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LOCAL GOVERNMENT PROCUREMENT: BEYOND "CONTRACT A"

DECEMBER 2, 2011

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I. INTRODUCTION

Most local government officials dealing with procurement matters have at least some familiarity with "Contract A". It is also well understood that the existence of "Contract A" can give rise to significant legal issues and exposure to liability in connection with a procurement process. In this context, it is often necessary to consult with legal advisors and to make difficult procurement decisions based on the risks of different courses of action in dealing with bidders and awarding a contract.

What is perhaps less clear is the extent to which other legal constraints can impact local government procurement decisions. In the context of a process that does not involve "Contract A", or a "Contract A" process that includes a waiver or limitation of liability in favour of the procuring local government, are there legal requirements that can nevertheless affect a procurement decision? Is a public procurement process legally required at all?

This paper looks beyond "Contract A" and examines some of the other legal issues that can affect local government procurement, including the impact of current legislation and Provincial trade agreements, as well as the role of the Courts.

II. THIS PAPER IS NOT ABOUT ""CONTRACT A""

This paper is not about "Contract A". However, to understand what this paper is about, one needs to have a basic understanding as to what this paper is not about (i.e. "Contract A"). So what is "Contract A"? Is there a Contract B? Contract C?

"Contract A" is a legal concept that the Canadian courts have developed in connection with calls for tenders, primarily for construction projects. Normally, a person who calls for tenders does so with the goal of entering into a contract of some kind, such as for the construction of a project or the sale or purchase of land. The courts refer to this desired "Contract A"s Contract B. However, a person calling for tenders may also incur contractual obligations in connection with the tender process itself. The courts refer to this "Contract A"s "Contract A".

Briefly stated, if the tender documents indicate an intention on the part of the person calling for tenders to enter into contractual relations as part of the tender process itself, a separate "Contract A" may arise between that person and each bidder who submits a bid. A requirement that bids remain irrevocable and open for acceptance for a specified period of time is a typical indication of an intention to enter contractual relations and such irrevocability has been referred to as the hallmark of a tender. However, "Contract A" can arise even where irrevocability is not a requirement. Again, this depends on intention as evidenced by the terms of the tender process.

Importantly, the name of the process and terminology used in the procurement documents will not necessarily be determinative of whether "Contract A" may arise. For instance, a request for proposals that requires proposals to be 'open for acceptance' for a period of time may give rise to "Contract A".

Following is an example of a language indicative of an intention to enter into contractual relations ("Contract A") in connection with a procurement process:

> The District hereby requests bids for the construction of the sewer line in accordance with the attached specifications. Bids shall set out a fixed price for the performance of the project in accordance with the requirements of these Tender Documents. Bids shall be irrevocable for a period of 60 days and must be submitted before 2:00pm, December 2, 2011, by submitting a completed Tender Form to the District at the above address.

If a person submits a bid in accordance with these requirements, a "Contract A" will arise between that bidder and the District. Under that "Contract A", the bidder would be required to honour its bid and, if accepted by the District, enter into 'Contract B' for the sewer line construction project at the stated fixed price. In return, the District would be obligated to treat bidders in accordance with the terms of the tender documents and not to apply evaluation criteria that are not identified in the tender documents. Depending on the other terms set out in the tender documents, the District might also be limited to accepting only bids that comply with the tender document requirements and might be under a duty to treat bidders fairly.

As to the consequences of a breach of this "Contract A":

- Bidder Default: if the District were to select a bidder and the bidder were to refuse to sign Contract B, the bidder could be liable to the District for the additional costs to the District associated with awarding the contract to the next preferred bidder.

- If, on the other hand, the District does not comply with the terms of its tender documents, such as by accepting a bid that does not comply with the tender requirements (such as by qualifying some aspect of its pricing), a disgruntled bidder may be in a position to sue the District for breach of "Contract A". If that bidder then established that the District breached "Contract A" and that the bidder would have been awarded Contract B had the District not breached, the bidder would be entitled to recover from the District the amount of profit the bidder would have earned had it been awarded the contract (without having to actually perform any work for the District!).

