



FROM THE GROUND UP

NOVEMBER 2005

Bidding and Tendering:

SOME OF WHAT YOU WANTED TO KNOW BUT WERE AFRAID TO ASK

By David Strand, Melissa Moulton Tennison and Rachel West

INTRODUCTION

Over the last 25 years Canadian courts have become very strict with owners and contractors who unfairly use bidding and tendering. To maintain the integrity of the bidding and tendering system, the courts do not hesitate to award damages to a contractor affected by misconduct such as “bid shopping.” This approach began with the landmark decision of the Supreme Court of Canada in *R. v. Ron Engineering and Construction (Eastern) Limited*¹ (“Ron Engineering”).

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In just a few pages this article will provide some insight into the historical background and development of the law on bidding and tendering, in particular, the formation of a bidding contract (Contract A), the obligations imposed by a call for tenders or a request for proposals and the practice of “bid shopping.”

BIDDING & TENDERING PRE RON ENGINEERING

In 1981 *Ron Engineering* changed the law of bidding and tendering. Before *Ron Engineering*, an owner’s request for tenders was considered

an invitation to contractors to make offers to construct the work tendered. The owner was under no particular obligation to assess the tenders (offers) submitted with any sort of defined or customary criteria. As mere offers, the owner could do with them pretty well anything it liked. One contractor’s offer, for example, might be used to obtain a lower price from another contractor. Or a hometown bidder might be preferred even though another bid was lower.

This freedom came at a price. Contractors spent money preparing tenders with no assurance that they would be treated fairly or that they

even had a genuine chance of winning. Owners risked losing the quoted prices when offers were withdrawn. Ron Engineering changed the unregulated tendering game by establishing rules through a clever creation—a new form of contract.

BIDDING & TENDERING AS CHANGED BY RON ENGINEERING: THE RULES OF THE GAME

Contract A, as it was called, was found by the Court to exist before the construction contract—called Contract B—which all

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Kyoto Protocol: Implementation Plan

by Brandon Barnes

On April 13, Environment Canada released its long-awaited implementation plan for meeting Canada's obligations under the Kyoto Protocol. It proposes a number of investment schemes and incentive programs to assist industry and the public with the consequences of emissions reduction.


To meet its target, Canada will have to cut its overall Greenhouse Gas (GHG) emissions to 6% below 1990 levels, or by 740 megatonnes (MT) over four years. The plan envisages a "trim" of 240 MT each year in that period, which is more than is necessary to achieve the goal. Of this, it is hoped that 45 MT per year will be the result of cuts

made by Large Final Emitters (LFEs), which are approximately 700 companies doing business in Canada, mostly in the manufacturing, mining, energy and thermoelectricity sectors, who are responsible for just under 50% of GHG annual output in Canada.

Large and medium-scale enterprises may prefer to adopt new technologies aimed at cutting or neutralizing GHG emissions, as opposed to revamping business processes or simply slashing production. To encourage this, LFEs can avail themselves of a \$1-2 billion Climate Fund to reduce the financial impact of purchasing new technology and hiring expertise. In addition, LFEs can acquire credits from other enterprises that have met or surpassed their targets, and may be permitted to acquire credits internationally. August of this year saw the release of a consultation paper seeking public comment on the proposed mechanism for administering an offset (credit) system for GHG emissions trading. Environment Canada envisages that credits will arise through better urban planning, agriculture and forestry practices. The combination of offset credits, "clean" energy production incentives, and financial assistance for the purchase of new technologies, together with an achievable target, will encourage LFEs and other businesses in those sectors to participate meaningfully in the national climate change strategy.

Increasing worldwide use of renewable energy sources, such as wind, biomass, tidal, or geo-thermic power, is a major component of the Kyoto Protocol. The Canadian implementation plan sets aside over \$200 million for a fund called the Wind Power Production Incentive (WPPI) for investment in wind-power enterprises, and loans to existing companies interested in updating, expanding or starting wind-farms or related facilities. The target for wind generation capacity is 4000 megawatts, or enough to meet the yearly needs of 1 million average Canadian households. A \$100 million dollar fund was also established, with money included in the 2005 federal budget, to assist private enterprise in developing other sources of renewable energy, although the contribution of these other sources in Canada's total supply remains somewhat minor.

