act, means the actual net expenditure incurred by the public body and not the value of the contract written on the tender form.

In 2013, the city of Sainte-Agathe-des-Monts (City) launched a call for tenders to increase the capacity of its

[2] Further to legislative changes since the time of the facts of this case, the AMP is now responsible for delivering the authorizations.now responsible for delivering the authorizations. now responsible for delivering the authorizations.

wastewater treatment plant. The City obtained bids from three bidders, which included Nordmec Construction inc. (“Nordmec”) and MPECO inc. (“MPECO”). Nordmec’s bid was the lowest (C$11.4 million), followed by MPECO. All bids included sales taxes, as well as operating costs and contingency costs. The City awarded the contract to Nordmec, even though Nordmec did not include an authorization from the AMF with its bid. MPECO alleged that Nordmec’s bid was not compliant given the lack of authorization from the AMF and initiated a claim against the City for loss of profits.

At the time of the call for tenders, the instruction to the bidders and section 21.17 of the Act required any business that wished to enter into a contract with a public body involving an expenditure, equal to or greater than C$10 million, to obtain an authorization for that purpose from the AMF.

Given that Nordmec’s bid came in at C$11.4 million, MPECO argued that the City committed a fault in declaring Nordmec’s bid compliant event though it did not have the AMF authorization. The City argued that after deducting statutory tax credits as well as the operating costs (which are paid to third parties) and contingency costs (which are not guaranteed), the expenditure amount fell below C$10 million; therefore, no AMF authorization was required.

The Superior Court and the Court of Appeal agreed with the City’s interpretation of section 21.17 and concluded that the requirement for the AMF authorization is not based on the value of the contract as shown on the bid form, but rather on the actual net expenditure incurred by the City.

Couillard Construction limitée c. Procureur général du Québec (Ministère des Transports du Québec), 2022 QCCS 2069

In *Couillard Construction limitée c. Procureur général du Québec (Ministère des Transports du Québec)*, the Superior Court granted Couillard Construction limitée’s (Couillard) claim and ordered the Ministère des Transports du Québec (MTQ) to pay Couillard C$1.8 million for lost profit, due to Couillard not being awarded a contract by the MTQ for non-compliance even though it had submitted the lowest bid.

In 2014, the MTQ launched a public call for tenders for the construction of a road. In addition to the tender documentation, the MTQ, in the context of a pilot project, added a special specification document (the Specification) that required the amount listed under the “site organization and site premises” (SOSP) line item to not exceed 6% of the total bid amount. However, Couillard evaluated this item as constituting 11.8% of the total bid amount and

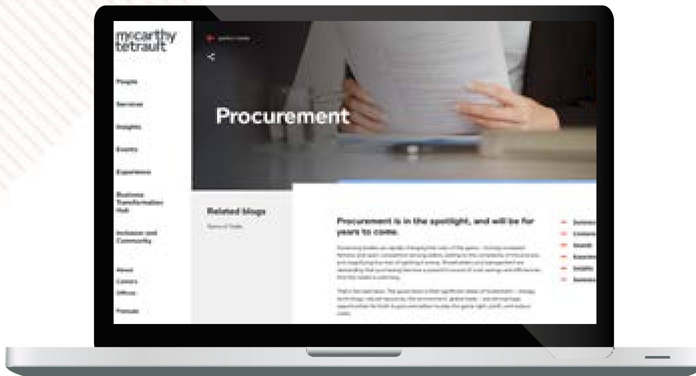
failed to distribute the excess amount onto other unit prices. The MTQ rejected Couillard's bid on this basis, even though it had submitted the lowest bid. Couillard maintained that its bid was compliant and sued the MTQ for its lost profits.

The Superior Court agreed with Couillard's position that its bid was compliant with the requirements of the call for tenders. The Court considered the pilot project to be problematic. The Specification was contradictory to the instructions in the tender documentation, which clearly prohibited bidders from unbalancing or distorting their unit prices. The MTQ had the responsibility to give bidders clear instructions.

The Court also stated that awarding the contract to Couillard would not have prejudiced the duty of fairness and equality between the bidders. The alleged irregularity, even if proven, was minor since it had no effect on the final bid price. Furthermore, the Court found that there was no logical reasoning behind the pilot project. Last, the Court noted that the pilot project was not in the public's benefit since the contract ended up being awarded to the second-lowest bidder instead of the lowest bidder. The Court concluded that the MTQ committed a fault in not awarding the contract to Couillard.

AMP'S REPORT ON IRREGULARITIES IN MUNICIPAL CALL FOR TENDERS

It must be noted that this year in August the AMP released its report on calls for tenders issued by municipal entities. According to the report, between August 2021 and March 2022, 14% of the 3903 call for tenders reviewed contained errors or non-compliant documents. Most frequent errors included non-compliant deadlines for filing a complaint (when required), non-compliance with the minimum 4-day period between the deadline for filing a complaint and the deadline for submitting a proposal, and non-compliance with the minimum 15-day period between the publication of the call for tenders and the deadline for submitting a proposal. The AMP informed the municipalities of such irregularities.



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

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