There may be benefits to a local government with such a process. The process may result in the receipt of more competitive bids. A bidder may be more likely to honour their bid, given the

potential repercussions of a failure to follow through and sign Contract B. Such a process may also help to maintain public confidence in a local government's procurement practices.

At the same time, the process of determining the best bid is complicated by the fact that the local government must also consider its obligations to bidders under "Contract A". Arguably, these obligations help maintain the integrity of the procurement process. However, with "Contract A", local governments frequently face difficult decisions in reviewing bids and corresponding potential financial exposure to other bidders. For instance, if the tender documents prevent a local government from accepting bids that do not materially comply with the tender documents, the local government may be faced with the difficult task of assessing whether a bid defect is material.

III. BEYOND "CONTRACT A"

Consider the following scenarios:

- A local government might use a request for proposal process that clearly states that no contractual obligations arise unless a project contract is signed.
- A local government's tender documents might include a clause limiting or waiving liability against the local government in connection with the tender process.
- A local government might 'sole source' a contract.

In cases one and three, "Contract A" does not arise. In case two, a bidder may not be able to sue for breach of "Contract A".

What procurement obligations do local governments have outside the realm of "Contract A"? To what extent is a local government obligated to use a particular procurement process? If a local government uses a process that avoids "Contract A", what legal constraints remain?

A. Local Government as Creatures of Statute

1. The Power to Enter Contracts

BC local governments are creatures of Provincial statute. A local government has only those powers set out in legislation and such powers must be exercised in accordance with the limits and requirements under such legislation.

With procurement of a project or a purchase or sale of land or an asset, a local government is exercising its power to enter contracts. It is looking for another person to enter into a contract to do some work or buy or sell some asset. Municipalities do not have a specific power to enter into contracts. Rather, a municipality's authority to enter contracts is derived from section 8 (1)

of the *Community Charter*, which provides that a municipality "has the capacity, rights, powers and privileges of a natural person of full capacity". While regional districts do not have 'natural person' powers, section 176 of the *Local Government Act* authorizes regional districts to make agreements of various kinds and to acquire and dispose of land and other property.

The *Community Charter* and *Local Government Act* do contain various limitations on the power to make contracts, including a requirement for elector approval of liabilities under agreement exceeding 5 years, a requirement that expenditures under agreements be provided for in a financial plan and a requirement for public notice before agreeing to sell or grant other interests in land.

2. Procurement Requirements Under Statute

Generally speaking, there is no statutory provision requiring that a local government use any particular kind of procurement process or preventing a local government from sole sourcing a contract. The *Community Charter* and *Local Government Act* leave it to individual local governments to make these kinds of decisions. This may reflect a view that contract procurement is a 'corporate' function and does not involve the exercise of a power that is unique to government (unlike the powers to tax and to regulate activities).

One notable exception is that under section 186 of the *Local Government Act*, a regional district that wishes to sell land or dispose of an interest in land (such as by granting a lease) remains obligated to make the land (or interest) available to the public for acquisition, subject to certain exceptions. Section 186 does not, however, specify a particular process for doing so

3. Indirect Statutory Motivation – Prohibition on Assisting a Business

(a) Prohibition on Assistance to a Business

Section 25 of the *Community Charter* and 185 of the *Local Government Act* respectively prohibit municipalities and regional districts from providing 'assistance' to a business. Assistance includes the provision of a "grant, benefit, advantage or other form of assistance" and includes disposing of land for less than market value. Accordingly, a local government would be providing unlawful assistance if it sold land to a business for less than market value purchase price or leased land to a business for less than market value rent. Similarly, a local government that enters into a contract for a service would be providing unlawful assistance to a business if the contract is for a greater than market value payment.

In considering allegations of unlawful assistance to a business, the BC Courts have to date shown considerable deference to the decisions of council and have focused on whether there was an obvious intention to assist a business [*Nelson Citizen's Coalition v. Nelson (City)* (1997), 38 M.P.L.R. (2d) 175 (B.C.S.C.)]. The Courts have however suggested that council's approach to assessing the value of a transaction (and the consideration to be received from the other party) can have a bearing on whether a council or board has breached this rule.