While cash incentives have been offered to encourage a shift in resources to more efficient technologies, it will be difficult for businesses to judge the benefits of implementing CO₂ reduction measures if they are not given an understanding of the implications of failing to pursue CO₂ reduction measures. Unfortunately, Environment Canada's plan does not provide a clear indication of the legislative or regulatory framework for ensuring Kyoto compliance. Now that a consultation process is at work, and the mechanism by which offset credits will be produced and traded is slightly less opaque, the next steps are: the release of the consultation process results, with modifications to the offset strategy in response to stakeholder comment; and legislation putting the entire plan in effect. The message, therefore, for large, medium and small enterprises: "Stay tuned".



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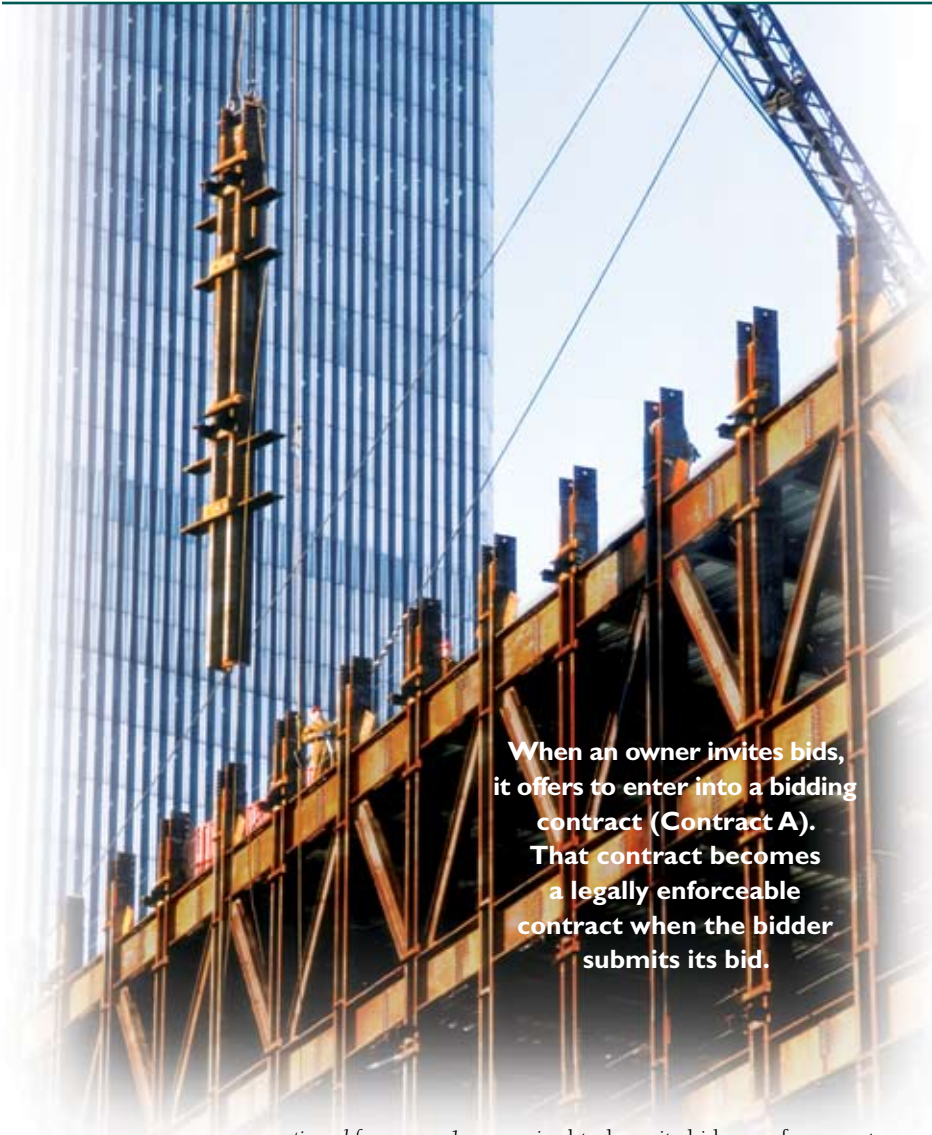
question is where to draw the line. The case law is confusing. Only the ends of the continuum are clear, with a large grey area in between.

