GOVERNMENT CONTRACTS

REVIEW OF THE SIGNIFICANT CANADIAN FEDERAL GOVERNMENT CONTRACTING CASES IN 2016

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All procurements in Canada are, at common law, founded on the principles articulated in the Supreme Court of Canada decision in *The Queen (Ontario) v Ron Engineering*.[1] *Ron Engineering* introduced the concepts of "Contract A" and "Contract B" into Canadian procurement law. The Court in *Ron Engineering* held that when a call for tenders is issued, this constitutes an offer, and when a compliant bid is submitted by a potential supplier, this constitutes acceptance and a unilateral contract (Contract A) is created at that moment. This gives rise to binding obligations on the Crown, including the implied duties to conduct a fair competition, to award the contract to the winning bidder, and to award the contract as tendered. Finally, by submitting a bid, the potential supplier is accepting the terms of the bid solicitation documents. Contract B is formed between the purchaser and the successful supplier once the winning contractor is selected. A breach of any of these implied duties under Contract A may give use to civil action in damages by the unsuccessful bidder in the courts.

Notwithstanding this procurement regime at common law, Canada's federal bid challenge regime falls under the jurisdiction of the Canadian International Trade Tribunal ("Tribunal" or "CITT'). This quasi-judicial regime applies to some, but not all, of the purchasing undertaken by the federal government.

The Tribunal conducts inquiries into complaints by potential suppliers considering federal government procurements that are covered by the *North American Free Trade Agreement* ("NAFTA"), the *Agreement on Internal Trade* ("AIT"), and the *Revised Agreement on Government Procurement*.

Where a complaint is upheld, the Tribunal generally makes recommendation for appropriate remedies. These recommendations can be far reaching and can significantly impact the affected parties. These may range from recommendations for re-evaluation of bids or a re-tender of the requirements after the Crown has made appropriate changes to the solicitation documents, to recommendations for payment of bid preparation costs or lost profits, or payment of compensation for lost opportunity to profit on a contract. The Tribunal may also recommend that a contract awarded pursuant to a flawed process be terminated and that the contract be awarded to the complainant.[2]

The following is an overview of some of the more significant recent cases.

Oshkosh Defense Canada Inc. v. Department of Public Works and Government Services[3]

On January 6, 2016, Oshkosh Defense Canada Inc. ("Oshkosh") filed a complaint with the CITT concerning a Request for Proposal ("RFP") issued by the Department of Public Works and Government Services Canada ("PWGSC"), on behalf of the Department of National Defence ("DND"), for the provision of Standard Military Pattern vehicles for its Medium Support Vehicle System project. Oshkosh alleged that the PWGSC ignored information in its bid, failed to follow the evaluation provisions within the RFP, improperly conducted the evaluation and failed to conduct a proper debriefing. The contract, valued at $834 million, was awarded to Mack Defense LLC ("Mack").

The Tribunal found that bid evaluators appeared to have ignored some information in Oshkosh's bid and failed to conduct the evaluation of some bid components in accordance with the terms and directives of the RFP. The Tribunal also discovered that significant gaps existed in the PWGSC's record-keeping, which seriously impacted both the transparency of the procurement process and the Tribunal's ability to analyze Oshkosh's complaint. In sum, it was not possible for the Tribunal to conclusively determine what additional points, if any, Oshkosh should have received under all but one valid ground of the complaint. While Oshkosh's complaint was valid, in part, the Tribunal was not in a position to determine how the performance of Oshkosh's vehicles would have changed had the test been properly conducted.

Therefore, the Tribunal recommended that PWGSC re-evaluate Oshkosh's bid and conduct a re-evaluation of the vehicles for the project. If the re-evaluation demonstrated that Oshkosh would have been the winning bidder but for PWGSC's breaches of the applicable trade agreements, the Tribunal recommended that PWGSC compensate Oshkosh for the profits it would have received had it been properly awarded the contract. Alternatively, if a physical re-evaluation was no longer feasible, the Tribunal recommended that the PWGSC negotiate with and compensate Oshkosh for its lost opportunity.

CAMEC Joint Venture v. Department of Public Works and Government Services[4]

On June 6, 2016, CAMEC Joint Venture ("CAMEC") filed a complaint with the CITT concerning a RFP by PWGSC on behalf of DND. The RFP concerned a headquarters shelter system ("HQSS") and in-service support for the HQSS.