In *Miller v. District of Salmon Arm* (2005), 9 M.P.L.R. (4th) 95, the BC Court of Appeal considered how far a council must go to ensure it receives market value consideration for the sale of land. A developer, who was also the mayor, was seeking a 38-lot subdivision and in connection with that subdivision wished to acquire some land from the District. Council approved the transaction using the assessed value of the developer's adjoining land as a yardstick for determining the value of the road to be transferred to the developer. A neighbour alleged the transaction was for less than market value and tendered an appraisal suggesting that Council had received substantially less than market value. Rather than trying to ascertain market value and then determine if the District had sold for less, the Court looked at Council's intention and actions and held:

> Members of the District Council who dealt with this issue could reasonably be expected to have themselves some general idea of land value relating to lands located in the District … deciding the precise value of a small strip of land like the one transferred, land that was traversed by underground pipes, is not easy and probably no figure would command universal assent. Council chose to adopt as a measure of value assessed valuation which does usually provide some guide to value of land. The members of Council must, in my opinion, be afforded a decent measure of discretion in deciding on such an issue…. I would not wish to be taken as saying it would in all circumstances be appropriate for a municipal body to proceed with a land transaction without obtaining specific appraisal information. In the case for instance of a sizeable lot in an urban area, it might be reckless on the part of a council to fail to get detailed appraisal evidence but that is not this case at all. It seems to me that Council was not acting in any improper fashion in the approach they took to valuation of this small piece of land.

Accordingly, a court is likely to show deference to council and board value assessments, provided there is some reasonable basis for that assessment.

(b) Assistance to Business and Procurement

The statutory prohibition on assisting business and the approach of the Courts to this issue provide strong support for local governments to use some kind of open and competitive procurement process, in order to ensure that the local government receives fair market value consideration with respect to the contract. If a local government goes through such a process in eventually awarding a contract, the local government is likely to be in a very strong position to defend any claim that it provided unlawful assistance to a business.

On the other hand, where a local government awards a contract to a person without any kind of process, such as sole sourcing, the local government will have little guidance that the contract is for market value, unless it obtains a third party assessment of the transaction. This

circumstance would leave the local government more vulnerable to allegations of assisting a business.

In such a case, it is possible that other contractors may feel disgruntled at not having had an opportunity to bid on the contract. If such a contractor feels that the contract was for less than market value, they may decide to commence legal proceedings challenging the award of the contract. If a court were to agree that the local government had provided unlawful assistance to a business, the court might set aside the award of the contract. If the 'horse has left the barn', such that and monies have already been paid to the contractor, it is possible that council or board members involved in approving the transaction might have personal liability for any financial loss to the local government. Under section 191 of the *Charter*, a council member who votes for a bylaw or resolution authorizing the expenditure or other use of money contrary to the Act may be disqualified from office and may also be personally liable to the municipality for the amount.

Of course, a court's conclusion as to whether or not a local government has provided assistance will depend on a number of factors, including the local government's reasons for sole sourcing.

Nevertheless, the statutory prohibition on providing assistance to a business provides a significant incentive for local governments to procure contracts using an open and competitive procurement process. A court is unlikely to question a contract that was the product of such a procurement process, where the council or board considered the contractor's proposal or bid to provide the best value to the municipality.

B. Provincial Trade Agreements

British Columbia is party to the Agreement on Internal Trade (AIT) with the Federal Government and other provinces and territories. Pursuant to the AIT framework, the Province has entered into the Trade, Investment and Labour Mobility Agreement (TILMA) with Alberta and, most recently, the New West Partnership Trade Agreement (NWPTA) with Alberta and Saskatchewan. These agreements contain provisions directed at procurement by local governments.

