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CONSTRUCTION
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Tercon: Freedom of Contract v. Fairness

by David Strand

Introduction

In a much anticipated decision, the Supreme Court of Canada (“the SCC”) on February 12, 2010 reversed the BC Court of Appeal’s decision in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)* (“*Tercon Contractors*”)¹ The SCC (by a 5-4 decision) held that an exclusion clause in the circumstances of the case was not enforceable. That had been the original result at trial.

A Recap of the Facts

Tercon Contractors Ltd. (“Tercon”) bid on a contract to build a multi-million dollar road in a remote valley in northern British Columbia. It did so even though the Province’s request for proposals (“RFP”) contained a clause excluding all claims for damages “as a result of participating in this RFP.” Tercon lost the contract to another bidder. That bidder (under the terms of the RFP) was ineligible. Tercon sued the Province to recover its damages of \$3.5 million.

The Issue

All levels of Court agreed that the Province had breached the terms of the RFP. They also agreed the Province had breached its implied duty to act fairly in awarding the contract. The key issue was whether Tercon’s claim was barred by the exclusion clause.

Discussion

A majority of the SCC held that the exclusion clause was ambiguous, should be construed against the Owner, and so interpreted, did not apply on the facts. The majority reasoned as follows: Only six proponents (qualified through a prior process) were eligible to submit a response to the RFP. The Province accepted a bid from a joint-venture. It was not one of the original qualified six, so was not eligible. The requirement that only compliant bids be considered, and the implied obligation to treat bidders fairly contribute to the integrity and business efficacy of the bidding process. Further, transparency is essential for public procurement. The words of the exclusion “participating in this RFP” meant participating in a contest only among those eligible to participate. The process followed by Province (involving another bidder) was not in any meaningful sense “participating in this RFP.”

The minority of the SCC (agreeing with the B.C. Court of Appeal) found the exclusion clause was unambiguous, clearly applied, and should be enforced. According to the minority, there is a public interest in leaving knowledgeable parties free to order their own commercial affairs. Tercon, the minority noted, is a large and sophisticated corporation. Further, the minority (again agreeing with the BC Court of Appeal) said “participating” was not ambiguous. To say (as the trial judge and majority of the SCC did) that the Province’s action in selecting an ineligible bidder was not part of the RFP process, in the minority’s view, was a strained and artificial interpretation.

Interestingly, the minority of the SCC also noted that the result in *Ron Engineering*² (the SCC decision that gave rise to the Contract A/Contract B analysis, and the concept that the bidding process may create contractual obligations prior to and independently of the actual construction contract that is the subject of the bid) was harsh. Ron Engineering made a \$750,000 error in the calculation of its bid. Within a little over an hour after bids were opened, it informed the government of its mistake, and tried to withdraw. The Ontario government was allowed to retain the \$150,000 bid bond put up by Ron Engineering. Thus, the Court in *Ron Engineering* was not prepared to substitute fair terms for what the parties had actually agreed to.

Approach to Fundamental Breach

Both the minority and majority of the SCC rejected Tercon’s argument that the Province fundamentally breached its obligations, and having done so, could not rely on the exclusion clause. Indeed the SCC unanimously agreed it was time to lay the fundamental breach doctrine to rest. The SCC stated the correct analytical approach is threefold³:

1. Does the exclusion clause (as a matter of interpretation) apply to the circumstances established in evidence?

This will depend on the Court’s assessment of the intention of the parties as expressed in the contract.

2. If the exclusion clause applies, was the exclusion clause unconscionable at the time the contract was made?

Unequal bargaining power between the parties might make the clause unconscionable.



3. If the exclusion clause is held to be applicable and valid, should the Court refuse to enforce the clause because of the existence of an overriding public policy.

A clause excluding recovery for fraud would probably not be enforced.