CAMEC alleged that the performance verification tests were not carried out in accordance with the requirements of the RFP. CAMEC asserted that, because of the evaluation errors, it did not achieve the required minimum score necessary for its bid to be considered responsive and to proceed to a further stage of the evaluation.

The evaluation was conducted in accordance with a two-phased process. In Phase 1, bids were evaluated on the basis of bidders' responses. If bidders passed Phase 1, they proceeded to Phase 2, which consisted of a physical test of the HQSS provided by the bidders. The physical test of the HQSS was carried out using performance verification tests, during which the HQSS was evaluated under mandatory requirements and point-rated requirements. Only those bids which passed both Phase 1 and Phase 2 were considered

responsive. In order for CAMEC's bid to be responsive, it not only had to achieve a minimum number of points but also had to pass each of the mandatory requirements evaluated during Phase 2.

CAMEC was deemed to fail three required minimum standards by the PWGSC. The Tribunal found that although CAMEC's complaint with respect to the U-factor test was valid, its complaint regarding the heater start test and snow load test was not valid. Given that both the heater start test and snow load test were mandatory requirements under the terms of the RFP and that a bidder must meet all mandatory requirements in order for its bid to be considered compliant, CAMEC's failure with respect to these two requirements was fatal to its complaint. Whether or not CAMEC ought to have been awarded any additional points under the rated requirements cannot alter the fact that CAMEC's proposal was ultimately non-complaint. As such, the Tribunal did not proceed to analyze those aspects of CAMEC's complaint.

The Tribunal found that the error committed with respect to the U-factor test did not affect the outcome of the procurement process. The Tribunal noted that not evaluating a proposal in accordance with the requirements of the RFP is a serious deficiency in the procurement process. However, even though the deficiency did prejudice the integrity of the competitive procurement system, ultimately the end result would have been the same regardless of the violation. As such, there was no prejudice to CAMEC. In addition, there was no indication that the PWGSC was acting in bad faith. Consequently, the Tribunal did not recommend a remedy in this case.

TPG Technology Consulting Ltd. v. Canada[5]

In *TPG Technology Consulting Ltd. v. Canada*, TPG Technology Consulting Ltd. ("TPG") appealed and the Crown cross-appealed from the October 2, 2014 judgment of the Federal Court (*TPG Technology Consulting Ltd. v. Canada*[6]), dismissing TPG's action for damages. TPG's action against the Crown stemmed from the award by PWGSC to CGI Group Inc. ("CGI") of a multi-year contract to provide engineering and technical support services to federal government departments and other governmental users. TPG was the incumbent provider and had previously provided such services under the predecessor contract. It lost the right to continue to do so following the procurement process that gave rise to its action. TPG claimed damages for the breaches of contract that it alleged had been committed by the Crown in the procurement process.

The Federal Court dismissed TPG's claim because it determined that it more properly ought to have been made to the Tribunal. The Federal Court determined that jurisdiction over the subject matter of TPG's action was concurrent with both the Federal Court and the Tribunal possessing jurisdiction, but that it should decline to exercise its jurisdiction. The Federal Court reasoned that the matter ought to have proceeded before the Tribunal as opposed to the courts in light of both the nature of TPG's amended claim and the comprehensive nature of the remedial process before the Tribunal, which the Federal Court held was capable of addressing such a claim. Therefore, TPG had an obligation to exhaust its remedies before the Tribunal before bringing this action to the Federal Court.

In *obiter*, the Federal Court did find that a breach of contract had occurred, however TPG failed to prove that it suffered any compensable damage as a result of this breach. With regard to TPG's assertions that CGI's bid was non-compliant, although the evaluation committee's scoring was flawed and inconsistent, TPG did not provide evidence that any evaluation errors affected the ultimate ranking of the bidders. The Federal Court of Appeal agreed with the Federal Court that there was concurrent jurisdiction between it and the Tribunal over the issues raised in TPG's claim. On the merits of the case, the Federal Court of Appeal determined that the Federal Court applied the correct legal principles. The Federal Court did not commit any reviewable error and there was no basis to interfere with the Federal Court's conclusions on the merits of TPG's claim.

Airbus Helicopters Canada Limited v. Canada (Attorney General)[7]

Airbus Helicopters Canada Limited v. Canada (Attorney General) involved the purchase of 15 helicopters to replace the aging fleet used by the Canadian Coast Guard ("CCG"). The government procured helicopters already built, rather than having helicopters built based on specifications. The contract was awarded to Bell Helicopter Textron as the only bidder. While Airbus Helicopters Canada ("Airbus") participated in the consultation process leading up to RFP, it chose not to submit a bid and instead brought an application for judicial review of the contract award process conducted by PWGSC.

