

THE TENDER PROCESS – OWNER OBLIGATIONS AFTER AWARD, BUT BEFORE FORMAL EXECUTION OF THE TENDERED CONTRACT

In a tender process the contractual obligations that arise after a contract is awarded but before it is formally executed are often overlooked or misunderstood by the tendering owner. A mistaken belief that there is no Contract B during this interim period could result in a breach of contract.

In *R. v Ron Engineering & Construction (Eastern) Ltd.*¹, the Supreme Court of Canada formulated the Contract A/Contract B framework in tender law. Contract A is the contract governing the relationship between the owner and every bidder that submits a compliant bid in response to the invitation to tender. Contract A is formed when the bidder submits the compliant bid. Two of the essential terms of Contract A provide that the submitted bid will be irrevocable for a period of time after the date of closing of the tender and, if the bid is selected, the owner and the successful bidder are obligated to enter into Contract B (i.e. the tendered contract) on the terms set out in the tender.

It is sometimes the case that the owner is either unaware or misinterprets this obligation and considers that it is entitled to proceed to unilaterally either significantly change the terms of Contract B or the scope of the project or re-tender the project. However, based on the term of Contract A obligating the parties to enter Contract B upon award, a refusal to enter Contract B on the terms set out in the tender or a refusal to enter into Contract B altogether by either party will entitle the other party to seek

compensation for any damages incurred as a result of this breach of a contractual term. The following cases illustrate this principle.

In the case of *Gulf Developments Inc. v Essex (Town)*², the Ontario Court of Appeal agreed with the trial judge that once the owner decided to award the contract to a bidder, the owner was required to enter with the selected bidder in the tendered contract, and that this contract's terms will govern any changes the owner wants to make to the project. In this case, the owner of the project originally resolved to award the contract to the plaintiff but subsequently decided to re-tender the project and award the contract to a different contractor. The Court of Appeal agreed with the trial judge's finding that once the municipality issued the resolution to award the contract to the plaintiff, it was required to issue a purchase order to the plaintiff, incorporating the terms of Contract B as provided under the tender documents. According to the trial judge, any changes in the work or other disputes that the owner wished to pursue had to follow the procedures set out in that contract.

In the recent case of *Drake Excavating (2016) Ltd. v 1121616 BC Ltd.*³, the issue was whether the signing of a simple contractual document meant that there was still an opportunity for the owner to unilaterally require a revision to Contract B. The plaintiff in this case had submitted a bid in response to an invitation

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to tender and had received notice of award. Shortly after being awarded the contract, the plaintiff sought a written contract from the defendant as soon as possible so that the plaintiff could lock down pricing with their vendors. The defendant requested that the plaintiff provide the form of the contract. The plaintiff sent a form that only included the price and a few other typical terms for construction contracts, such as regarding bonding, back charges, work rectification, holdback and payment terms. The plaintiff specifically noted that the defendant may choose to later execute a CCDC 2 contract, if they so wish. The defendant signed the form.

The project subsequently experienced delay and underwent various changes. The plaintiff remained ready, willing and able to perform the work and undertake preliminary work towards the project, but it never actually started work on the ground for the project. Six months after the parties signed the noted form, the defendant asked the plaintiff to provide a revised quotation for the entire project. The plaintiff refused to provide a completely revised bid and noted that it would rather honor its originally submitted bid, as modified on several occasions during the months that passed since the execution of the noted form. The defendant refused the plaintiff's proposal. In the action, the defendant argued that the procurement process they engaged in lacked the formality and certainty to constitute a tender process leading to binding contractual relationships. The Court disagreed. The Court looked at the procurement documents and the form signed by the parties and concluded that the procurement process was a tender leading to a contract, which it did in the shape of the form signed by the parties.

In the case of *George Robson Construction (Weston) Ltd. v Hamilton-Wentworth (Regional Municipality)*⁴, the parties executed a Contract B, however, the parties disagreed about how a term in that contract applied. The Court resolved the issue in Contract B by incorporating the terms as set out in Contract A. In this case, the owner advised the plaintiff that the use

of building materials that were different than those specified in the tender documents will be acceptable. The plaintiff submitted a bid based on this, and the owner selected this bid. After award of the tendered contract to the selected bidder and after execution of this contract by the parties, the owner decided to not accept the building materials proposed by the contractor and revert to the use of the building materials specified in the tender documents. The contractor refused to use those materials, and the owner refused to permit the contractor to commence work on the project. The Court found that by refusing to allow the contractor to proceed to work, the owner was in breach of contract. The Court noted that in construction contracts arising out of tender calls, when an owner accepts a bid, a contract is formed (Contract A), and that contract requires the parties to enter into a second contract (Contract B) on the same basis as the first contract. The case of *George Robson Construction* stands for the proposition that the parties are bound to enter into Contract B on the terms as crystallized when the owner awarded the bid to the successful bidder, and no party may unilaterally change those terms. However, there is legal authority that supports the proposition that the parties may change those terms if both parties so agree after entering into Contract B⁵.

Conclusion

There is a binding contractual relationship between the owner and the successful bidder between the time of the award of the tendered contract and the formal execution of the contract the breach of which will entitle the innocent party to damages. This claim for damages may include costs incurred for the preparation for the project and loss of profit on the contract. As regards the avenues available for an owner to avoid a breach of this contractual obligation, an owner should ensure that they are ready to award the tendered contract on the terms set out in the tender and the selected bid. If an

owner expects variations to the scope of the project or delay in the start of the project, the owner should either consider cancelling the tender before award, if the tender documents so permit, or award the contract and pursue changes as permitted under the terms of that contract. This may require the agreement of the contractor and additional compensation to be paid to the contractor. If, after award, the owner no longer wants to proceed with the project or proceed with the contract with the successful bidder, the owner may terminate the contract in accordance with the termination procedures available to the owner under this contract, if any.

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- 1 *R. v Ron Engineering (Eastern) Ltd.* [1981] 1 SCR 111 (SCC)
- 2 *Golf developments Inc. v Essex (Town)*, 2018 ONCA 465
- 3 *Drake Excavating (2016) Ltd. v 1121616 BC Ltd.*, 2024 BCSC 2523
- 4 *George Robson Construction (Weston) Ltd. v Hamilton-Wentworth (Regional Municipality)*, [2005] OJ No. 2011 (ONSC), affirmed on appeal 2007 ONCA 395
- 5 *Double N Earthmovers Ltd. v Edmonton (City)*, 2007 SCC 3



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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.

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