1. AIT

Annex 503.4 of the AIT contains procurement requirements for "municipalities, municipal organizations, school boards and publicly funded academic, health and social service entities, as well as any corporation or entity owned or controlled by one or more of the preceding". These

requirements apply where the "procurement value" is $100,000 or greater, for goods and services, or $250,000 or greater for construction. The procurement requirements for such entities include the following:

- Non-Discrimination - No discrimination based on province of origin of the goods, services or materials, or the province of origin of the supplier of the goods services or materials.

- Transparency – A requirement to provide ready access to legislation, regulations, procedures, guidelines and administrative rulings regarding procurement matters, and to notices of "Contract A" ward.

- Fair Acquisition Process:

  - Procurements shall be covered by a "tendering process" (subject to limited exceptions).

  - Use a "fair acquisition process that is based on the highest degree of competition, efficiency and effectiveness and is consistent" with the non-discrimination and transparency requirements of the Annex.

  - Post tender notices on Provincial electronic tendering system.

  - Evaluation of bids may take into account price, quality, quantity, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria consistent with the non-discrimination requirements.

  - Tender documents must identify procurement requirements, evaluation criteria and the methods of weighting and evaluating the criteria.

  - Pre-qualification is permitted.

- Notable exceptions to the procurement requirements include:

  - "Where an unforeseeable situation of urgency exists and the goods, services or construction cannot be obtained in time by means of open procurement procedures".

  - The procurement (i.e. acquisition) of real property (land and improvements).

Importantly, the term "tendering Process" as used above is defined to include "all methods of tendering such as requests for information, requests for quotations, requests for proposals,

requests for qualification and calls for tender". As such, 'tender', as used in the AIT, appears to permit procurement processes that do not give rise to "Contract A".

The general AIT dispute resolution procedures do not apply to entities covered by Annex 503.4, but the Annex includes its own complaints and resolution procedure. The Annex requires that covered entities "document their non-judicial complaint process and provide this information to suppliers or Provinces upon request" and "provide suppliers from other Provinces the opportunity and process to challenge contract decisions that are equal to those available to local suppliers". The Annex also contains dispute resolution procedures permitting a supplier to complain to the Province in which the supplier is located, which can then inform the other Province. The Provinces are then to work with the parties to resolve the complaint. If the complaint is not resolved, a Province can require consideration by an expert panel, which is to make a report that is to form the basis for the Provinces to then reach a "mutually acceptable" settlement.

Importantly, the Annex provides that the dispute resolution procedure is not to "cause delay in the awarding of a contract by the covered entity". This suggests that the dispute resolution procedure is aimed at achieving a result that avoids a repetition of the problem giving rise to the complaint, rather than directly addressing the particular compliant by changing a contract award decision.

2. TILMA and NWPTA

The TILMA and NWPTA are substantially the same, this part refers to NWPTA. The NWPTA requires that the 'Parties' (BC, Alberta and Saskatchewan), "will provide open and non-discriminatory access to procurements" of "regional, local, district or other forms of municipal government, school boards, public funded academic, health and social service entities, as well as any corporation or entity owned or controlled by one or more of the preceding entities" where the procurement value is:

- $75,000 or greater for goods or services, or
- $200,000 or greater for construction.

The Provinces are also to ensure that covered entities post tender notices on a Provincial electronic tendering system.

As for dispute resolution, the NWPTA provides that the Provinces are to "consider options to improve the dispute settlement process as it relates to procurement, including the development of an effective bid protest mechanism", but that until that time, the monetary award provisions of the NWPTA do not apply to covered entities.

It is important to note that the AIT, TILMA and NWPTA contemplate that the provisions of each agreement apply to covered entities and procurement and provide that in the event of any

inconsistency "the provision that is more conducive to liberalized trade, investment and labour mobility prevails".

3. Impact of AIT, TILMA and NWPTA

While BC is a party to these trade agreements, local governments within BC are not signatories. As such the mere existence of these agreements does not give rise to any obligations on the part of local governments.

