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"Bid Shopping" in a Tendering Process

Participation in a tendering process may require contractors to expend significant effort and incur costs to prepare their bids, obtain bid security, hold their pricing for a specified period of time, and be bound by the terms of the construction contract. While contractors assume these risks without any promise of being awarded the construction contract, they do have an expectation that their bids will be taken seriously and that they, and their competitors, will be treated equally and fairly. This is the legal construct that Canadian courts seek to uphold in an effort to preserve the integrity of the tendering process. This article discusses how the Canadian courts have responded when such expectations are not maintained.

In recognition of the risks assumed by contractors in competitive tendering, our courts developed a unique set of contract law principles to introduce certainty and fairness into the tendering process. The leading case in tendering law, *R. v Ron Engineering*[1], formulated the modern framework of tendering law, unique to Canada: the concept of Contract A and Contract B. The framework is simple on its face: every compliant bidder enters into Contract A, the bid contract, with the procuring entity, whereas the single successful compliant bidder chosen to perform the work enters into Contract B, the work contract, with the procuring entity. The essential terms of Contract A include the irrevocability of the bid and the obligation in both parties that they will enter the work contract (Contract B) upon acceptance of the bid[2]. The concept of Contract A was introduced to provide a legal basis for obligations between the parties that are necessary to protect the reasonable expectations of the parties, including the expectation of the bidders to fair treatment of their bids. Based on the strength of contractual obligations, the bidders may claim a breach of contract and seek recovery of resulting damages if the owner does not comply with their obligations (whether express or implied) under Contract A. To protect the integrity of the tendering process, the courts have implied into Contract A terms that place duties of fairness on the owner. For examples, the courts have recognized that Contract A includes the duties to accept only substantially compliant bids[3], to award Contract B only based on disclosed criteria[4], and a wider duty to treat all bidders fairly and equally[5].

As a consequence of the implied duties of fairness in Contract A, the courts have recognized the significance of rejecting conduct that amounts to bid shopping. An established definition of the term "bid shopping" in tendering, which was formulated by the British Columbia Supreme Court, is as follows:

> *"[B]id shopping should be given an expansive interpretation so as to encompass conduct where a tendering authority uses the bids submitted to it as a negotiating tool, whether expressly or in a more clandestine way, before the construction contract has been awarded, with a view to obtain a better price or other contractual advantage from that particular tenderer or any of the others[6]."*

Unscrupulous conduct by the procuring entity is viewed by the courts as a serious threat to the integrity of the tendering process. As noted above, the bidders expose themselves to significant risk and incur costs when entering a tendering process. They would not be inclined to participate if their bids could simply be used as a bargaining tool by the procuring entity to negotiate with other bidders[7]. The tendering process under the Contract A/Contract B framework is intended to replace negotiation with competition; engaging in post-closing negotiations undermines the very intent sought by the process[8].

An illustration of conduct that was found by the court to amount to bid shopping is provided by the case of *Stanco Projects Ltd. v British Columbia (Ministry of Water, Land & Air Protection)*[9]. In the case, the owner intended an upgrade of a water system, and proposed, as part of the project, the construction of two reservoirs. Shortly after the tenders were opened, the owner decided to change the scope of the work and, thus, build one tank only. Stanco Project Ltd. ("Stanco"), the lowest bidder, was asked to break down its tender price to provide a price for just one tank. Without advising Stanco, the owner engaged in similar discussions with one of the higher bidders. Having the knowledge of Stanco's bid price, the higher bidder could provide a quote which was lower than Stanco's quote. When Stanco refused to lower its bid, the owner awarded the contract to the higher bidder. Importantly, the owner never cancelled the tender, and it engaged in negotiations with other than the lowest bidder after the tender closing date. The Court held that whether bid shopping has occurred will depend upon the court's assessment of the owner's conduct in the circumstances of a particular tender. The Court found that the owner's conduct amounted to bid shopping and was in breach of the owner's implied duty to act fairly under the Contract A.

The Court in *Stanco* provided useful guidance to owners that find themselves in similar situations and would like to avoid engaging in bid shopping. The Court noted there were two avenues for the owner to take in the circumstances[10]: (1) to reject all of the bids and re-tender the project on a modified scope; (2) to award the Contract B, and then adjust it after it was awarded. To do so, the Court noted, the owner could have issued a change order or a change directive under the Contract B, altering the scope of work and adjusting the contract price.

The following case illustrates conduct where the owner was not found to have engaged in bid shopping. In *Amber Contracting Ltd. v Halifax (Regional Municipality)*[11], the municipality issued a tender for the construction and upgrade of storm sewers. The tender documents included a privilege clause, giving the municipality the right to reject any tender that it found unsatisfactory and to cancel the tender all together. Amber Contracting Ltd. ("Amber"), along with two other

bidders, submitted a bid. The bids were opened publicly, and the results were published. Amber was the lowest bidder, but all the submitted bids were significantly over the municipality's budget. The municipality decided to cancel the tender and issue another tender for the project. Prior to retendering, Halifax sought to negotiate a lower price with the lowest tender but was unsuccessful. In the re-tender, the scope of work and design of the project were substantially identical to those in the original tender. All three contractors that participated in the original tender plus one new contractor submitted a bid. This time, Amber was the second lowest bidder. In fact, the new contractor submitted the lowest bid (albeit higher than Amber's bid in the original tender), and was awarded the work contract. Amber brought an action against the municipality, claiming that the municipality's conduct amounted to bid shopping. While the trial court agreed with Amber, the Court of Appeal found that the express terms of the tender reserved broad discretion in its privilege clause for Halifax to reject all bids and re-tender the project. In this case, the municipality's choice to proceed as contemplated by the tender documents could not amount to an attack on the integrity of the tender process[12]. In the circumstances, the Court of Appeal noted, the rejection of all the bids in the original tender because they were over the municipality's budget, followed by a second tender did not amount to bid manipulation or use of the bids as a negotiating tool.

In order to assess whether an owner in a tendering process engaged in bid shopping, the analysis must start with the owner's conduct in light of all the circumstances of the tender and, in particular, relative to the express and implied terms of the tender, such as, the reservation of the owner's rights and the breath of the discretion clause. Conduct that a court is likely to find as amounting to bid shopping is the owner's use of the bidders' prices in negotiations with a bidder. Conversely, a procuring entity that cancels the original tender due to budgetary constraints and re-tenders, and has reserved the right to do so, is less likely to be engaging in bid shopping.

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Footnotes:

1. *R. v Ron Engineering,* [1981] 1 SCR 111 (SCC) [*Ron Engineering*]

2. *Ibid* at para. 16 [*Ron Engineering*]

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

4. *Chinook Aggregates Ltd. v Abbotsford (Municipal District),* [1989] BCJ No. 2045 (BCCA) [*Chinook*]

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

6. *Stanco Projects Ltd. v British Columbia (Ministry of Water, Land & Air Protection)*, 2004 BCSC 1038 at para. 100, reversed in part, but on another point at 2006 BCCA 246 [*Stanco*]

7. *Ibid* at paras. 101 – 103 [*Stanco*]

8. *Supra* note 3 at para. 3 [*M.J.B. Enterprises*]

9. *Supra* note 6 [*Stanco*]

10. *Ibid* at paras. 120 and 121 [*Stanco*]

11. *Amber Contracting Ltd. v Halifax (Regional Municipality)*, 2009 NSCA 103 [*Amber*]

12. The fact that Halifax had traditionally negotiated with the low bidder was overcome by an express term of the tender that no term or condition would be implied.

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