

NON-COMPLIANCE AND SUBSTANTIAL COMPLIANCE OF TENDER BIDS

One of the frequent issues that comes before courts in the tendering context is whether a tender bid is compliant with the tender documents. There are considerable legal implications arising from a determination that a bid is not compliant.

While in other business contractual relationships an irregularity in the contract documents may be reasonably ignored by the parties, in the tendering context irregularities have greater significance due to the unique legal framework of tendering. In order to uphold the fairness and integrity of the tendering process the law requires that only *compliant* bids be considered for award. In this article, we discuss the general principles that apply in a compliance assessment. We also provide you with a few illustrative examples of common non-compliance issues in the

construction industry that have come before the courts and how these were resolved.

In order to preserve the fairness and integrity of the tendering process, the courts have adopted a particular analytical framework for tendering, the so-called “Contract A/Contract B” framework.¹ According to this framework, an owner’s invitation to tender represents an offer and a contractor’s response to that invitation represents an acceptance of that offer. However, not every bid response will be acceptable; only compliant bids may be considered by the owner. In other words, the initial contract – the bid contract – that arises (legally referred to as the “Contract A”) when a tender bid is submitted in response to an invitation to tender only exists between

(Continued on page 2)

the owner and each *compliant* bidder. When the owner accepts one of the compliant bids, a second contract – the works contract – comes into existence (legally referred to as the “Contract B”). This latter contract will govern the performance of the work that was the subject of the invitation to tender.

Every contract contains terms and conditions. The terms and conditions of Contract A are governed by the express terms and conditions set out in the invitation to tender *plus* all applicable implied terms derived by custom, usage or the presumed intentions of the parties.² One such implied term of Contract A that is recognized by the courts is that the owner will accept only compliant bids.³ It is necessary to imply this term into every Contract A to protect the reasonable expectations of the parties and maintain the integrity of the tendering process.⁴ The bidders spend large amounts of funds, time and effort in preparing their bids for submission. Exposing oneself to such risks while allowing an owner to circumscribe the process and accept a non-compliant bid makes little sense.⁵ Thus, the mere submission of a bid in response to an invitation to tender does not create Contract A; the bid must be compliant to give rise to this contract.

Similarly, the courts have held that there is also an implied duty in Contract A to treat all bidders fairly and equally⁶, which is a required term to give business efficacy to the tendering process.⁷ Importantly, this duty, as well as other rights and obligations under the Contract A, will not arise unless a Contract A is formed, which, as noted, may only be formed when a compliant bid is submitted. In other words, non-compliant bids incapable of forming Contract A will not be afforded the protections of implied terms.

The assessment of bid compliance must be undertaken objectively at the time the bid is submitted.⁸ This assessment is not conducted in the abstract, but in the context of the express terms and conditions contained in the tender documents.⁹ Owners have the option to expressly reserve rights for themselves in the tender to assess bids against a specified standard. These reserved rights, expressed most often in “discretion clauses”, may permit the owners to waive certain irregularities and, if expressed with clarity, certain forms of non-compliance.¹⁰ When such form of discretion is reserved by the owner, the test for compliance in the tender process will be “material” or “substantial” compliance, rather than strict

(Continued on page 3)

compliance.¹¹

Determining whether a bid is materially compliant is based on the test for material non-compliance, which was articulated by the courts¹², as follow:

“material non-compliance will result where there is a failure to address an important or essential requirement of the tender documents, and where there is a substantial likelihood that the omission would have been significant in the deliberations of the owner in deciding which bid to select.”¹³

When assessing whether the irregularity represents a failure to address an important or essential requirement of the tender documents, the evaluator must first consider whether the tender documents on their face indicate that the information in issue is mandatory and material, in which case there will be *prima facie* proof that the information in issue is an important and essential requirement.¹⁴

When assessing whether the irregularity would have been significant in the deliberation of the owner in deciding which bid to select, a court will consider the rationale underlying the tendering process, namely, to protect the fairness and integrity of the tendering process.¹⁵

According to case law authority, relevant considerations when assessing the

materiality of the irregularity are: whether the irregularity would affect the price and performance of Contract B¹⁶; whether the acceptance of the non-compliant bid will raise the risk of action by compliant bidders¹⁷; and the reasonable expectations of the parties.¹⁸

The following are illustrative examples of common non-compliance issues considered by the courts:

- In the *Graham* case¹⁹, the bidder’s responses to requests in the invitation to tender for details of the bidder’s proposed environmental-related management were in issue. Namely, the bidder has supplied a short, nominal response. The court found that the responses amounted to perfunctory “we will comply” responses to a request to provide detailed plans on substantive and important matters, and as such, the bid was materially non-compliant.
- In *Silex*²⁰, the court considered a bid that provided a bid bond of only 60 days’ duration while the tender invitation required a 90 days’ bid bond. Finding that the bid was materially non-compliant, the court noted that the scheme set out in the invitation to

(Continued on page 4)

tender included a security requirement for the duration of the time within which the bid may be accepted. Given that the cost of the bond is generally proportionate to the duration for which it is granted, the bidder with a shorter period bid bond will incur lower costs, giving it an advantage over the compliant bidders.