At one end, are cases where the owner intends a competitive formal tendering process, for a well-defined project. This process includes detailed specifications, defined criteria for qualifying tenders as well as evaluating them and the requirement that a bidder keep its bid open for acceptance until the owner selects the winning bid on a fixed date. At the other end of the continuum, are cases where the owner merely seeks a quote or asks for proposals from various contractors. In such cases the project is often incompletely defined, contractors are not required to keep their proposals open for a fixed period, and negotiations are understood to follow with the contractors whose proposals interest the owner.

In between however, are many cases where it is difficult to tell what the owner intended. Did the owner intend a call for tender or a mere request for proposals? The document sent by the owner to the contractors has features of both. Just calling a document a Request for Proposals (“RFP”) does not make it so. And so the disputes arise. But it is not only owners who fail to distinguish between call for tenders and mere requests for proposals. Courts also confuse them. The only certainty is that courts will strain to find a bidding contract (Contract A) or a least some duty of care if they find an owner has treated contractors unfairly.

The following examples provide some guidance about whether an owner’s document will be determined to be one or the other:

- ▶ Where a major component of a project is not yet determined (i.e. whether there will be one or two buildings for example, the Court has found an RFP exists as opposed to a Contract A. *Buttconn Ltd. v. Toronto Electric Commissioners*², (“*Buttconn Ltd.*”).
- ▶ Language in the document stating that the owner is not obliged to accept any of the proposals is strong but not definitive evidence that the document is an RFP. The label or name of the document is not the determining factor; rather the substance and terms of the contract govern. (*Mellco Developments Ltd. v. Portage la Prairie (City)*³, (“*Mellco*”) and *Buttconn Ltd.*).



When an owner invites bids, it offers to enter into a bidding contract (Contract A). That contract becomes a legally enforceable contract when the bidder submits its bid.

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parties had previously thought was the sole contract involved in the tendering process. When an owner invites bids, it offers to enter into a bidding contract (Contract A). That contract becomes a legally enforceable contract when the bidder submits its bid. If the bidder’s bid is accepted, both the owner and bidder are contractually obligated by the bidding contract to enter into the construction contract (Contract B).

Where do the rules come from? They are the terms of the bidding contract (Contract A). The Court implies some. And some are found in the tender package sent to bidders by the owner. Put another way, the owner is held to whatever process it describes in its tender package and the contractor is

required to keep its bid open for acceptance for the time period set in the tender package. Rules are implied by the Court to make the process fair—for example, that without more, the lowest qualifying bid will be accepted. Not surprisingly, since the decision in *Ron Engineering*, disputes have arisen about whether and how it applies. The issues tend to fall into two categories. One, is a bidding contract (Contract A) created? Two, if the answer is yes, what are the terms (rules) of the bidding contract (Contract A)?

IS A BIDDING CONTRACT (CONTRACT A) CREATED?

Not all attempts by an owner to obtain bids or proposals for a construction project create a bidding contract, imposing contractual obligations upon an owner. The 64-dollar

- ▮ Where neither party is obligated to pursue the project and the obligation is to simply begin negotiations about the project, a Contract A will not be found. (*Powder Mountain Resorts Ltd. v. British Columbia*⁴, (“Powder Mountain”) and *Mellco*).
- ▮ There is a suggestion that an owner’s experience in the industry and knowledge of the differences between an RFP and the formal tendering process will play a part in deciding what was intended by the documents (see *Buttconn Ltd.* where it is suggested that Toronto Hydro was a longstanding public company that knew the difference between an RFP and a formal tender).

Owners would be prudent to consider that any competitive process seeking bids will likely be presumed by the courts to be a Call for Tenders (as opposed to an RFP).

- ▮ With respect to subcontractors, where subcontractors take steps to qualify themselves with the owner as required by a general contract and where the subcontractor reviews plans and specifications to submit a quote, a formal bidding process has likely been triggered. (*A. Dynasty Roofing (Windsor) Ltd. v. Marathon Construction Services*⁵ (“Dynasty Roofing”).

Owners would be prudent to consider that any competitive process seeking bids will likely be presumed by the courts to be a Call for Tenders (as opposed to an RFP) unless language to the contrary is clear and unequivocal. But beware that even a document characterized as a Request for Proposals may require an owner to be fair.

DOES THE DUTY OF FAIRNESS APPLY TO AN RFP?