Airbus claimed that the technical requirements of the RFP had been tailored to enable Bell to win the contract. Airbus argued that the technical requirements were designed based on the specifications for the aircraft provided by Bell, and therefore substantially favoured Bell. Airbus argued that these technical requirements could have been stated in a less specific form and offered alternatives for the technical specifications (as Airbus knew that they could not comply with them). In its memorandum of fact and law, Airbus wrote:

> …despite the appearance of an impartial, fair, open and transparent competitive call for proposals process, the Government of Canada had decided from the start to award the contract to Bell, and that the procurement process was conducted in a manner that ensured that the Bell 429 would be the only aircraft that would meet the project's technical specifications.[8]

The Federal Court applied a standard of reasonableness in reviewing the government's actions in the procurement and upheld the contract award. It found that many of the alternatives proposed by Airbus would ultimately result in decreasing the desired performance. The Federal Court was satisfied on the evidence of the CCG that the technical requirements were intended to address CCG's operational requirements. It held that the technical requirements were neither unfair, nor unreasonable nor arbitrary, and that Airbus had failed to demonstrate that the technical requirements exceeded the identified

operational requirements. It further held that the Government acted reasonably as a rigorous consultation process was in place leading up to the procurement, including the employment of an external fairness monitor.

M.D. Charlton Co. Ltd. v. Department of Public Works and Government Services[9]

In *M.D. Charlton Co. Ltd. v. Department of Public Works and Government Services*, PWGSC issued a Request for Standing Offer ("RFSO") that was not made publicly available, but only to three potential suppliers who were prohibited from disclosing information regarding the RFSO to third parties under a national security exception ("NSE"). The procurement involved the provision of night vision binoculars for the Royal Canadian Mounted Police ("RCMP").

M.D. Charlton Co. Ltd. ("M.D. Charlton") filed a complaint with the Tribunal alleging that the NSE was improperly invoked by PWGSC to remove the procurement process from the disciplines of applicable trade agreements. Charlton also alleged that the solicitation requirements favoured a specific supplier and that the technical specifications were designed in such a way that only one of the companies would be able to meet them.
As a first point of matter, despite claims by PWGSC that the Tribunal did not have jurisdiction to address the case, the Tribunal relied on the analytical framework set out in *Eclipsys Solutions Inc. v. Shared Services Canada*[10] and found that, despite the invocation of the NSE, it retained jurisdiction to address the complaint in accordance with subsection 30.11(1) of the *Canadian International Trade Tribunal Act*[11] [CITT Act].

Next, the Tribunal noted that although trade agreements leave the identification of the NSE to the sole discretion of the responsible government institution, the Tribunal has held that the language of the trade agreements suggests that government institutions should curtail the application of the disciplines of the trade agreements only to the extent necessary for the protection of the NSE identified with respect to the particular procurement. Government institutions should conduct an objective assessment and exclude only specific provisions of the trade agreements that cannot be maintained without compromising national security.

The national security interest at issue was the ability of the RCMP to conduct investigations in order to protect public order and safety, as well as human life and health. The RCMP identified that the non-disclosure of the technical specifications of the binoculars was required to safeguard this interest. However, the PWGSC went beyond that need and applied a blanket exemption to the solicitation, withdrawing it altogether from any and all of the disciplines of the trade agreements. In so doing, the Tribunal found that PWGSC breached the trade agreements by failing to properly tailor the scope of the NSE. Therefore, despite the NSE, the Tribunal was to review the complaint on the basis of the applicable trade agreements technical specifications provisions. On this point, the Tribunal stated:

> In at least one instance, the technical specifications in the RFSO make it mandatory to provide the products of either of two of the three invited specific suppliers, which are identified by name. Further, the Tribunal accepts M.D. Charlton's uncontested evidence that some of the other mandatory requirements could only be met by one supplier. In addition, there are no provisions in the RFSO that would allow for potential suppliers to propose equivalent products.
>
> PWGSC has offered no justification that would allow the Tribunal to conclude that the technical requirements were set out this way for reasons other than avoiding the open competition requirements of Chapter Five. In fact, some of the documentary evidence submitted with the GIR supports M.D. Charlton's claim that the RCMP clearly had a preferred supplier, which is also the company favoured by the technical specifications.

