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Client Update

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CITT confirms that procurements undertaken on behalf of entities covered by the Trade Agreements are within the CITT's bid dispute jurisdiction

Introduction

In *Pomerleau Inc. v. Department of Public Works and Government Services* PR-2014-048, the Canadian International Trade Tribunal (the "CITT") found that a procurement process conducted by a third party on behalf of the Department of Public Works and Government Services ("PWGSC") is subject to the procurement obligations of the Trade Agreements¹ and, therefore, within the CITT's bid dispute jurisdiction. While the complaint was found not to be valid on the merits, this decision represents an important jurisdictional precedent.

In this case, the CITT also provides important guidance regarding the production of relevant documents by a government institution in the context of a procurement complaint process.

¹ Being: the Agreement on Internal Trade; the North American Free Trade Agreement; the World Trade Organization Agreement on Government Procurement; the Free Trade Agreement between Canada and the Republic of Colombia; the Free Trade Agreement between Canada and the Republic of Panama; the Free Trade Agreement between Canada and the Republic of Peru; and the Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile.

Background and Context

This case relates to the procurement of construction management services for the Carling Campus Project, which is major capital project undertaken by PWGSC to upgrade and refit facilities located at the former Nortel campus in Ottawa's west end to house the National Defence Headquarters.

PWGSC undertook the project pursuant to its mandate as a common service provider to the Government of Canada and as the designated custodian for general-purpose office accommodation. Pursuant to this mandate, PWGSC is to provide property manage and project delivery services for tenants of Government of Canada buildings. In the case of the Carling Campus, PWGSC engaged Brookfield Johnson Controls Canada LP ("BJCC"), which involved PWGSC delegating various property management services and project delivery services relating to the Carling Campus.

PWGSC decided to involve BJCC in the delivery of a project relating to construction at the Carling Campus.

Pursuant to the terms of PWGSC's contract with BJCC and the authorizations provided by PWGSC to BJCC under that contract, BJCC solicited bids for the provision of construction management services.

Pomerleau submitted a bid in response to that solicitation process. Pomerleau's bid was found to be



non-compliant and was not accepted for contract award.

Pomerleau brought a complaint before the CITT on the grounds that the finding of non-compliance gave rise to a breach of the applicable Trade Agreements.

PWGSC responded to Pomerleau's complaint by bringing a motion to dismiss the complaint on the grounds that the CITT did not have jurisdiction to inquire into the complaint as the solicitation was conducted by BJCC, as opposed to PWGSC, and, hence, the Trade Agreements did not apply.

The CITT determined that the procurement is subject to the Trade Agreements

The CITT determined that it had jurisdiction to inquire into Pomerleau's complaint.

The CITT found that PWGSC's contract with BJCC "creates a structure whereby PWGSC has substituted BJCC for itself to conduct the tendering of various services, including the construction management services in the [subject procurement for the Carling Campus Project]"

The CITT also found that PWGSC's contract with BJCC "makes BJCC a private sector arm of PWGSC, allowing PWGSC, in accordance with the NSMS, to direct BJCC to perform work under PWGSC's direction that it would otherwise perform directly itself

– notably the conduct of procurement process such as the CM RFP."

The CITT also found that "the framework described above constitutes public procurement; and public procurement conducted via a private party is public procurement nonetheless."

The CITT ultimately concluded that:

It follows that the Tribunal has jurisdiction to inquire, because the CM RFP constitutes a "designated contract" pursuant to the *Regulations*, as if it had been conducted by PWGSC itself. As the procuring government institution, PWGSC is accountable to ensure that the procurement (as delegated contractually under the RP-2 Contract to be conducted by BJCC) is carried out in conformity with the obligations of the trade agreements."

Additional Guidance Regarding Obligation to Produce Relevant Documents

In its determination, the CITT also provided additional guidance relating to the production of relevant documents.

At the outset, it is important to note that: a) the CITT procurement complaint process is primarily conducted by way of written submissions; and b) the CITT is required to issue a determination with respect



to a complaint within 90 days of when a complaint is filed or, in exceptional cases, within 135 days of when a complaint is filed.

This process is generally viewed in a positive light as it results in bid disputes being resolved in an expeditious manner that avoids the costs and delays normally associated with court proceedings.

However, the expedited process does have drawbacks. More particularly, the bid dispute process does not include documentary or oral discovery processes normally found in court proceedings. The lack of a formal discovery process can result in a complainant requesting that the government institution produce documents that were not included in the government institution's initial response to the complaint. Such requests are often met with opposition on the grounds that the requested documents are not relevant and that the complainant is engaged in a "fishing expedition" by requesting additional documents.

The proceeding in *Pomerleau Inc. v. Department of Public Works and Government Services* included a dispute over the production of relevant documents. In light of this dispute, the CITT took the opportunity to clarify production obligations during the course of a bid dispute proceeding. The CITT held that:

"The Rules impose on government institutions a significant duty of transparency

and cooperation to be immediately forthcoming with the provision of documentary evidence. A complainant should be able to count on the proper respect of the Rules by government institutions and should not be unnecessarily required to bring a motion for the production of documents."

The CITT stated that this obligation is a function of "the very short legislative time frames for the filing of complaints, the exchange of submissions between the parties, the convening of an oral hearing if necessary and ultimately for the Tribunal to deliberate on a complaint."

The CITT also recognized that:

"Procedural fairness must be guaranteed and is provided for by the legislative framework. But this framework was never meant to mimic that of the courts, and neither counsel for a government institution nor private counsel should behave as if it did. The Tribunal's procurement review mechanism does not provide for a court-like discovery process, and there is little time to conduct a *voir dire* on the relevance of documents that are purported to be necessary to inform the Tribunal's inquiry."



The CITT went on to distinguish circumstances that may be characterized as a “fishing expedition” with those that are proper and well-founded request for relevant documents. In this regard, the CITT held that:

“While fishing expeditions by complainants will not be countenanced by the Tribunal any more than they are by the courts, when a complainant can precisely identify a document in its complaint (for example, because it is specifically referred to by name in another document that is already in its possession), such a document should be disclosed by the government institution. Objections to relevance should only be made for the most compelling of reasons and should therefore be a rarity. And it is not a compelling reason to object to or resist the production of readily obtainable documents merely for tactical reasons.”

**Why this is important to both
procuring entities and potential
suppliers**

This case is important as it confirms that the procurement obligations under the Trade Agreements and the remedial jurisdiction of the CITT to resolve bid disputes cannot be avoided by the use of an intermediary. Further, this case confirms that the CITT will analyze the specific circumstances of the procurement, including any relationship between a

government institution and an intermediary, to determine whether the procurement is subject to the Trade Agreements.

Also, this case provides important guidance regarding production obligations that will avoid disputes regarding the production of documents and, hence, will enhance the efficiency of CITT proceedings.



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