The law is mixed. In *Powder Mountain*, the British Columbia Court of Appeal found an RFP did not give rise to a duty of fairness. However the New Brunswick Queen’s Bench in *Chaleur Fertilizers Ltd. v. Mega Blue Inc*⁶ appears to suggest otherwise, as does the Ontario Court of Appeal in *Cable Assembly v. Dufferin-Peel Roman Catholic School Board*⁷. As you can see, a court may now impose some of the rules imposed in *Ron Engineering* without the court actually finding a Contract A.



The better and more popular view may prove to be as stated by the Manitoba Court of Appeal in *Mellco*⁸:

...the question of the duty to negotiate in good faith with respect to bids (be they a tender or proposal), is a form of continuum. At one end are the formal tender cases invoking the principles of *Ron Engineering*. At the other end are cases where, for example, an owner requests a simple quote. There is obviously a lot of territory between those

two extremes... Within the continuum, in the instant case there was, in my opinion, an obligation on the part of the city to conduct itself fairly and in good faith. Without some fairness in the system proponents could incur significant expenses in preparing futile bids, which could ultimately lead to a negation of the process. In circumstances such as those before us, there must be enough fairness and equality in the procedures to ensure its integrity and openness.

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BD&P's Construction Team

BD&P launches its *From the Ground Up* Newsletter by introducing its Construction Team, a team of 15 dynamic litigators and solicitors who offer full service representation in all facets of the construction industry.

Our Team represents owners, contractors, sub contractors, engineering firms, developers, banks, and other financial institutions on a wide range of construction issues ranging from the straight forward to the complex. We review, negotiate and prepare terms and conditions and other documentation for varied construction and engineering projects; provide practical, timely and expert legal support throughout the construction process; and provide experienced litigation services when required.

BD&P's Construction Team represents a diverse range of client interests from those of small local contractors to developers of large-scale energy and infrastructure projects. Whether our clients require the review of a contract, the arbitration of a construction dispute, or the coordination and preparation of the multi-faceted and complex series of transactions demanded by a major project, BD&P is able to provide the individual lawyer or assemble a team with the appropriate depth and experience.

For your easy reference, we highlight both our Significant Areas of Service and examples of Major Projects in which either individual firm lawyers or the firm were involved, which include some of the largest projects carried out in Canada.

SIGNIFICANT AREAS OF SERVICE:

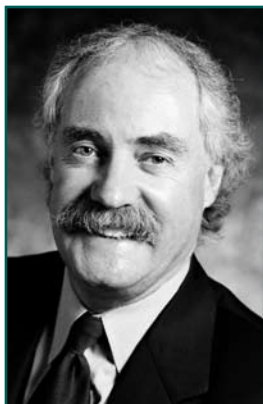
- Negotiation and preparation of tender packages and joint venture, confidentiality, consulting, engineering services and architectural services agreements
- Negotiation and preparation of construction, construction management, sub-contract, supply and mining services agreements
- Negotiation and preparation of Engineering, Procurement, & Construction (EPC) and design/build contracts
- Negotiation and preparation of Engineering, Procurement, & Construction Management (EPCM) contracts
- Delay claims
- Industrial design disputes

- Construction and contract disputes
- Tender disputes
- Engineering claims
- Lien claims
- Insurance issues including liability, builder's risk, errors and omissions and professional liability coverage
- Regulatory and municipal planning approvals
- Preparation of construction security documentation
- Representation at arbitrations and mediations
- Service as arbitrators and mediators in construction disputes

MAJOR PROJECT EXPERIENCE:

- **Hbernia Project** – offshore oil production platform off coast of Newfoundland
- **Erra Nova Project** – floating production, storage & offloading facility in oilfields on Grand Banks
- **Sable Island Project** – offshore natural gas recovery project off coast of Nova Scotia
- **Hbrizon Oil Sands Project** – oil sands project in northern Alberta
- **Muskeg River Oil Sands Project** – oil sands project in the Athabasca oil sands region of northern Alberta
- **LongLake Oils Sands Project** – development project of heavy oil infrastructure in the Athabasca oil sands region of northern Alberta
- **Languh Project** – a liquefied natural gas project in Indonesia
- **Confederation Bridge Project** – fixed link bridge across Northumberland Strait
- **Sakhalin Island Project** – large scale oil and gas development project on Sakhalin Island in Russia
- **Husky Oil Upgrader** – development of Lloydminster Heavy Oil Upgrader
- **MEGlobal** – worldwide joint venture for manufacture and sale of ethylene glycols