Concluding Thoughts

One result of this decision maybe more careful drafting of exclusion clauses by owners who want to bar all claims. At the end of day, a prudent contractor faced with such a clause may want to exercise its free choice not to bid. That is the course suggested by both the BC Court of Appeal and the minority in the SCC. If enough contractors refuse to participate, owners like the BC government may change their approach.

But what if contractors are willing to bid on tenders with onerous exclusion clauses? They may take their chances in court. The decision in *Tercon Contractors* does not decide whether an all encompassing exclusion clause is contrary to public policy. Based on the three step analytical procedure (endorsed by all the SCC judges in *Tercon Contractors*) that may be argued. A word of caution though: a significant number of appellate judges (the minority in the SCC, and the unanimous BC Court of Appeal) do not think it is the court’s job to rescue contractors from the consequences of their decision to do bid on tenders with such clauses.

Footnotes

¹2007 BCCA 592 rev’d 2010 SCC 4

²R v. Ron Engineering & Construction (Eastern) Ltd. [1981] 1 SCC 111

³2010 SCC 4 at para. 122

Does a Course of Construction Policy Cover Damage to an Existing Structure?

by David Strand

Introduction

The Alberta case of *Medicine Hat College v. Starks Plumbing & Heating Ltd.*¹ (“*Medicine Hat College*”) examined the issue of whether a course of construction insurance policy (“COC policy”) covered damage to an existing structure during the construction of an addition to a building.



The coverage dispute in *Medicine Hat College* could easily have been avoided if the COC had excluded any damage to the existing structures. Alternatively, the entire subrogated action could have been avoided if Lombard had agreed under its already existing property policy to waive subrogation for property damage resulting from the expansion work.

Facts

Medicine Hat College (“the College”) undertook an addition to its facilities. It already had property insurance. The same insurer (Lombard) issued a COC policy for the addition. A natural gas explosion occurred during construction. Improper installation of a new gas line allowed natural gas to migrate to the existing mechanical room. The explosion occurred there, damaging the mechanical room. The College’s claim for damage (approximately \$350,000) to the mechanical room was paid under its property policy (not the COC policy). Lombard then brought a subrogated action against several contractors and consultants, alleging their negligence caused the explosion.

The Issue

The Defendants claimed that the damage caused by the explosion was covered by the COC policy. If there was coverage, all parties agreed that the insurers had no right of subrogation against the defendants. Justice McDonald (as he then was) heard a trial of this preliminary coverage issue.

Discussion

In coming to his decision, Justice McDonald relied on the Supreme Court of Canada’s decision in *Commonwealth Construction v. Imperial Oil* (“*Commonwealth*”).² In that decision the Supreme Court of Canada found that:

- (1) persons working on a construction project have an insurable interest (because they all have an interest in avoiding litigation if an accident occurs) in the entire project, and
- (2) the COC insurer had no right of subrogation against them.

In *Commonwealth* the damage in question occurred to the structure under construction. Justice McDonald notes this fact. He then considers whether it makes any difference where the damage occurs to an existing structure (the existing mechanical room) rather than one under construction (the expansion).

In the result, Justice McDonald finds it does not make a difference. In his view, it is a logical extension of the reasoning in *Commonwealth* to recognize that the trades involved in the expansion work have an

insurable interest in the entire interconnected structure. Their insurable interest is not limited merely to the new addition they are working on. On this basis, Justice McDonald concluded that the loss in question was covered by the COC policy.

Although the decision has not been appealed, another court, in another case, may have to consider whether its reasoning is correct. Does the fact the contractors have an insurable interest in the entire interconnected project (including existing buildings) mean that the COC insurer has agreed to insure not only the expansion but the existing buildings as well? Insurable interest by itself does not entail coverage.

Consider, for example, a new building under construction, sandwiched between existing buildings with different owners. A COC policy taken out by the owner of the new building will only cover the building under construction, not the adjacent buildings as well. Yet the contractors working on the new building would seem to have an insurable interest in the existing, adjacent buildings as well—it is easy to imagine a fire spreading from the building under construction to the existing buildings, and easy to conclude that the contractors have an interest in avoiding litigation resulting from damage to the existing buildings. Coverage under the COC for damage to the existing buildings however does not follow. And the property insurers of the adjacent buildings would not be precluded from subrogation against the contractors.

