

CON·STRUCT

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DEVELOPMENTS IN TENDER LAW: J. COTE & SON EXCAVATION LTD. V. CITY OF BURNABY

Due to the large volume of purchasing conducted by public entities, the likelihood of purchasing from the same pool of vendors raises the challenge of potentially selecting a bidder with whom they are (or have been) embroiled in a dispute. A strategy that some public entities have used to address this issue is to adopt the practice of including in their procurement documents a term that excludes from the bidding process those entities that are (or have been) engaged in legal proceedings against the public body, commonly referred to as a “reprisal cause”. A number of local governments have formalized this practice in their procurement policies. Notwithstanding its common use, the issue of whether such a practice is lawful within a public procurement process has long been a topic of discussion, and some uncertainty.

This issue has recently been addressed by the BC Supreme Court in *J. Cote & Son Excavation Ltd. v. City of Burnaby* (2018 BCSC 1491 (CanLii)). In this case, the City of Burnaby’s Invitation to Tender entitled the City to reject any bid from a party that was currently, or had been within the prior two years, engaged in a court action against the City. This reprisal clause barred *Cote*, a construction and excavation contractor, from bidding for this tender, as it had been involved in a dispute with the City in 2013 related to the collapse of a retaining wall that resulted in the death of one of *Cote*’s employees while *Cote* was engaged in a public works contract with the City. During the dispute resolution process, the referee ruled in favour of *Cote*. However, the City refused to comply with the referee’s decision (which was non-binding). Therefore, *Cote* pursued its dispute in BC Supreme Court. Shortly after commencing the action, the City added the reprisal clause to its Invitation to Tender for municipal works.

Cote’s challenge to the City’s reprisal clause had two bases:

1. a constitutional challenge that the clause denied *Cote*’s general right of access to the courts; and
2. that the clause was contrary to public policy. Both arguments were rejected by the court. The Court held that, even if a reprisal clause may indirectly discourage some contractors from exercising their rights to pursue claims in court, this effect did not establish a constitutional infringement. On the issue of public policy, the court supported the municipality’s implementation of a discriminatory procurement policy, provided that it is adopted for a valid commercial or business purpose and is absent any indication of bad faith.

From the perspective of owners, it seems reasonable that they would not want to entertain bids from a bidder with whom they are (or were) in a dispute. In construction especially, any impasse in the owner’s relationship with the contractor is likely to impact the timely and cost-efficient completion of a project. Contractors, on the other hand, who were successful in their prior claims, likely see this approach as unfair. An appeal of this decision was dismissed on May 16, 2019.

Tips and Takeaways

While preparing solicitation documents, public entity owners should:

- consider that solicitation documents can include a term that disqualifies bids from contractors that are engaged in litigation with the owner.
- review their procurement policy and practice on the issue, and update as needed to ensure the policy is

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aligned with practice, and vice versa.

- ensure that a policy adopting the use of a reprisal clause is for a valid public purpose and is implemented in a fair and consistent manner.
- review the language of their reprisal clause in the procurement documents to ensure it is appropriately worded and sufficiently captures the objective of the policy.

Contractors who obtain a large proportion of their work from certain public bodies are wise to investigate the public body's procurement policies and be alert to reprisal clauses in procurement documents. If a dispute arises with a public body that has such a policy, the contractor should conduct a long-term cost-benefit analysis before engaging in formal proceedings, now that it has been established that a public body client's grudge is lawful.

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Adrienne Atherton & Sonia Sahota

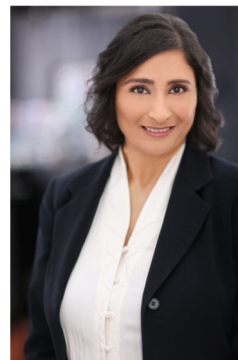
Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

710 - 900 West Hastings Street, Vancouver, BC, V6C 1E5
604.639.3639 | www.civiclegal.ca |  CivicLegal



Adrienne Atherton
604.358.6648
adrienne@civiclegal.ca

Adrienne brings over 24 years of legal experience in litigation and dispute resolution in the areas of local government, construction, public procurement professional liability, and insurance. Adrienne has advised and represented clients in relation to a variety matters, including municipal powers, duties, jurisdiction and procedural requirements, judicial reviews and constitutional challenges, builders' lien, delay claims and other construction disputes, environmental, regulatory, procurement, administrative hearing processes, tax sales, remedial action orders, bylaw challenges, contract claims, FOIPPA and privacy issues, insurance, risk management and expropriation. Adrienne is one of only a handful of lawyers in B.C. with experience in the Expropriation Inquiry process. Adrienne worked with the MI-ABC for 21 years, both as outside counsel, and for 8 years in-house as Senior Staff Lawyer. Adrienne has extensive experience at all levels of Court in British Columbia, administrative tribunals, mediations and arbitrations.



Sonia Sahota
604.358.7167
sonia@civiclegal.ca

Sonia is a founding partner of Civic Legal LLP, and practises in the areas of procurement, construction and land development, with a particular focus on tendering law, procurement fairness, construction contracting and use of standard form construction contracts. Sonia routinely provides advise on structuring and administering public tenders and competitive RFPs, managing contractor performance and lien issues and securing land tenure. She practised as a professional engineer for 10 years and worked on civil and geotechnical design and construction projects in British Columbia and abroad. She provides legal advice with practical insight by drawing upon her unique professional understanding of construction and engineering projects. Sonia keeps a watchful eye on technological disruptions to the construction industry, and how these may impact the traditional relationships between parties, such as