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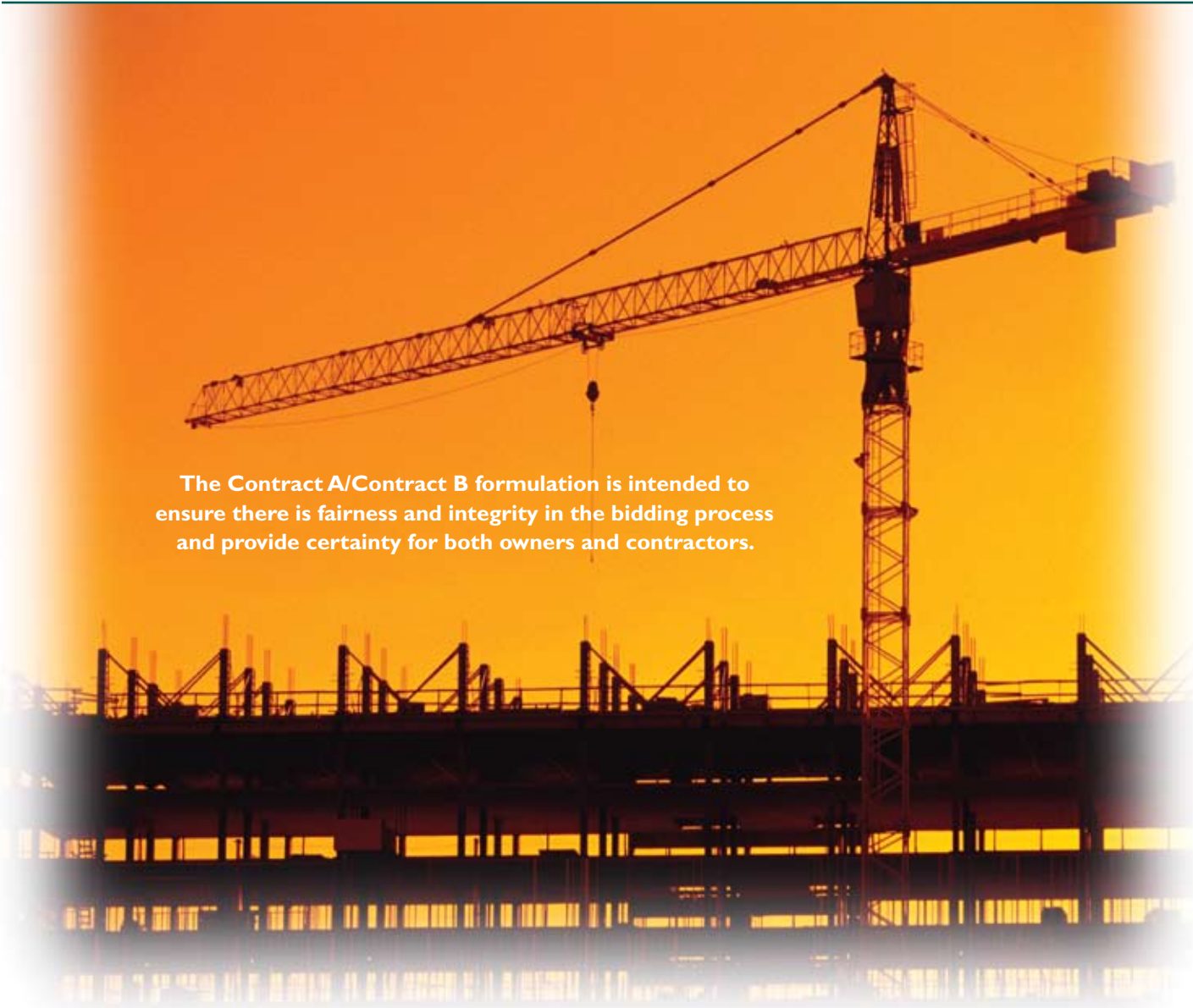


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The Contract A/Contract B formulation is intended to ensure there is fairness and integrity in the bidding process and provide certainty for both owners and contractors.