Concluding Thoughts

The coverage dispute in *Medicine Hat College* could easily have been avoided if the COC had excluded any damage to the existing structures. Alternatively, the entire subrogated action could have been avoided if Lombard had agreed under its already existing property policy to waive subrogation for property damage resulting from the expansion work. Most importantly for owners, the action could also have been avoided if the College had obtained a wrap-up liability policy from Lombard for the expansion project in addition to the COC policy. Where construction project insurance is obtained, a prudent owner will typically obtain both COC and wrap-up liability policies.

Footnotes

¹2007 ABQB 691

²[1978] 1 S.C.R.317



Introduction

Construction contracts often require a contractor to perform work in a “good and workmanlike manner”. This expression is seen in all types of contracts, from complex agreements for construction of petrochemical refineries to simple agreements for residential services. The expression is often used as a “catch-all” phrase and intended to require a contractor to perform the work to a satisfactory and reasonable standard. However, while the expression is simple and the intention may be clear, determining whether a contractor’s work actually meets the standard is clearly more difficult. A recent Alberta Court of Queen’s Bench decision *Viper Concrete 2000 Inc. v. Agon Developments Ltd.* (“*Viper Concrete*”)² addressed this issue directly and provides a useful analysis of the term “good and workmanlike”. The case also considers the nature of implied contractual terms.

Facts

Agon Developments Ltd. (“Agon”) retained Viper Concrete 2000 Inc. (“Viper”) to complete various concrete work on a residential renovation project. This work comprised the installation of a concrete sidewalk, stairs, a patio and a landing. All concrete was to be finished as “exposed aggregate concrete” to add a pleasing finish and soften the look of otherwise uniform grey concrete.

After the work was performed, various disputes arose as to the quality of the work performed. The horizontal concrete surfaces pooled water, the cut lines in the concrete were uneven and inconsistent, the exposed aggregate was unevenly distributed, some panels were misaligned, areas of concrete were cracked and stairs were of inconsistent

A Good and Workmanlike Manner: Can It Be Implied and What Does It Really Mean?¹

depth. Viper attempted to correct some of these issues but the new concrete was a different colour from the original concrete, resulting in additional visual problems. When Agon and the residential owners refused to pay Viper the full contract price, Viper commenced an action.

Discussion

The first issue that Associate Chief Justice Wittmann considered was whether the contract between Viper and Agon required that the concrete be aesthetically pleasing in addition to being functional. The only written agreement between the parties was a quotation for the work that did not contain other contractual terms. However, the Court found an *implied term* in the contract that the concrete must not only be structurally sound, but also enhance the aesthetics of the property. An implied term is a term that exists in a contract that is not expressly written down or agreed to by the parties but that a court will find was implicitly agreed to between them. For example, even if it is not expressly stated in a contract, there is an implied term that one party will not prevent the other party from performing its obligations—an owner cannot contract with a contractor to build a structure, refuse to allow them onto the construction site and then sue the contractor for not performing the work. In the present case, the Court found that because the work required an aesthetic exposed aggregate finish, the final appearance of the work was important and therefore the contract contained an implied term that the concrete not only had to function, but also had to look pleasing. The Court also determined that Viper had breached this implied contractual term.

Secondly, the Court considered whether there was an implied term that the work had to be completed in a “good and workmanlike manner”. The Court found this was the case, stating that:

The Contractor must do the work with all proper skill and care... There is an implied term in a construction contract that a contractor will perform its work diligently and in a good and workmanlike manner. Absent agreement to the contrary, a contractor need not build to a standard of perfection but only in a good and workmanlike fashion. The workmanship obligation requires care and skill in the physical execution of the specified work³.