The Tribunal held that the NSE did not justify limiting the number of potential bidders. M.D. Charlton's complaint was found to be valid and the PWGSC was ordered to reissue the solicitation.

Eclipsys Solutions Inc. v. Shared Services Canada[13]

Eclipsys Solutions Inc.'s ("Eclipsys") complaint concerned a procurement by Shared Services Canada ("SSC") for the provision of data centre server and storage infrastructure services. Eclipsys alleged that it was unfairly excluded from the solicitation by SSC.

The solicitation documents for the initial Invitation to Qualify ("ITQ") phase of the procurement originally included a form that would allow an original equipment manufacturer ("OEM") to certify that a bidder was authorized to supply and maintain the OEM's hardware, thus allowing bidders to include hardware that they did not manufacture themselves in their bids. Eclipsys intended to bid infrastructure hardware manufactured by Oracle ULC, as it had in many previous procurements. However, through an amendment to the ITQ, SSC removed the OEM form and stated that it had been included in error. According to Eclipsys, the removal of the OEM form effectively prevented it from submitting a response to the ITQ since it could not meet one of the mandatory requirements of demonstrating experience in manufacturing infrastructure. Although requested to do so, SSC refused to remove this mandatory requirement from the ITQ.

After reviewing the analytical framework on NSEs, the Tribunal found that, rather than assuming that the invocation of the NSE automatically outs its jurisdiction to review a procurement process, it must look at the exact terms of the invocation to determine its scope and the extent to which the Tribunal's ability to exercise its jurisdiction has been accordingly curtailed:

> In this case, according to the letter of July 12, 2012, SSC has invoked the national security exception "for all purposes to exempt the procurement of goods and services related to the Government of Canada's electronic mail (email), network, and data

centre infrastructure, systems and services *from the application of Canada's domestic and international trade agreements*". The Tribunal finds that the action that SSC has identified as necessary to protect national security is to except the procurement from *all* of the disciplines of the trade agreements. As a result, the Tribunal is forced to conclude that it cannot assess the conformity of any aspect of this procurement against any of the disciplines of the trade agreements. The practical effect of this finding is the same as if the Tribunal had no jurisdiction, but it is not proper to cast it as a jurisdictional matter because the Tribunal's jurisdiction should not be confused with the non-application of trade disciplines resulting from an exception.

Nothing in the trade agreements, the *CITT Act or the Regulations* provides guidelines as to how the NSE is to be invoked and what parameters, if any, apply to its invocation. Furthermore, the applicable language in the various NSE provisions of the agreements leaves the identification of the actions necessary to take in order to protect national security to the sole discretion of the party (or federal government in the case of the *AIT*), i.e. to the responsible government institution. As a consequence, the Tribunal is left with no legislative mandate to assess the reasons for the invocation of the NSE or to review the decision to invoke it.

In this instance, the Tribunal is therefore left to examine whether the NSE has in fact been invoked from a procedural standpoint only. The questions that the Tribunal examines in that regard are as follows:

- Did a duly authorized person in a relevant government institution invoke the NSE?

- Are the goods and services being procured those that are indicated in the NSE?

If either of these questions is answered in the negative, the Tribunal will enquire into the complaint. The Tribunal also examines the timing of when the NSE was invoked, but has previously stated that the NSE could be invoked at any time[14]. [emphasis in original]

The Tribunal ceased its inquiry and ordered the dismissal of the complaint on the grounds that SSC had properly excluded the procurement from the application of the obligations at issue under the relevant trade agreements. The Tribunal, however, continued in *obiter*:

As indicated above, the Tribunal takes this opportunity to express some concerns in regard to the integrity of the competitive procurement system as it relates to the approach taken by SSC, in respect of the NSE.

Recognizing that none of the evidence presented in the complaint has been tested, and that some of it remains unsubstantiated assertion, the Tribunal nevertheless believes that the present case provides an example of where a government institution may have cast too wide an exclusion from the disciplines of the trade agreements for reasons seemingly unrelated to national security. For example, SSC could have limited the solicitation to only Canadian suppliers holding sufficient security clearance *without* subtracting the procurement from bid challenge review by the Tribunal.

…

The Tribunal cannot but emphatically stress that, as noted above, the NSE provisions of the trade agreements require that government institutions limit the NSE only to the extent *necessary* to protect the national security interests. This means that government institutions should conduct an objective assessment and exclude only specific provisions of the trade agreements that cannot be upheld without compromising national security.