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Owners should recognize that in most cases a court will impose some duty of fairness and good faith when they are soliciting proposals and quotes. The most onerous duties will be imposed when the court finds a bidding contract (Contract A). As already noted, an owner will be held to strictly observe the process and terms set out in its tender package. Discussed below are two practices the courts find particularly objectionable, and in breach of the duties created by the bidding contract (Contract A). One is bid shopping. The other is an undisclosed criterion for evaluating bids.

SOME RULES OF THE BIDDING CONTRACT (CONTRACT A)

1. BID SHOPPING PROHIBITED

Bid shopping is the practice of an owner using the competitive bid process to seek a price, which is then used as a starting point for negotiating a better price or other advantage from that tenderer or a preferred contractor. One judge (Justice Ballance in *Stanco Projects Ltd. v. British Columbia (Ministry of Water, Land and Air Protection)*⁹ (“*Stanco Projects*”) has suggested that bid shopping could potentially encompass a vast spectrum of objectionable practices, limited only by the motivation and inventiveness of the owner. The cases below highlight examples of bid shopping.

a. Stanco Projects

In *Stanco Projects*, The Ministry of Water, Land and Air Protection put the construction of two water reservoirs out for tender. The Ministry wanted to obtain prices for two tank designs in either epoxy steel or glass fused to steel but due to poorly worded tender documents, this was not conveyed. The bidders were only required to submit one price for the supply of both tanks in epoxy steel. Stanco was the low bidder and was recommended by the consultant as the appropriate contractor. After the close of tender, the Ministry decided that it only wanted to proceed with the construction of one tank in epoxy.

Stanco assumed it was successful, and was unaware that the consultant was engaging in private discussions with the second lowest bidder, Westport, as to the cost that they could provide a single epoxy tank. Westport came back with a price for one tank that was lower than Stanco's, as Westport now had knowledge of Stanco's bid. In an effort to remedy the bidding process, the consultant requested that each bidder fill out an Offer of Credit and provide a separate price for a single epoxy tank. At this point, Stanco discovered that the consultant was negotiating behind its back and refused to sign the Offer of Credit. The contract was awarded to Westport and Stanco sued for damages.

The Court was not prepared to accept the Ministry's or the consultant's actions, criticizing both the post-closing price request of Westport and the adoption of the course of action with the Offer of Credit, which enabled tenderers to effectively re-bid with full knowledge of Stanco's lowest tender price. In aiming to uphold the integrity of the tendering process, the Court found the owner's conduct to amount to bid manipulation, to be patently unfair and to be in breach of the implied duty to act fairly under Contract A.

b. Dynasty Roofing

In the case of *Dynasty Roofing*, the prime contractor won the project contract with the owner. After it had been so informed, the prime contractor approached its sub-trade and requested that the sub-trade lower its quote. When the sub-trade refused this request the prime contractor proceeded to enter into a contract with the second lowest bidder who agreed to lower its price. The Court held that the prime contractor had breached "Contract A" and made a sham of the bidding process. It had used the lowest bid from the sub-contractor as a basis from which to bargain for an even lower price. The Court, with a strong message against bid manipulation of this manner, awarded the sub-trade with the initial lowest bid its entire lost profit and cost of overhead.

c. Naylor Group

The Supreme Court of Canada had occasion to further consider the issue of bid shopping in *Naylor Group Inc. v. Ellis-Don Construction Ltd.*¹⁰. In this case, Ellis-Don used the low bid submitted by the subcontractor Naylor

to obtain the prime contract. Ellis-Don then went back to Naylor and told Naylor it would not use Naylor's bid unless Naylor aligned itself with the unions who were allowed to work on the site. Ellis-Don had recently received an Ontario Labour Relations Board ruling mandating that Ellis-Don use certain subcontractors aligned with certain unions. Naylor refused to do this and Ellis-Don proceeded to "shop" Naylor's low bid in the market place to get a subcontractor that was aligned with an appropriate union. Ellis-Don obtained the benefit of the low subcontractor bid without having to enter into a contract with Naylor. It was clear that without Naylor's bid, Ellis Don would not have received the prime contract.