- In *Double N*²¹, the Supreme Court of Canada considered that the absence of serial numbers and the licence registration numbers for the equipment subject to the tender when such information was expressly required by the tender call did not rise to material non-compliance in the context of the particular tender.
- In *Maple Reinders*²², the bidder failed to include mandatory alternative prices as required by an appendix to the tender call. The court determined that the failure amounted to material non-compliance, noting that the mandatory pricing affected the price of the bids and could objectively be expected to play an important role in the owner's consideration of the bids submitted.
- In *True Construction*²³, the bid failed to include the list of subcontractors when it submitted its bid and submitted the missing information at a later time by using the mechanism dedicated to the

revision of the bids. The court determined that by using this method of completing the bid, the bidder gained a competitive advantage over the compliant bidders. Completing the bid in this way, the bidder had the opportunity to continue to negotiate with potential subcontractors while avoiding the risk of being required to perform a potentially unprofitable contract since it submitted a bid that was not capable of acceptance. This opportunity was denied to the bidders who submitted completed bids capable of acceptance.

- In the *Maglio Installations* case²⁴, the bid in question failed to provide a preliminary construction schedule that was required by the invitation to tender. The court found that on the face of the tender documents, the preliminary construction schedule requirement fulfilled a material purpose. The failure was assessed as materially non-compliant.

June, 2022

Marcela Ouatu and Sonia Sahota

(Continued on page 5)

Footnotes:

1. *R v Ron Engineering & Construction (Eastern) Ltd.*, [1081] 1 SCR 111 (SCC) [*Ron Engineering*]

2. *Double N Earthmovers Ltd. v Edmonton (City)*, 2007 SCC 3 at para 106 [*Double N*]

3. *M.J.B. Enterprises Ltd. v Defence Construction (1951) Ltd.*, [1999] 1 SCR 619 (SCC) [*M.J.B. Enterprises*]

4. *Cambridge Plumbing Systems Ltd. v Strata Plan VR 1632*, 2009 BCSC 605 [*Cambridge*]

5. *Supra* note 3 [*M.J.B. Enterprises*]

6. *Martel Building Ltd. v R.*, 2000 SCC 60 [*Martel*]

7. *Ibid* [*Martel*]

8. *Graham Industrial Services Ltd. v Greater Vancouver Water District*, 2004 BCCA 5 [*Graham*] and *True Construction Ltd. v Kamloops (City)*, 2016 BCCA 173 [*True Construction*]

9. *Supra* note 8 [*True Construction*]

10. *Supra* note 4 [*Cambridge*]

11. *Supra* note 8 [*Graham*]

12. *Ibid* [*Graham*]

13. *Ibid* at para 34 [*Graham*]

14. *Supra* note 8 [*True Construction*]

15. *Supra* note 8 [*True Construction*] and *Silex Restoration Ltd. v Strata Plan 2096*, 2004 BCCA 376 [*Silex*]

16. *Supra* note 2 [*Double N*]

17. *Supra* note 15 [*Silex*]

18. *Supra* note 8 [*True Construction*] and note 4 [*Cambridge*]

19. *Supra* note 8 [*Graham*]

20. *Supra* note 15 [*Silex*]

21. *Supra* note 2 [*Double N*]

22. *Maple Reinders Inc. v Cerco Developments Ltd.*, 2011 BCSC 924 [*Maple Reinders*]

23. *Supra* note 8 [*True Construction*]

24. *Maglio Installations Ltd. v Castlegar (City)*, 2018 BCCA 80 [*Maglio Installations*]

**MARCELA OUATU****604.358.7590****MARCELA@CIVICLEGAL.CA**

Marcela is an associate lawyer of the firm. Her practice is focused primarily in the areas of tendering, procurement, construction matters and local government law. Marcela's experience includes assisting with construction contracts, procurement, and liability issues for public organizations as well as insurance disputes and construction litigation. She writes on legal topics of interest to members of the local government and construction communities, including builders' liens and construction contracts. Prior to joining Civic Legal LLP, Marcela completed a Juris Doctor and a Master of Laws at the Peter A. Allard

School of Law at the University of British Columbia. Marcela articulated at a civil litigation law firm, where she gained extensive legal experience in advocacy by frequently representing clients in the Supreme Court of British Columbia.

**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 advice 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 with the use of BIM technology and smart contracts.

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