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The Fine Line Between Bid Repair and Bid Clarification:

Permissible Post-Closing Conduct for Bidders and Procuring Entities

Follow-up

In June, we published an article addressing non-compliance and substantial compliance of tender bids. In that article, we discussed the need for bids to be compliant to give rise to Contract A—the bid contract.[1] The requisite compliance, while assessed objectively,[2] can vary depending on the express terms and conditions contained in the tender documents.[3] For example, when the procuring entity has reserved the discretion to waive certain forms of non-compliance, the requisite compliance may be "material" or "substantial" compliance rather than strict compliance.[4] This is one difficulty that a procuring entity may encounter when assessing bids. Another difficulty is an apparent lack of clarity or information in a submitted bid such that the procuring entity may wish to seek clarification or information post-closing from the bidder.

Overview

Generally, a bidder cannot make a material correction or an amendment to their bid after the bid's closing date,[5] also known as "bid repair." The rationale behind prohibiting bid repairs is straightforward: a bid repair is "an indirect way of allowing a late bid... [and] allowing a bid to be modified or altered after the fact would undermine the bidding process itself, as it would allow a change to be made to a bid at a time when the bids of others are known or could be known."[6] Despite this, there are some situations where a procuring entity may seek *clarification* from a bidder. This article will examine situations when seeking clarification from a bidder post-closing may be permitted and when such conduct may constitute bid repair.

Two decisions are helpful in illustrating the nuances between permissible bid clarification and impermissible bid repair:

1) *Francis HVAC Services Ltd v Canada (Public Works and Government Services)*,[7] a 2017 decision by the Federal Court of Appeal.
2) *Maystar General Contractors Inc v Newmarket (Town)*,[8] a 2009 decision by the Ontario Court of Appeal.

Facts in Francis HVAC

In *Francis HVAC*, Canada's Public Works and Government Services ("PWGSC") issued a Request For Proposal for building maintenance services.

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Francis Ltd. ("Francis") responded and was the successful bidder.[9] As a result, a binding contract between Francis and the government arose. Days later, PWGSC sought to terminate the contract because the respondent MNO was the lowest bidder—originally, PWGSC determined that MNO's bid was non-compliant, but upon reassessment, PWGSC deemed the bid responsive.[11] While there were two bid repair issues, the one relevant to this discussion was a significant downward revision to MNO's pricing.[12] PWGSC had found mathematical errors in tables in MNO's bid:[13] MNO had set out 23 tables (one for each building to be serviced) that contained unit prices categorized by cooling unit and by year, with a subtotal at the end of each table. In three of the 23 tables MNO had incorrectly added the subtotals. Additionally, in a pricing summary table that consisted of the subtotals from all 23 tables broken down into quarterly amounts per year, MNO had not converted the annual amounts into quarterly amounts—MNO still had to divide the annual amounts by four. Using the information in the bid itself, PWGSC corrected the errors and sought clarification and confirmation from MNO afterwards to ensure that PWGSC's corrections were accurate.[14] Francis argued that this "constituted a wholesale re-write of the bid."[15]

Facts in *Maystar*

In *Maystar*, "the Town of Newmarket [(the "Town")] issued a Tender Notice for the construction of a new recreational facility...."[16] The respondents included Maystar General Contractors Inc. ("Maystar"), and the ultimately successful bidder, Bondfield Construction Company ("Bondfield"). In accordance with the terms of the bidding process, the Town read out the total bid price from each bidder at an opening ceremony and declared Maystar the unofficial lowest compliant bidder; Bondfield had submitted the third-highest bid.[17] In examining the bids post-closing, the Town's staff "noticed a discrepancy in Bondfield's bid."[18] Line item 1.1 of the bid showed a price of $33,000,528, line item 1.1.1 showed a GST of $2,346,960, and line item 1.1.2 showed a total sum (price plus GST) of $35,875,960.[19] The issues with these calculations were that: (1) Bondfield used $33,528,000, rather than the price in line item 1.1, to calculate the GST for line item 1.1.1; and (2) line item 1.1.2 was a total sum of the GST from line item 1.1.1 and of $33,528,000 rather than the price in line item 1.1.[20] After internal discussions, the Town recalculated the GST (line item 1.1.1) and total amount (line item 1.1.2) based on the price in line item 1.1—$33,000,528—and they intended to accept Bondfield's bid. Shortly afterwards, Bondfield's Vice President left a voicemail for the Town stating that their bid was lower than what the Town read out at the opening ceremony. Bondfield followed up with a letter the next morning "indicating that an addition error had occurred following last minute changes to the base price...."[21] Days later, the Town circulated corrected tender results indicating that Bondfield submitted the lowest bid,[22] to which Maystar objected.[23]

Similar Facts, Different Outcomes

Factually, the *Francis HVAC* and *Maystar* were similar—in both situations, a respondent's bid contained calculation issues. In *Francis HVAC*, it appeared that the respondent MNO had not added their subtotals correctly and it had neglected to divide an annual amount by four. In *Maystar*, it appeared that the respondent Bondfield had calculated their total price using $33,528,000 rather than the listed stipulated price of $33,000,528. Yet in *Francis HVAC*, the Federal Court of Appeal held that the procuring entity, PWGSC, had *not* engaged in bid repair, whereas in *Maystar*, the Ontario Court of Appeal held that the Town *had*.