**While the law is unsettled
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The Supreme Court found that "Contract A" was formed between Ellis-Don and Naylor and that the Labour Relations Board ruling did not frustrate "Contract A". Ellis-Don had approached Naylor promising work that had already been bargained away to a union affiliated subcontractor. Ellis-Don was held to have breached "Contract A" by virtue of it being unable to demonstrate that in all the circumstances its objection to having Naylor was reasonable.

2. EVALUATING BIDS BY UNDISCLOSED CRITERIA PROHIBITED

Fairness also requires that an owner not have a hidden agenda when considering bids. In *Chinook Aggregates Ltd. v. Abbotsford (Municipal District)*¹¹ the owner had an undisclosed policy of accepting the lowest bid from a local bidder whose bid was within 10% of the low bid from a non-local bidder. The owner intentionally hid its policy to seek the benefits of a competitive market. The British Columbia Court of Appeal found that an implied term of the bidding contract ("Contract A") was that the award of the

contract had to go to the low qualified bidder in the absence of any notice to bidders of preferential rules.

CONCLUSION

As is evident from the above examples, the courts will not tolerate attempts by anyone to gain an unfair advantage through the bidding and tendering process. The Contract A/Contract B formulation is intended to ensure there is fairness and integrity in the bidding process and provide certainty for both owners and contractors. While the law is unsettled in relation to the obligations flowing from an RFP, it would be prudent for owners and contractors to be aware of good faith principles in these situations as well. The more outrageous the behaviour of the owner, the greater the likelihood that a court will accept an argument from an aggrieved bidder that the process engaged in by the owner was irredeemably flawed.

NEW DEVELOPMENT

In June of 2005, an interim motion was heard in an Alberta construction case directing that the parties proceed to trial on issues that include the interpretation of a privilege clause. Watch for more on the subject of privilege clauses in a future edition of *From The Ground Up!*

Footnotes

¹R. v. *Ron Engineering and Construction (Eastern) Limited*, [1981] 1 S.C.R. 111

²*Buttconn Ltd. v. Toronto Electric Commissioners*, [2003] O.J. No. 2796 (S.C.J.)

³*Mellco Developments Ltd. v. Portage la Prairie (City)* 2002 MBCA 125

⁴*Powder Mountain Resorts Ltd. v. British Columbia*, 2001 BCCA 619

⁵*A. Dynasty Roofing (Windsor) Ltd. v. Marathon Construction Services* (2002), 16 C.L.R. (3d) 43 (Ont. S.C.)

⁶*Chaleur Fertilizers Ltd. v. Mega Blue Inc.* 2003 NBQB 227

⁷*Cable Assembly v. Dufferin-Peel Roman Catholic School Board* (2002), 13 C.L.R. (3d) 163 (Ont. C.A.).

⁸*Mellco Developments Ltd. v. Portage la Prairie (City)*, 2002 MBCA 125 at para 80-81

⁹*Stanco Projects Ltd. v. British Columbia (Ministry of Water, Land and Air Protection)*, [2004] B.C.J. No. 1644 (S.C.)

¹⁰*Naylor Group Inc. v. Ellis-Don Construction Ltd.*, [2001] 2 S.C.R. 943

¹¹*Chinook Aggregates Ltd. v. Abbotsford (Municipal District)* (1989), 35 C.L.R. 241 (B.C.C.A.)

A Joint Venture – What Is It?

by Adam Chalkey

In the construction industry, the term “joint venture” is used loosely and one might well ask: “What are we talking about when we refer to a joint venture”?

The term “joint venture” does not have a precise meaning; rather, the phrase is frequently used to refer to a variety of business relationships where two or more parties combine some of their resources for the pursuit of a common commercial purpose, while, for purposes outside of the joint venture, the parties remain independent. Generally, joint ventures take one of the following three forms: a joint venture corporation, a joint venture partnership or a contractual joint venture.

When entering into or contracting with a joint venture, it is important to understand the type of joint venture being discussed because the form of relationship can affect one’s rights.

Joint venture corporations are formed by each of the joint venture parties becoming shareholders in a corporation. If you, as an owner, negotiate a contract with representatives from construction Companies A and B, your actual contract might be with Company C owned in some percentage (totalling 100%) by each of Company A and Company B. Often such a corporation has been created to be the counterparty to the contract and thereby be responsible for satisfying the terms of the contract, but otherwise has few assets. As a result, if Company C were to breach the terms of the contract, the assets belonging to Companies A and B would be sheltered. Our recommendation to owners is to obtain parental guarantees or other security to protect the Owner’s position unless Company C can show creditworthiness.

