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The Bids THAT BIND

Government bidding must be fair, or else
companies will answer to the courts

BY CHRISTOPHER W. SPASOFF

Ever since the case of *R. v. Ron Engineering and Construction (Eastern) Ltd.*, owners have tried to bind bidders to certain contractual obligations, while evading any reciprocal obligations themselves. It is for this very reason that year after year we continue to see a variety of interesting tendering cases working their way through the courts.

The first came to us in January from our very own Court of Appeal, in the case of *Chandos Construction Ltd. v. Alberta Infrastructure*. Chandos dealt with “Instructions to Bidders,” which purported to give the owner sole discretion to determine, and then accept or waive, “minor or inconsequential” irregularities in a bid. Further, the clause permitted the owner, as a condition of bid acceptance, to request that a bidder correct any irregularities with no change in bid price.

The Alberta government sought tenders from general contractors for a construction project in Eckville. Keller Construction Ltd. was successful, despite the fact that its bid contravened the rules and regulations for construction tenders and contained other irregularities. The government determined that the irregularities were “minor and inconsequential.” Chandos sued, argu-

ing Alberta had a contractual obligation to accept only a compliant bid. On appeal, Chandos was successful. The Court held that the owner could not subjectively determine what was minor and inconsequential. Neither could it rely on the clause to accept a tender that was not substantially compliant. Allowing too much leeway in correcting irregularities would effectively amend the bid after closing, thereby creating a different construction contract than was originally contemplated.

The B.C. Court of Appeal tackled a similar issue in the case of *Stanco Projects Ltd. v. Ministry of Water, Land & Air Protection*. Contractors had been invited to pre-qualify as bidders for the construction of two reservoirs. Ultimately, the Ministry decided to proceed with a single-tank system, for which none of the bidders had quoted a price. The contract for that work was awarded to another party. The Court held that a clause reserving the right not to accept the lowest or any bid does not exclude the obligation to treat all bidders fairly. A tendering contract, “Contract A,” had been formed with the initial bidders for the two-tank system, and the Ministry breached its duty when, instead of awarding “Contract B” and nego-

tiating changes, it instead sought quotes from other bidders.

Finally, and perhaps foreshadowing things to come, in the case of *Design Services Ltd. v. R.*, the Federal Court of Appeal examined whether an owner may be held liable to the architect, consultants and subcontractors of a bid proponent, where the proponent was relying on the knowledge, expertise, and work of those parties. According to the Court, “Contract A” would not explicitly or implicitly cover the architect, consultants and subcontractors. On the issue of whether the tendering process created a relationship of sufficient proximity so as to establish common law liability, the Court held that there was insufficient proximity between the government and the architect, consultants and subcontractors to justify it. Similarly, considerations of policy simply argued against such a duty. Tendering continues to be a legal minefield. Despite owners’ efforts to retain broad discretion in the tendering process, the courts will continue to intervene where they perceive unfairness. ■

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