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Privilege and Reprisal Clauses: Tipping the Balance

This article explores how local governments exercise broad discretion in awarding construction contracts through "privilege clauses", including related "reprisal clauses".

(A) Privilege Clauses

"Tendering" is the process by which a person (an "Owner"), who intends to enter into an agreement relating to their land with another person (a "Contractor"), solicits binding offers.[1] In Canada, tendering is governed by two contracts: Contract A and Contract B. "Contract A" arises when a bidder submits a bid to an Owner. Once it is submitted, the bid and the rules that help the Owner determine its potential selection are governed by the terms, conditions, and instructions specified by the Owner when they began soliciting bids.[2] These specifications are usually published simultaneously with the announcement that the Owner is seeking to find a Contractor for a project. "Contract B" on the other hand is a formal agreement entered into by an Owner and a Contractor when a bid, which is subject to Contract A, is selected. Customarily, Owners were expected to select the lowest cost bid when awarding Contract B.[3]

Beginning in the 20th Century, Owners started deviating from the custom of awarding Contract B to the lowest cost bidder. This trend was a result of Owners recognizing that the lowest price did not always equal the best bid. As such, Owners drafted tendering documents to give themselves discretion through "Privilege Clauses".[4] A Privilege Clause, in its briefest form, is a term of Contract A that says that the Owner will not necessarily award Contract B to the lowest bidder.

The court has declined to interpret such clauses as allowing for arbitrary or capricious contractual awards. Owners must treat all bidders fairly when considering discretionary factors.[5] This duty of fairness obliges Owners to only select bidders subject to Contract A[6], and they must apply the same rules impartially to all eligible bidders.[7] In connection with these responsibilities, the factors that an Owner uses to award Contract B must not be arbitrarily weighed to remove nuance from the bid selection process.[8]

When relying on a Privilege Clause, an Owner's discretion must be grounded in valid, objective reasons.[9] Such reasons can include any legitimate business consideration including past dealings with a bidder.[10] In *Sound Contracting Ltd. v. Nanaimo* ("Nanaimo"), such past dealings were found to include a local government receiving unsatisfactory work from a bidder in a prior project.[11]

(B) Reprisal Clauses

Given the breadth of Privilege Clauses, Owners who are soliciting bids have occasionally contractually empowered themselves to remove from consideration bids received from certain bidders because of a perceived litigation risk. To do this a local government uses what is known as a "Reprisal Clause".[12] In *J. Cote & Son Excavating v. Burnaby (City)* ("Burnaby") a Reprisal Clauses was drafted to read:

> *Tenders will not be accepted by the [Owner] from any person, corporation, or other legal entity (the "Party") if the Party, or any officer or director of a corporate Party [...] is, or has been within a period of two years prior to the tender closing date, engaged either directly or indirectly through another corporation or legal entity in a legal proceeding initiated in any court against the Owner in relation to any contract with, or works or services provided to, the Owner, and any such Party is not eligible to submit a tender.*[13]

Reprisal Clauses are a form of risk mitigation. On one hand, a Bidder may have previously been sued by a local government for substandard work that went unrepaired. On the other, that same Bidder may have historically sued a local government for extra funds for services rendered. By including a Reprisal Clause, a local government avoids the reoccurrence of either scenario by refraining from working with a bidder who previously engaged in such conduct.

In a follow up case to *Nanaimo*, a local government's use of a Reprisal Clause in response to prior-litigation involving a bidder was found lawful because there was a valid commercial and business purpose for the local government's decision.[14] This valid purpose was to preserve public finances because[15] the risk of inferior work product, budgetary overruns, or future litigation was an intolerable risk to subject public funds to. This was made manifest by a prior project between the parties that required on-site supervision by a local government and arbitration expenses to be paid in connection with work deletions.[16]

In a similar vein, in *Burnaby*, a local governments Reprisal Clause in response to litigation commenced by a contractor relating to a worksite accident was found valid because the local government was entitled under its enabling legislation to include such terms into its call documents.[17]

A potential consequence of the court's endorsement of Reprisal Clauses is the stifling of claims from parties currently performing a contract who do not want litigation to ruin their chances to bid on the next contract. Given that the terms, conditions, and instructions specified by the Owner are not laws of general application, but rather form the basis of a contract, bidders have limited options if a local government makes a practice of incorporating a Reprisal Clauses into calls for tenders.[18] Thus, a Contractor that is currently engaged in a contract with a local government may face a dilemma if it has a claim against that local government. The Contractors may either insist upon their legal rights and risk a reprisal clause being applied against them in the future or it may avoid litigation for the purpose of improving its chances on a future tender. Not bidding on projects involving Reprisal Clauses that are perceived to be stifling is another potential response.[19]

(C) Key Takeaways

The practice of including Privilege and Reprisal Clauses recognizes that the lowest bid is not always the best bid. The practice may also influence how Contractors who have been awarded contracts behave. A Contractor may (at its expense) do more to show that it is a good company to work with for the purpose of improving its chances at being selected in the next call for tender. Similarly, a Contractor may seek to avoid litigation arising under a current contract so that the Contractor is not excluded as a bidder from the next.

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1 See: Robert Pattison, *Overview of the Law of Bidding and Tendering*, 2004 83-3 Canadian Bar Rev, 715, at 716

2 See: *The Queen v. Ron Engineering*, [1981] 1 SCR 111, at pg. 119

3 See: *M.J.B. Enterprises Ltd. v. Defence Construction*, [1999] 1 SCR 619, at para 27

4 See: Janice Buckingham et al, *Tendering and Purchasing Law in Upstream Oil, Gas, and Oilsands: The Competitive Bidding Process and Obligations When Contracting for Work*, 2010 47-2 Alberta Law Rev, 497, at 517

5 See: *Supra*, note 3

6 *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] SCC 4, at paras 64 – 67

7 See: *Supra*, note 3

8 See: *Supra*, note 3 , and *Elite Bailiff Services Ltd. v. British Columbia*, [2003] BCCA 102, at para 30

9 See*: Sound Contracting Ltd. v. City of Nanaimo*, [2000] BCCA 312

10 *Ibid*

11 *Ibid*

12 Kevin Barr and Theron Davis, *Under Construction: A Close Examination of Recent Construction Law Developments and Their Impact on the Oil and Gas Industry*, 2019 57-2 Alberta Law Rev 411, 2019 CanLII Docs 3781, at pg. 429

13 *J. Cote & Son Excavating Ltd. v. Burnaby (City)*, [2019] BCCA 168, at para 10

14 See: *Sound Contracting v. City of Nanaimo*, [2000] BCSC 1819, para 29

15 *Ibid*, para 3

16 See *ibid*

17 *Supra*, note 14

18 See: Burnaby, *Supra* note Error! Bookmark not defined., and Kaitlyn Cumming, *Current trends in Canadian civil justice system reform: manufactured simplicity or equitable access to justice?*, University of British Columbia (Master's Thesis), 2020 CanLIIDocs 4271, at pg. 55

19 See: *Supra*, note 6

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