An additional wrinkle to be wary of is if the party or parties with whom you contract (or with whom you plan to contract) have not yet incorporated but plan to do so. There are plenty of cases in which one or more parties anticipated incorporation but did not later satisfy the requirements for ratifying pre-incorporation contracts. It is important



that you understand counterparty’s plan in this regard and structure the terms of the deal accordingly.

Joint venture partnerships are formed by each of the joint venture parties being partners in a partnership scheme. Joint venture partnerships that use a traditional partnership scheme are generally the safest form of joint venture with which to contract. Under a traditional partnership scheme (also known as a **general partnership**) each of the joint venture partners have both joint and several liability for contractual obligations. This means that each of the partners is fully responsible for the liability of the partnership. As well, one partner’s actions can bind the other partner. Under a **limited partnership** scheme, much of the liability may be restricted to the general partner while the limited partners are sheltered from liability.

Contractual joint ventures are created when the parties agree to have their respective rights and obligations governed only by a contract between them. When entering into a contract with a contractual joint venture, it is important for you to enter into the contract with **all** of the parties participating in the contractual joint venture and have those parties confirm that they are jointly and severally liable for the actions of the other partner as it relates to your contract. Failure to contract with one of the joint venture parties can result in that party potentially being sheltered from responsibility to you in the event that the joint venture breaches the contract.

In summary, when negotiating a contract, or putting one out for tender, one should always ask: “Whom am I contracting with?” and “Do I understand the form of joint venture?”

Occupational Health and Safety Act

Changes to Penalty Mechanisms

by Brandon Barnes

Last year saw the implementation of changes to the penalty mechanisms for violations of the *Alberta Occupational Health and Safety Act* introduced in 2002. Three notable reforms are becoming ever-more commonplace: (i) fines with a larger dollar value, (ii) “on-the-spot” administrative fines, and (iii) the use of alternative penalties not previously included in the occupational health and safety scheme. The following is a brief overview of these changes, and how they affect employers and workers.

The maximum fine for a first offence under the Act was increased from \$150,000.00 to \$500,000.00. The maximum fine for subsequent offences was upped from \$300,000.00 to \$1,000,000.00. All intermediate fines were adjusted according to the new scale. The government department responsible for occupational health and safety, Alberta Human Resources and Employment, justified the increases by commenting that the previous rate-scale had not been changed since 1988. This adjustment brought Alberta into the same range as British Columbia, Ontario, the Northwest Territories and the Federal Government. A greater deterrent effect and the provision of a wider range of fines for judges to work with, were seen as additional benefits to the increases. For employers, the consequences are clear: violations of workplace safety standards could **be considerably more expensive and might require a review of the company’s insurance coverage in the event of liability.**

Early in 2003, Alberta Human Resources and Employment was given the mandate to create a system of on-the-spot administrative fines. Although the 2004 calendar year passed without this mechanism being fully implemented, the prospect exists of these fines being used in the near future. The use of spot fines is common in British Columbia, Ontario,

Manitoba and Nova Scotia. Essentially, spot fines are given immediately by OH&S investigators, without a court process, for violations of the Act, Code or Regulations. An example of a violation that might result in a spot fine would be the absence of safety harnesses where work heights might require them. There are, on average, six to seven occupational health and safety prosecutions in Alberta annually. Even though Alberta Justice claims that its limited resources have

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prevented more prosecuting from occurring; employers are directly affected by this change, as it will often require immediate action to remedy a potential harm or to pay a fine.

If prosecutions do occur, the courts have new and greater latitude to award non-traditional remedies (i.e. outside of fines and jail sentences). This liberalization arises out of the belief that a greater range of victim-focused solutions should be available to the court. Examples of non-traditional penalties include an order to establish an effective health and safety programme, performing community service or any other specific order the Court deems appropriate. The decision to relax the strictness of penalties permits employers’ lawyers to be more creative in their defence: hard costs such as fees might be avoidable if a more suitable remedy can be found.

The goals of reforming the provincial occupational health and safety regime are to encourage compliance with the legislation and catch violations before serious injury can occur. These changes, while potentially tough on employers who breach the rules, are seen by investigators as steps in the direction of injury prevention.



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