Furthermore, the Province has not enacted any legislation obliging local governments to comply with these trade agreements. BC has enacted the *Trade, Investment and Labour Mobility Agreement Implementation Act* and the *New West Partnership Trade Agreement Implementation Act*. However, neither of these Acts makes compliance with the TILMA or NWPTA mandatory for local government or provides for any repercussions should a local government fail to comply with those agreements.

Accordingly, BC may be taking a "wait and see" approach before taking any formal steps to force compliance. At this point, it is unclear what the impact would be if a local government were to fail to comply with the AIT requirements. While it may be unlikely that there would be direct repercussions on a particular procurement process from non-compliance, it is possible that non-compliance would lead the Provincial government to take legislative action.

4. Grant Funding Agreements – Compliance with Trade Agreements

The Province has used funding contracts as an indirect means to require local government compliance with trade agreements. In providing a grant to a local government, the Province typically requires the local government to enter into a 'contribution agreement'. These agreements may contain provisions obligating the local government to comply with the AIT and NWPTA. The following is an example of such a clause:

> The Recipient will ensure that any contracts it awards to any Third Party will be awarded in a way that is transparent, competitive, consistent with the Agreement on Internal Trade, the Trade, Investment and Labour Mobility Agreement, and consistent with value for money principles.

In theory, a failure to comply with the above obligation could see the local government lose the funding promised under the contribution agreement.

5. Areas of Potential Non-Compliance

Most local governments probably comply with these trade agreements most of the time, without necessarily trying to do so. That said, based on past experience with local government

procurement, the following are some areas that may give rise to non-compliance with the AIT and other trade agreements:

- On occasion a local government wishes to award a contract directly to a particular contractor, without going through any kind of public process. This would be permitted under the AIT if the matter was urgent and this urgency was unforeseeable or if the circumstances fit into another AIT procurement exception. However, a desire to proceed directly with a contractor merely because the local government is comfortable with that contractor would not be permitted under AIT.

- In the past, it was not uncommon for a local government to give some advantage to local contractors. Such a local preference would not be permitted under the AIT or NWPTA. This seems to have become less of an issue over time.

- As noted above, the AIT requires that a procurement process identify "evaluation criteria and the methods of weighting and evaluating the criteria". While local governments sometimes include weighting or specifically list criteria, in many cases there is no weighting at all. As for evaluation criteria, a local government will typically wish to leave its procurement process fairly open in terms of evaluation criteria (using 'best value' as the key factor, based on obvious factors such as price, proposal content and experience) and then simply explain its justification for selecting a preferred bid in a report council. A traditional tender call will request price, experience and reference, but will not expressly indicate criteria. In particular, the use of weighting can be cumbersome and complicate tender evaluation unnecessarily. It might be argued in cases such as a straight tender for work that necessary experience is a pre-requisite for consideration and that price is otherwise the overriding factor. However, where the process involves bid variation beyond price and qualifications, such as for a design-build contract, the AIT would appear to require the weighting of such criteria.

C. Local Government Policy

A local government must be mindful of its own policies. Most local governments have procurement policies. These policies are typically established by council resolution and require public procurement of most significant contracts.

A local government must comply with its policies. However, a council may authorize a procurement process that differs from existing policy by passing a council resolution to that effect. The establishment of a procurement policy is a political decision, as is a decision to vary from such a policy.

D. The Courts

Aside from the enforcement of "Contract A", what role do the courts have in evaluating local government procurement decisions?

Business corporations are creatures of statute. While such corporations can and do sometimes procure contracts using a tendering process that gives rise to "Contract A" obligations, the procurement decisions of such a corporation is not subject to second guessing by the courts at the behest of the public or other contractors.