Therefore, even if though there is no clear specific written term in a contract about the quality of the work, a contractor is under a duty to perform work in a “good and workmanlike manner”.

The Court then considered several previous cases to attempt to determine what constituted a “good and workmanlike manner”. This determination is often difficult, and is very fact-specific. The Court relied on several previous cases, all relating to the placement of concrete. However, the Court also accepted the testimony of an expert witness retained by Agon. The expert witness testified that the concrete work was of a “do-it-yourself” quality, did not meet industry standard, and was not up to the standard of architectural concrete. Viper attempted to argue that the work was “good and workmanlike” because it was functional and structurally sound. However, the Court rejected this, stating that because there was an implied term that the concrete was aesthetically pleasing, Viper was under an obligation to perform the work in a good and workmanlike manner not only in terms of function, but also in terms of aesthetics.

Concluding Thoughts

One interesting feature of this case is that the Court does not go as far as to state that all other things being equal, a “good and workmanlike” standard *always* means that work be aesthetically pleasing. Instead the Court appears to find that in this particular case, the “good and workmanlike standard” only applies to the aesthetic aspect of the work because it was an implied term that the work would be aesthetically pleasing. Whether or not the standard requires work to be aesthetic in its own right is not addressed by this decision.

This case is of interest to both owners and contractors. Not only does it discuss implied terms in a construction contract, but it clearly finds that a contractor must complete work in a “good and workmanlike manner” irrespective of whether the contract states this expressly.

Footnotes

¹With acknowledgement to Simon Lee, P.Eng., LLB, formerly of BD&P

²2009 ABQB 91

³Keating on Building Contracts, 7th Ed. (London: Sweet & Maxwell, 2001) and Halsbury’s Laws of Canada, 1st Ed., Vol. “Construction” (Markham: LexisNexis Canada 2008)

The Language of Efforts

by Mark Henderson, Student-at-Law

Introduction

The terms “best efforts”, “reasonable efforts” and “commercially reasonable efforts” are often included in commercial contracts. As the terms impose different obligations on the signing parties, it is important to understand the meaning of each term.

Best efforts

Of the three phrases, “best efforts” presents the most onerous obligations for the party having to make those efforts. The meaning of “best efforts” was clarified in *Atmospheric Diving Systems Inc. v International Hard Suits Inc.*¹ (“*Atmospheric Diving*”) where the Court listed seven distinguishing factors of the “best efforts” standard:

1. “Best efforts” imposes a higher obligation than a “reasonable effort”.
2. “Best efforts” means taking, in good faith, all reasonable steps to achieve the objective, carrying the process to its logical conclusion and leaving no stone unturned.
3. “Best efforts” includes doing everything known to be usual, necessary and proper for ensuring the success of the endeavour.
4. The meaning of “best efforts” is... not boundless. It must be approached in the light of the particular contract, the parties to it and the contract’s overall purpose as reflected in its language.
5. While “best efforts” of the defendant must be subject to such overriding obligations as honesty and fair dealing, it is not necessary for the plaintiff to prove that the defendant acted in bad faith.
6. Evidence of “inevitable failure” is relevant to the issue of causation of damage but not to the issue of liability. The onus to show that failure was inevitable regardless of whether the defendant made “best efforts” rests on the defendant.
7. Evidence that the defendant had it acted diligently, could have satisfied the “best efforts” test, is relevant evidence that the defendant did not use its best efforts.

The point was clearly made in *Atmospheric Diving*, after a review of a number of cases, that where parties include a “best efforts” clause in a contract, they must surely intend that “something more than reasonable efforts” be used.

The seven distinguishing factors for the “best efforts” standard were endorsed in Alberta in the case of *Amonson v. Martin Goldstein*.²

A helpful note for drafters or those who are entering a contract with “best efforts” language, is that the best efforts requirement is more limited in the case of government bodies. Where public policy issues arise that conflict with the best efforts obligations in a contract, these public policy concerns will supersede the contractual “best efforts” requirement.³

Reasonable Efforts

The concept of “reasonable efforts” is not well defined.

