

CON·STRUCT

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THE LEGALITY OF HOLDING A GRUDGE IN PUBLIC PROCUREMENT

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* (2017 BCSC 2323 (CanLii)) and all appeals were dismissed. 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 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 contra-

ry 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.

Tips and Takeaways

While preparing solicitation documents, 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 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

(Continued on page 2)

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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This article is intended for the general information of organizations in British Columbia. If your organization has specific issues or concerns relating to the matters discussed in this article, please consult a legal advisor.



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Sonia keeps a watchful eye on technological disruptions to the construction industry, and how these may impact the traditional relationships between parties, such as with the use of BIM technology and smart contracts.