Local governments are also creatures of statute. However, local governments hold many extraordinary powers, including to impose taxes and to spend money raised through taxation. Accordingly, the courts have held that unlike private corporations, local government purchasing decisions may be challenged, depending on the motivation behind the decision. In the Supreme Court of Canada's decision in *Shell Canada Products Ltd. v. Vancouver (City)* (1994), 88 B.C.L.R. (2d) 145, McLachlin J., stated, in considering whether government purchase decisions should be treated differently from those of private corporations or individuals:

> According to the private law of contract, each person, individual or corporate, has the right to contract with whom it chooses, and on the terms it chooses. The courts have not restricted this freedom of contract, but confine themselves to enforcement and interpretation of contracts. It has been said that a public body which seeks to procure goods or services is in the same position as any private individual or corporation which seeks to contract with another party. Vickers J. expressed this opinion in *Peter Kiewit Sons,* [1992] B.C.J. No. 1591, where he held that the ordinary rules of private law apply to the public contracting process, and that judicial review does not lie for commercial decisions of public authorities. He explained (at p. 120) that "it would be inappropriate to allow both a public law and a private law remedy in situations involving government contracts where no particular procedure is prescribed by statute or regulation". Adding weight to the argument that government purchasing decisions should be immune from judicial review is the potential for excessive litigation, which may in turn result in significant inconvenience to the public through a disruption of the procurement process.
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> In favour of allowing judicial review of the procurement or purchasing power of governments is the argument that while this principle is valid for private contracts, the public nature of municipalities renders it inapplicable to them. As Arrowsmith states, at p. 14, "there are many considerations applicable to public bodies and not to private which may justify different treatment of the two, even when engaged in similar activity". The most important difference is the fact that municipalities undertake their

> commercial and contractual activities with the use of public funds. Another consideration justifying different treatment of public contracting is the fact that a municipality's exercise of its contracting power may have consequences for other interests not taken into account by the purely consensual relationship between the council and the contractor. For example, public concerns such as equality of access to government markets, integrity in the conduct of government business, and the promotion and maintenance of community values require that the public procurement function be viewed as distinct from the purely private realm of contract law. Finally, it must be remembered that municipalities, unlike private individuals, are statutory creations, and must always act within the legal bounds of the powers conferred upon them by statute. In particular, council members cannot act in pursuit of their own private interests, but must exercise their contractual powers in the public interest.
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> On balance, it is my view that the doctrine of immunity from judicial review of procurement powers should not apply to municipalities. If a municipality's power to spend public money is exercised for improper purposes or in an improper manner, the conduct of the municipality should be subject to judicial review.

Accordingly, local government purchasing and procurement decisions may be subject to legal challenge, without the need to establish the existence of or a breach of "Contract A". There are some recent cases of interest in this regard.

1. *Bot Construction Limited v. Ontario Ministry of Transportation* (2009), 99 O.R. (3d) 104 (Ont. S.C.)

In this case, Bot, a disgruntled bidder, seeking judicial review of the Ministry of Transportation's "Contract A" award, alleged the MOT had awarded the contract to a non-compliant bidder, Cavanagh. The decision indicates that Bot brought the application for judicial review, rather than a traditional suit for breach of "Contract A", in part because the Ministry's tender documents include a waiver of liability against the Ministry.

The Court first considered whether a judicial review was available to challenge the Ministry's decision. On this issue, the Court followed *Shell*, supra, stating:

> We are also satisfied that the public law interests in this case are sufficient to require that judicial review be available. The tendering decision of the MTO has obvious broad public interest implications that extend beyond the interests of the contracting parties, not only with respect to the construction of public roads but also to the fairness and integrity of the process followed in the expenditure of significant public funds – totaling $2 billion in 2008 and

> about $60 million for this project. As noted in *Shell*, public concerns such as equality of access to government markets, integrity in the conduct of government business, and the promotion and maintenance of community values are relevant to government procurement powers. As well, the issues in the tendering process in this case have significant economic implications for both the steel industry in Canada and the road building industry in Ontario. The government is the only market for provincial road construction and it controls the pre-qualification of bidders and the economic opportunities for the road building industry. Clearly, the tendering of public highways in Ontario impacts not only the rights and interests of the industry bidders but also broader public interests.