Chiefly, and perhaps exclusively, this may mean "surgically" excluding only certain specific provisions of the trade agreements. As mentioned above, the non-discrimination provisions are an example. By proceeding in this manner, government institutions would be able to protect national security concerns while still allowing suppliers to access the Tribunal's bid challenge mechanism. In instances like the present complaint, the Tribunal does not see how the jettisoning of Canadian suppliers' access to that mechanism is justified by security concerns, nor, more importantly, how the integrity, fairness and transparency of the competitive procurement system has been served by SSC's actions.

…

Accordingly, the Tribunal is of the view that the NSE should not unnecessarily limit competition or subtract procurement processes from Tribunal scrutiny where these results are unnecessary. Had the NSE not been invoked in this instance, the Tribunal would have initiated an inquiry on the grounds that Eclipsys had established a reasonable indication of a breach of the trade agreements based on the alleged lack of consistency in applying the OEM criterion.[15] [emphasis in original]

Following *Eclipsys Solutions Inc. v. Shared Services Canada*, it is clear that government institutions should show restraint in their application of the NSE to curtail the application of the obligations of trade agreements only to the extent necessary for the protection of the national security interest identified with respect to the particular procurement.

Canada (Attorney General) v. Rapiscan Systems, Inc.[16]

In *Canada (Attorney General) v. Rapiscan Systems, Inc.*, the Federal Court of Appeal heard an appeal from a decision of the Federal Court in favour of Rapiscan Systems Inc. ("Rapiscan") regarding a procurement award by the Canadian Air Transport Security Authority ("CATSA"), a Crown corporation.

In September 2009, CATSA purchased x-ray equipment from Smiths Detection Montreal Inc. ("Smiths") through a non-competitive sole-source procurement. A year later, in August 2010, CATSA initiated another procurement process for x–ray equipment and received submissions from four suppliers, including Smiths and Rapiscan. Based on the recommendation of CATSA management, CATSA's Board of Directors awarded the Standing Offer Agreement to Smiths. CATSA's management had determined that Smiths was the only supplier able to perform the contract and that Rapiscan's equipment did not meet the minimum performance requirements.

Rapiscan filed an application for judicial review and the Federal Court found that CATSA used an unfair and non-competitive procurement process. CATSA management was found to have concealed information regarding the legitimacy of the procurement process and information related to Rapiscan, which resulted in favourable treatment of Smiths and an inability of the Board to properly exercise its oversight function.

The Crown appealed this decision, while Rapiscan maintained its position and sought declaratory relief. The Federal Court of Appeal dismissed the appeal, noting that CATSA had a "duty to promote transparency, fairness or value for money."[17] The lack of information conveyed to CATSA's Board by its management could have reasonably led the Board to believe that management ran an open procurement process, when CATSA's management actually held a non-competitive process by way of directed contract. The Federal Court of Appeal also found that CATSA's management failed to inform the Board that Smiths' equipment costs were substantially higher than Rapiscan's equipment. Based on the foregoing, the Federal Court of Appeal agreed with the Federal Court that the Board could not have come to a reasonable conclusion with the information available to it and its decision to award the procurement exclusively to Smiths was reached through a flawed and unreasonable process.

Ucanu Manufacturing Corp. v. Defence Construction Canada[18]

Ucanu Manufacturing Corp. v. Defence Construction Canada dealt with a public procurement contract for the construction of a maintenance hangar in Trenton, Ontario. Ucanu Manufacturing Corp. ("Ucanu") brought an application for an order, pursuant to section 41 of the *Access to Information Act*[19] ("ATIA"), directing Defence Construction Canada ("DCC") to disclose redacted records relating to a contract and joint venture between DCC and Graham Construction and Engineering. DCC refused to disclose portions of the joint venture agreement, claiming that it was allowed to exempt some information pursuant to sections 19(1) and 20(1)(b) of the ATIA as the undisclosed information constituted personal information under the *Privacy Act*[20] ("Privacy Act"), and confidential commercial information of a third party.

After DCC was deemed to have appropriately applied these exemptions by the Office of the Information Commissioner of Canada, Ucanu filed an application for judicial review of this decision. Ucanu argued that the information withheld on the basis of the personal information exemption, namely the signatures of the two signatories to the joint venture agreement and the name and signature of the witness on the tender form, did not fall within the scope of section 19 of the ATIA.