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The difference in *Francis HVAC* and *Maystar* was this: in *Francis HVAC*, "there [was] no ambiguity regarding the unit prices;"[24] "it [was] entirely possible [for PWGSC] to ascertain [MNO's bid price] because the only figures that [were] of relevance [were] the unit prices; the errors in calculation... [did] not cast doubt on the total bid price,"[25] and PWGSC could correct the errors using *already-provided information* from MNO's bid.[26] While PWGSC did contact MNO post-closing, it was "merely [to seek] confirmation from MNO that [the] corrected numbers accurately reflected the initial bid."[27] In *Maystar*, dovetailing with our previous article discussing "material" or "substantial" compliance, the price was a material issue—"there was uncertainty as to which price was the intended bid price until the correction was made... [and] the after the fact correction gave Bondfield an unfair advantage over other bidders and was not compliant with the terms of the tender documents."[28] The court in *Maystar* also suggested that had the price error occurred in a summary section or other section in the bid that was "subordinate," and had there been other values in the bid that consistently pointed to an intended bid price, the error may have amounted to a clerical error and thus the bid may have been compliant.[29] Instead, the court held the Town, in essence, relied on communications with Bondfield post-closing and repaired Bondfield's bid. The uncertainty in price made Bondfield's bid non-compliant, and bringing its bid to compliance was impermissible.

TAKEAWAYS

There is a fine line between impermissible bid repair and permissible bid clarification, and the outcome of each may leave readers feeling uneasy; after all, based on the facts provided in *Francis HVAC*, there still existed a level of uncertainty: what if the unit prices in the three "incorrectly added" tables were incorrect, and the subtotals were correct? On the other hand, PWGSC did not ask MNO to select the correct price, but instead asked MNO to confirm its corrections.

Ultimately, caution and due diligence are necessary when assessing bids. In *Maystar*, the Town had initially decided against awarding Bondfield, but in reviewing a decision made by the same court, the Town believed that it was not engaging in bid repair and could adjust Bondfield's price. This, unfortunately, turned out to not be the case. While both *Francis HVAC* and *Maystar* follow a long line of reconcilable decisions by both our courts and tribunals in addressing bid repair,[30] procuring entities should be aware of the risks that arise due to post-closing conduct, and that whether such conduct is bid repair is highly fact-dependent.

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Footnotes:

1 See *R v Ron Engineering & Construction (Eastern) Ltd*, [1981] 1 SCR 111.

2 See *Graham Industrial Services Ltd v Greater Vancouver Water District*, 2004 BCCA 5 [*Graham*].

3 See *True Construction Ltd v Kamloops (City)*, 2016 BCCA 173.

4 See *Graham, supra* note 2.

5 See *Francis HVAC Services Ltd v Canada (Public Works and Government Services)*, 2017 FCA 165 at para 22 [*Francis HVAC*].

6 *Ibid*.

7 See *supra*, note 5.

8 2009 ONCA 675 [*Maystar*].

9 See *Francis HVAC, supra* note 5 at para 5.

10 See *ibid*.

11 See *ibid* at para 6.

12 See *ibid* at para 21.

13 See *ibid* at para 23.

14 See *ibid* at para 25.

15 *Ibid*.

16 *Supra* note 8 at para 2.

17 See *ibid* at para 3.

18 *Ibid* at para 4.

19 See *ibid* at para 5.

20 See *ibid*.

21 *Ibid* at para 10.

22 See *ibid* at para 11.

23 See *ibid* at para 12.

24 *Francis HVAC, supra* note 5 at para 26.

25 *Ibid* at para 28.

26 See *ibid* at para 23 (emphasis added).

27 *Ibid* at para 29.

28 *Maystar, supra* note 8 at para 44.

29 See *ibid* at paras 26 to 32.

30 See *10647802 Canada Limited (o/a Outland-Carillion Services) v Department of Public Works and Government Services*, 2018 CanLII 146699 (CA CITT); see *Ottawa (City) Non-Profit Housing Corporation v Canvar Construction (1991) Inc*, 2000 CanLII 2004 (ON CA); see *Bradscot (MCL) Ltd v Hamilton-Wentworth Catholic District School Board*, [1999] OJ No 69, 1999 CanLII 2733 (ON CA); see *Vachon Construction Ltd v Cariboo (Regional District)*, 136 DLR (4^{th}) 307, 1996 CanLII 1851 (BCCA). These decisions have been included for reference.

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