

LIFE IS NOT FAIR: UNSUCCESSFUL PROPONENT ADMITS NON-COMPLIANCE WITH RFP, BUT SUES FAIRNESS ADVISOR ANYWAYS

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Modern public procurements, particularly in the public-private partnership model, typically involve a third party fairness advisor. A fairness advisor (also commonly referred to as a fairness monitor or fairness reviewer) acts as an independent observer with respect to the implementation of a competitive procurement process. Public bodies typically appoint fairness advisors for the dual purposes of providing confidence to bidders that the procurement processes as described in the procurement documents are applied fairly and to obtain an independent opinion that can be made available to the public as to the fairness of the procurement process.

In a novel lawsuit, *CG Acquisition Inc. v. P1 Consulting Inc.* [1], a disqualified proponent filed a lawsuit seeking damages against a fairness advisor and two Ontario Crown agencies, alleging that the fairness advisor owed the proponent a common law duty of care or fairness despite the fact that the proponent submitted a non-compliant bid. The Ontario Superior Court of Justice summarily dismissed the lawsuit and found in favour of the fairness advisor and the Crown agencies.

Background Facts

The action in *CG Acquisition* by the disqualified proponent arose from a request for proposals (“RFP”) process for the redevelopment of land along the Toronto waterfront and the construction of a new Liquor Control Board of Ontario head office and flagship retail space. The RFP process was conducted by Ontario Infrastructure and Lands Corporation and the Liquor Control Board of Ontario (together, the “Public Bodies”).

The Public Bodies retained P1 Consulting Inc. (the “Fairness Advisor”) to act as a third party fairness advisor in connection with the RFP. The Fairness Advisor was contracted to observe the procurement process and provide impartial opinions on the fairness of the process. As found by the court, the Fairness Advisor did not provide legal or quasi-legal advice; was not an ombudsperson; and was providing a service to the Public Bodies under a contract.

The unhappy proponent was disqualified from the RFP process for including an ineligible person as one of its

design team members. After the initial disqualification for non-compliance with the RFP, the proponent requested that the decision be reconsidered. When the Public Bodies maintained their original decision to disqualify the proponent, the proponent commenced its lawsuit claiming in tort that the Fairness Advisor and the Public Bodies breached a freestanding duty of fairness during the RFP process which required the defendants to reconsider its disqualification in an adequate manner. The proponent argued that the defendants did not do so, and thereby conducted a negligent investigation and were negligent in the provision of a service to the proponent.

No Duty of Fairness

The Ontario Superior Court of Justice rejected the proponent's claim that there is a freestanding duty of fairness in the RFP process. The court found that no such freestanding duty exists independent of a contractual duty unless the RFP documents explicitly provide to the contrary. As the proponent in this case never submitted a compliant bid, no duty of fairness could arise.

No Duty of Care

Not only did the court refuse to find a freestanding duty of fairness, the court also concluded that no duty of care existed in tort. With regards to the Fairness Advisor, the court emphasized that there was not a sufficiently close relationship or proximity between the Fairness Advisor and the proponent to justify the imposition of a duty.

Even if there had been a sufficiently close relationship, the court pointed to a number of policy reasons why a duty of care should not be imposed on fairness advisors. In particular, the court emphasized that fairness advisors are engaged to serve the procurement process and provide observations with respect to the issue of fairness and prepare a report at the conclusion of the procedure. Fairness advisors perform an advisory and monitoring function. They do not make the decision. The decision is that of the public bodies. Further, it is in the public interest that fairness advisors be able to carry out their duties objectively and free from the prospect of litigation in the RFP process.

Not Negligent

While the court could have dismissed the case upon concluding that there was no duty of fairness or duty of care, it went on to confirm that neither the Fairness Advisor nor the Public Bodies acted negligently. While the proponent complained that the Fairness Advisor merely "rubber stamped" the Public Bodies' reconsideration decision, the Fairness Advisor was found to have been engaged in the reconsideration and to have reached a reasonable conclusion concerning the issue of fairness.

Limitation Clause Protects Fairness Advisor

Finally, the court concluded that a limitation of liability clause found in the RFP extended protection to the Fairness Advisor. The court found that the Fairness Advisor was in the position of a subcontractor and was not in a position to and could not enter into any form of contract with the proponents. It would be unreasonable if the Public Bodies could be immune from liability but the Fairness Advisor, who had no opportunity to limit its liability with proponents, would face liability and be exposed to the entire burden of such liability.

Takeaways

In a rare decision considering the role of a fairness advisor, the court in *CG Acquisition* makes clear that fairness advisors are not answerable to unhappy bidders in an RFP process. Not only does the court confirm that general limitation of liability clauses extend protection to fairness advisors, but numerous public policy reasons also shield fairness advisors from claims advanced by unsuccessful bidders. In future, unhappy bidders considering a lawsuit will also need to grapple with the court's decisive statements regarding the absence of a freestanding duty of fairness in the RFP process.

This decision is currently under appeal and it will be interesting to see whether the Ontario Court of Appeal upholds the lower court's decision.

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[1] 2018 ONSC 4089 [*CG Acquisition*].[ps2id id='1' target='']

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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