The Court then discussed how it would assess the reasonableness of the Ministry's decision to award the "Contract A" and referenced a Ministry Procurement Directive issued by the Management Board of Cabinet to the Ministry, which had as its stated purpose to "ensure that goods and services are acquired through a process that is fair, open, transparent, geographically neutral and accessible to qualified vendors". With reference to the Directive, the Court stated:

> …the statute [governing the Ministry] in this case confers a broad general power [to award a contract for this project] and does not impose any specific limits on the exercise of that power. However the government has chosen to issue directives to ministries to exercise that power fairly and transparently and to provide open and equal treatment to qualified vendors, with geographic neutrality …. The Directive does not have the force of law at the instance of third parties and does not constrain the government to the same degree as the statutory or regulatory scheme.… However, in our view, the Directive creates and informs the MTO's duty of fairness in the procurement context….[The] Directive is published and its stated purposes and mandatory nature create a public expectation that the tendering process will be conducted fairly and transparently and will provide a level playing field to qualified vendors.

The Court concluded that the Directive "gives rise to and informs a duty of fairness that is reviewable by" the Court. The Court found that in allowing Cavanagh to submit a bid that did not comply with the specification set out in the tender documents for rolled steel beams, the Ministry had effectively modified that specification. The Court held that to award the contract to Cavanagh would be contrary to the Directive and unfair to all bidders, who should have been informed of the modification.

The Court quashed the contract award and remitted the matter back to the Ministry to re-evaluate tenders in accordance with the terms and conditions of the tender documents. It also indicated that the Ministry could at its discretion conduct a fresh tender process.

The Ministry appealed the decision and was ultimately successful [*Bot Construction Ltd. v. Ontario (Ministry of Transportation)*, [2009] O.J. No. 5309 (Ont. C.A.)]. The Court of Appeal concluded that the impact of the non-compliance of Cavanagh's bid was very small in relation to the gap between its bid and the second lowest bidder. The Court of Appeal also emphasized that it was not expressing any views as to the availability of judicial review in respect of the procurement of the contract.

Notwithstanding the Court of Appeal's decision, the lower Court decision remains of interest in two respects in particular:

- The challenge was brought because of a lack of effective alternative grounds for the complainant to challenge (ie. breach of "Contract A").

- The lower Court was clearly guided by the Ministry's directive both in concluding that the contract award was reviewable by the court and in evaluating the Ministry's conduct in awarding the contract. This approach suggests that a court might look beyond the terms of a procurement document that states very little respecting evaluation criteria (such as a very basic RFP) and examine a local government's policies regarding procurement and contract award. Furthermore, it could be argued that the AIT and other trade agreements, signed by BC, are similar in effect to the Directive issued by the Management Board of Cabinet to the Ministry in the *Bot* decision and that those trade agreements and the Provinces' commitments in them should guide a court's review of local government procurement decisions. That said, aside from clauses in grant contribution agreements, while BC has signed these trade agreements, we are not aware that of any directive issued by the Province to local governments respecting the trade agreements.

2. *Metercor Inc. v. Kamloops (City)*, [2011], 82 M.P.L.R. (4th) 77 (B.C.S.C.)

In this case, the City of Kamloops issued a request for proposals for the supply and installation of residential water meters. CMI (formerly Metercor) submitted a proposal but was unsuccessful, as the City entered into negotiations with another proponent, Neptune Technology Group (Canada) Ltd. CMI applied by judicial review to set aside the City's decision on the basis that its process gave preferential treatment to Neptune and that the City had breached its duty of openness, transparency, fairness and equality to all its proponents.

In this case, the parties had agreed that the City was under such a duty and they also agreed that the Court had jurisdiction to review the City's decision.