Ucanu cited decisions of the Information and Privacy Commissioner of Ontario as evidence, which stated that information associated with an individual in their professional, official or business capacity is generally not considered to be about the individual for the purposes of the definition of "personal information" under Ontario's privacy legislation. Ucanu argued that a substantially similar definition can be found under the Privacy Act, and therefore should be applied in this case. In the alternative, Ucanu argued that even if the signatures and names constitute personal information, they ought to be disclosed because such information is publicly available in other business-related documents. The Federal Court found significant differences between the definitions of personal information under the Privacy Act and Ontario's provincial legislation. Therefore, the decisions of the Information and Privacy Commissioner of Ontario were of limited value in interpreting the definition of personal information under the Privacy Act.

Ucanu also argued that pursuant to subsection (k) of the definition of personal information under the Privacy Act, the government can disclose personal information about an individual who is performing services under contract for a government institution. The Federal Court once again agreed with DCC by finding that neither the signing of the joint venture agreement nor the witnessing of the tender form should be characterized as related to the services performed under the contract with DCC. As such, DCC was authorized under section 19(1) of the ATIA to refuse to disclose the witness's name and the three signatures at issue.

Finally, Ucanu maintained that the information in the joint venture agreement did not fall within exemption in section 20 of the ATIA as not all withheld information in the agreement and covering letter could be properly characterized as commercial information. The Federal Court agreed with Ucanu that DCC could not rely on section 20(1)(b) of the ATIA to refuse to disclose the third party's confidential commercial information as the evidence on this point fell short of what was required to establish confidentiality on the basis of commercial information. The Federal Court held that DCC was only authorized to refuse to disclose the name and signatures of the parties to the joint venture agreement, and the witness' name on the tender form. DCC was required to disclose the contents of the joint venture agreement and the covering letter which accompanied the agreement.

Unisource Technology Inc. v. Canada (Department of Public Works and Government Services)[21]

On June 1, 2016, Unisource Technology Inc. ("Unisource") filed a complaint with the the Tribunal concerning a procurement by PWGSC, on behalf of the Department of National Defence ("DND"), for the provision of loudspeakers and amplifiers.

Unisource alleged that PWGSC accepted a bid that did not meet the mandatory requirements of the Request for Proposal ("RFP"). In particular, Unisource alleged that neither the winning bidder, Simex Defence Inc. ("Simex"), nor any other company that submitted a bid, had approached Global Market Development Inc. ("GMD") to purchase loudspeakers or to use the proprietary driver and amplifier designs that were qualified for use. Unisource claimed that no company other than GMD had proposed a qualification test plan, conducted qualification testing or could provide loudspeakers that had actually passed the necessary qualification tests.

Unisource requested that the contract that PWGSC awarded to Simex be terminated immediately. It also requested the Tribunal to direct that the contract be awarded to it, given that Unisource is "... the only approved/tested/certified and qualified Loudspeaker for Warfighters guaranteed to perform in extreme environmental field conditions encountered during military field operations." [22]

On June 3, 2016, the Tribunal informed the parties that it had accepted the complaint for inquiry. On July 11, 2016, tPWGSC filed a motion requesting that the Tribunal cease the inquiry on the grounds that the RFP concerning the procurement covered by the complaint had been cancelled and that, therefore, the Tribunal no longer had jurisdiction to inquire into the complaint. PWGSC submitted that, since the contract at issue was cancelled, there was no longer a contract that had been or was proposed to be awarded by a government institution in respect of the RFP, as required pursuant to section 30.11(1) of the CITT Act.

In its motion, PWGSC explained that, upon receipt of the complaint, it conducted a full review of the solicitation process at issue, determining that there were issues with the way in which the evaluation criteria were drafted in the RFP. Accordingly, on June 29, 2016, it cancelled the contract previously awarded to Simex. In essence, the PWGSC agreed that the provisions of the RFP allowing for products that were equivalent to that produced by GMD were ambiguous and required clarification in order to more clearly reflect DND's actual requirements. The PWGSC indicated that it would initiate a new solicitation so that all bidders may fairly participate on the basis of clarified requirements. The Tribunal confirmed that the cancellation of the contract does not affect the Tribunal's *jurisdiction* to hear a complaint. According to the Tribunal, "…nothing in the CITT Act or its regulations suggests that Parliament contemplated that a decision by the government institution to cancel a contract could terminate the Tribunal's jurisdiction to continue an inquiry that was commenced in accordance with the law."[23] More specifically, the complaint filed by Unisource met all conditions necessary for the Tribunal to exercise its jurisdiction to initiate and proceed with an inquiry and subsection 7(1) of the CITT Procurement Regulations does not require these conditions to persist at all times during the inquiry.

However, pursuant to subsection 30.13(5) of the CITT ACT, the Tribunal may at any time cease conducting an inquiry "…if it is of the opinion that the complaint is trivial…" and chose to do so in this case. In light of the cancellation of the contract awarded to Simex, the complaint had now become trivial and a new solicitation was desirable for reasons of fairness to all bidders.

***Deloitte Inc. v. Department of Public Works and Government Services*[24]**

On February 12, 2015, Deloitte Inc. ("Deloitte") filed a complaint with the Tribunal concerning a RFP by PWGSC, on behalf of the Department of National Defence, for change management services. Deloitte alleged that PWGSC improperly evaluated its bid, used undisclosed criteria to evaluate its bid and failed to provide a meaningful debriefing. More specifically, Deloitte argued that PWGSC did not act reasonably in verifying information with respect to the size of the organization for which certain projects were performed and used undisclosed criteria in assessing whether another project achieved expenditure and personnel reductions.

With regard to Deloitte's debriefing, the Tribunal reaffirmed that there is no concrete list of what information or documents must be given to an unsuccessful bidder. Rather, the information that should be released will depend on the circumstances of each case. In this case, on the basis of the information included in the initial contract award letter, the Tribunal found that PWGSC provided a sufficient debriefing in accordance with the requirements of the applicable trade agreements.

On the merits of the complaint, the Tribunal found that by assessing whether or not Deloitte's submission achieved expenditure and personnel reductions, the evaluators were requiring more than merely a demonstration that the project included expenditure and personnel reduction exercises. In doing so, the evaluators were assessing the project on the basis of an entirely new requirement, which was not stated in the RFP (i.e. whether or not the project achieved reductions). In this regard, the complaint revealed a deficiency in the procurement process used by PWGSC.

Deloitte's complaint was deemed valid in part because PWGSC did not act reasonably in verifying information with respect to the size of the organization for which certain projects were performed and used undisclosed criteria in assessing whether another project achieved expenditure and personnel reductions. The Tribunal determined that Deloitte's technical score should have received seven additional points. In accordance with the RFP, these additional points would have given Deloitte the highest overall score and, therefore, it would have been the winning bidder. Because it was likely that at least some of the work under the resulting contract has already been performed and the Tribunal did not have all the facts to determine whether it should recommend cancelling the contract which had been awarded to another bidder, the Tribunal found that compensation for lost profit was the appropriate remedy in this case.

***CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.*[25]**

CGI Information Systems and Management Consultants Inc. ("CGI") brought a complaint to the Tribunal alleging that Innovapost Inc., a subsidiary of Canada Post Corporation (together, "Canada Post") breached Articles 1013(1) and 1015(4) of NAFTA by conducting an unreasonable and biased evaluation of CGI's proposal in response to its RFP and breached Article 1017(1)(p) of NAFTA by destroying documents relating to the RFP.

Upon losing out on the contract for data centre services, CGI requested a debriefing with Canada Post. After multiple meetings, it remained unsatisfied, asserting that the debriefing was deficient and that Canada Post's evaluation plan was flawed:

> In particular, it stated that, from a review of the debriefing information that it had been provided, "CGI's concern . . . is that, in addition to failing to assess CGI's proposal in accordance with the rated requirements in an objective and fair manner, Canada Post has utilized subjective, non-disclosed and improper criteria" and that it considered that Canada Post's failure to explain exactly how CGI failed to meet the rated requirements justified its concern.[26]

After determining that the Tribunal had jurisdiction to hear the complaint, the Tribunal had to address whether the complaint was timely. To determine whether CGI had raised its objection in due time, the Tribunal considered whether CGI's letter to Canada Post, which denounced the debriefing as deficient, "contained sufficient specificity to enable Canada Post to deal with CGI's concerns."[27] The letter was held to be of sufficient detail to be an objection, especially in light of Canada Post's failure to disclose a meaningful explanation for CGI's evaluation, noting that "whether or not an objection letter is sufficiently precise will depend on all the facts and circumstances in a given case and, thus, must be assessed on a case-by-case basis."[28]