The Court dismissed all but one of CMI's allegations and ultimately took issue with the City's approach to evaluating proposals. The RFP process had three stages. If a proponent did not pass the "mandatory and review stages", the City would not open the pricing component of their proposal and the envelope containing their price would be returned unopened. The City

used a scoring system for the second stage and the Court found that this system could result in circumstances where two proposals are very close in score for the earlier stages, but only one is able to continue to the price consideration stage. This was because the City required that a proponent score 75% on the second stage in order to proceed to the price evaluation stage. 75 points were for non-price related matters and 25 points for price. Out of those 75 points, 30 points related to project management, corporate experience and public education. Out of the total possible 75 points, CMI received 38.53 points and Neptune received 67.68 points. The cut-off for consideration was 75% of 75 points, i.e., 56.25. The Court indicated that as follows:

> Out of a total 75 points CMI received 38.53 points. They would have required 17.72 additional points in order to meet the cut-off before their price would be considered. Even if Neptune got zero points for their price and CMI got the full 25 points for their price, Neptune's proposal would still have scored just over 4 points higher than CMI. This would not mean that the City would have to deal with Neptune, because the proposal made it clear they were not bound to deal with any particular proponent even after they passed the evaluation process. However, it is odd that the committee selected a process by which they would not even consider the price of CMI unless they met the threshold of 75 percent of the 75 points; that is, 56.25 points .... The concern that the evaluators might be affected by the price if they knew it before they considered the technical aspects of the proposal could easily have been met by simply not opening the price envelope until after the Schedule B evaluation.
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> …
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> Was the City's decision not to consider price unless a proposal earned 75 percent of the marks available on the assessment reasonable? The City's purchasing policy specifies that quality and price are to be considered. The City responds by saying that may be the policy, but they were entitled to vary from that policy in this instance. The City responds that this was clear to anybody presenting a proposal, and that all proponents were treated equally.
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> …
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> Although they were entitled to select the process and I should not interfere with that decision, the process they selected had the potential to produce an absurd result; that is, one proponent might receive 74 percent of the marks on the assessment and another 76 percent. The price of the first proposal would not even be considered. However, price was good for 25 marks out of 100. If the proponent that scored 74 on the assessment had the best price, they might attain 25 marks. If the proponent that received

> 76 percent on the assessment had the worse price, they might receive significantly less than 25 marks. If that were the case, the proponent who scored 74 marks on the assessment would be the best proposal.
>
> … in this case I find that the multi-stage process was unreasonable. I find that the committee was attempting to create a process which would be as objective as possible. I find the committee was trying to create a process in which price would not influence the technical evaluation. However, in doing so and imposing the 75 percent requirement on the evaluation process, before price would even be considered, they effectively tied their hands or blinded themselves to the issue of price, even though a proposal might meet all of the mandatory requirements. This was more than simply assigning a certain weight to price. This had the effect of eliminating price in its entirety. This was a significant project involving many millions of dollars. The process chosen by the committee would have eliminated the consideration of price even if a proponent had only missed the cut-off by 1 or 2 points. It is hard to understand how that is reasonable when decisions are being made about how to spend somebody else's money; that is, the tax payers' money.

The Court remitted the decision to award the contract back to the City in order to re-consider their decision after considering the prices submitted by the parties. The Court indicated that the City still had the discretion to decide who they wished to award the contract despite price and noted that the RFP gave the City significant discretion in that respect.

While the precedential impact of this case may be lessened by the fact that the parties had agreed to judicial review and that the City was under a duty of fairness in relation to its RFP, in the context of this paper, this case is nevertheless of particular interest for the following:

- This case arose in the context of an RFP, where normal remedies for breach of "Contract A" were not available.
- The Court considered the City's purchasing policy, although the Court appears to have recognized that the City could use a process that differed from its own policy.
- The case highlights some of the risks associated with using a point system to evaluate proposals.

IV. CONCLUSION

Many of the potential non-"Contract A" legal issues relating to local government procurement have only recently begun to emerge. Trade agreements are relatively new and it is unclear how far the Provincial government will go in enforcing these agreements in respect of local governments. It also remains unclear how the Province will deal with complaints against local governments for non-compliance with trade agreements. We are also beginning to see legal challenges in cases where a local government uses a non-"Contract A" procurement process or where it includes liability waivers in its tender documents. While these kinds of challenges may not ultimately lead to damages awards against local government, they can certainly slow down the procurement process and create pressure on local government procurement practices.

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