The Tribunal found that CGI's complaint that Canada Post intentionally destroyed documents was unfounded. Although the documents were intentionally destroyed, there was no evidence that this was done at a time when litigation was contemplated or done to affect any future litigation. There was, however, still a breach of Article 1017(1)(p) of NAFTA, which prohibits destroying procurement process documents. While Canada Post had not intentionally destroyed evidence, it had intentionally destroyed procurement process documents. The Tribunal reinforced that "proper retention of documents is an integral part of a fair procurement process."[29] Had this information been properly provided, the complaint may have been avoided. However, since the destruction occurred after the award of the contract, it was inconsequential to the procurement process. Nonetheless, the Tribunal recommended that Canada Post "…change its policies and practices regarding the preservation of documents related to a procurement process so that they are consistent with the requirements of Article 1017(1)(p) of NAFTA…"[30]

CGI's claims that Canada Post's evaluation breached Articles 1013(1) and 1014(1) of NAFTA were found to be unsubstantiated. CGI argued that the rating scale used by the evaluators was inconsistent with the terms of the RFP, the evaluators had preferences for certain characteristics over others, which had not been disclosed in the RFP, and that they evaluated several specific aspects of CGI's proposal unreasonably, including an allegation that the evaluation was tainted by improper considerations. Although the rating scale was not disclosed in the RFP, "the rating scale that Canada Post chose to use [was] entirely consistent with what was indicated in the RFP."[31] The Tribunal further commented that CGI made the decision to not seek further information regarding the allocation of the points evaluation, which undermined its complaint.

Finally, the Tribunal found that there was no evidence that could support a finding of bias or reasonable apprehension of bias on the part of Canada Post. As such, CGI's complaint was found to be not valid.

Dickinson Wright's lawyers are experienced in the rules governing Canada's procurement regime and are available to provide advice and assist companies during all stages of the procurement process, including representation before the CITT and Canada's federal courts.

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[1] [1981] 1 S.C.R. 111, 1981 CarswellOnt 109.
[2] *Canadian International Trade Tribunal Procurement Inquiry Regulations*, S.O.R./93-602 [CITT Procurement Regulations].
[3] 2016 CarswellNat 4433, 2016 CarswellNat 4434 (C.I.T.T. File Nos. PR-2015-051, PR-2015-067).
[4] 2016 CarswellNat 5340, 2016 CarswellNat 5341 (C.I.T.T. File No. PR-2016-014).
[5] 2016 FCA 279, 2016 CarswellNat 5817.
[6] 2014 FC 933, 2014 CarswellNat 3860, 2014 CarswellNat 5573.
[7] 2015 FC 257, 2015 CarswellNat 4384, 2015 CarswellNat 640 [*Airbus Helicopters*].
[8] *Ibid* at para 10.
[9] 2016 CarswellNat 4033, 2016 CarswellNat 4034 (C.I.T.T. File No. PR-2015-070) [*M.D. Charlton*].
[10] 2016 CarswellNat 216, 2016 CarswellNat 217.
[11] R.S.C., 1985, c. 47 (4th Supp.).
[12] *M.D. Charlton*, supra note 8 at paras 56-57
[13] 2016 CarswellNat 216, 2016 CarswellNat 217 (C.I.T.T. File No. PR-2015-039) [*Eclipsys Solutions*].
[14] *Ibid* at paras 22-24.
[15] *Ibid* at paras 34-45.
[16] 2015 FCA 96, 2015 CarswellNat 1261, 2015 CarswellNat 9211 [*Rapiscan*].
[17] *Ibid* at para 45.
[18] 2015 FC 1001, 2015 CarswellNat 3998, 2015 CarswellNat 9259.
[19] RSC 1985, c A-1.
[20] RSC 1985, c. P-21.
[21] 2016 CarswellNat 4273, 2016 CarswellNat 4274 (C.I.T.T. File No. PR-2016-013) [*Unisource*].
[22] [emphasis in original] *Ibid* at para 3.
[23] [emphasis in original] *Ibid* at para 9.
[24] 2015 CarswellNat 2436, 2015 CarswellNat 2437 (C.I.T.T. File No. PR-2014-055).
[25] 2014 CarswellNat 8782, 2014 CarswellNat 8783 (C.I.T.T. File Nos. PR-2014-015 and PR-2014-020) [*CGI*].
[26] *Ibid* at para 37.
[27] *Ibid* at para 49.

[28] *Ibid* at para 53.
[29] *Ibid* at para 95.
[30] *Ibid* at para 166.
[31] *Ibid* at para 125.

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