Certainly it appears on its face to be a less onerous obligation than “best efforts”. Commentary from an Ontario case, *Ontario (Ministry of Transportation) v. O.P.S.E.U.*⁴ indicates that it may be easier to define “reasonable efforts” by what it is not: “reasonable efforts” does not connote “all efforts”, “every effort” or “efforts to the point of undue hardship”. Instead “what it means is efforts that are reasonable in the circumstances, all things considered. What is reasonable in the circumstances will obviously, depend on the facts of particular cases”⁵

Commercially Reasonable Efforts

The meaning of “commercially reasonable efforts” was discussed in the case of *364511 Ontario Ltd. v. Darena Holdings Ltd.*⁶ (“*Darena Holdings*”). There the numbered company (“Delta”) entered into an offer to lease an arena from Darena. The offer was conditional upon Delta obtaining the required approvals to operate a bingo hall on the premises. Delta had been unaware of the strong opposition by the public and city council to the operation of the bingo hall and upon becoming aware, concluded its chances of succeeding with its application did not look

good and abandoned a formal application. Darena argued that Delta had not made “reasonable commercial efforts” to obtain the approvals as required by the offer.

The trial judge noted he could find no judicial authority on the meaning of “reasonable commercial efforts” and referred to the ordinary dictionary meaning of the words as follows:⁷

- a) “Reasonable” implies sound judgment, a sensible view, a view that is not absurd.
- b) “Commercial” means having profit or financial gain as opposed to loss as a primary aim or objective

The trial judge concluded that the standard of “reasonable commercial efforts” meant that if Delta had a doubt from the efforts made, that no approval would be granted; it could conclude its efforts would be

unsuccessful and could withdraw from the transaction. While the Court of Appeal⁸ in this case agreed with the trial judge in terms of the outcome, that Delta had made all reasonable commercial efforts in the circumstances, the Court of Appeal did not agree that “a simple doubt” about the prospects of success would be enough to enable a party to withdraw from a transaction. In the words of the Court of Appeal, rather than simple doubt, “uncertainty that made it commercially unreasonable to proceed was required”⁹.

It was interesting that the Court of Appeal commented that it did not find it necessary or useful to define “reasonable commercial efforts” in terms of “good faith”, “bona fides” or “best efforts.”¹⁰

The Darena Holdings case was followed in the more recent case of *Nelson v. 535945 British Columbia Ltd.*¹¹ (“Nelson”) wherein the Court held that the obligation pursuant to “all reasonable commercial efforts”

A Reminder of the Importance of Strict Adherence to Tender Documents

by Candice Jones

Introduction

A recent Court of Appeal decision from Ontario reinforces the significance of the tendering process, and particularly the responsibility of owners to strictly adhere to the terms of their tender documents. In *Maystar General Contractors Inc. v. Newmarket (Town)*¹, the Ontario Court of Appeal affirmed the trial decision and found that the acceptance of a bid containing a price discrepancy in the bid price was a breach of the tender contract.

The Facts

The Town of Newmarket (“the Town”) had issued a Tender Notice for the construction of a new recreational facility and invited four pre-qualified contractors to bid on the project. The Town publicly opened and read out the Unofficial Total Bid Price from each bid, announcing that Maystar General Contractors Inc. (“Maystar”) was the lowest compliant bidder.

Upon meeting to discuss the bids, the Town noticed a price discrepancy in the bid of Bondfield Construction Company (“Bondfield”) The price discrepancy arose as a result of the sum of the stipulated price and the GST not adding up to the total cost of the work as stated.

It was not clear on the face of the Bondfield bid whether the stipulated price was the correct amount with the GST, (and consequently the total cost), having been calculated incorrectly, or alternately, whether the GST and the total cost were correct numbers, with the stated stipulated price having been stated incorrectly. When the stipulated price was used and the GST and total cost were recalculated based on the stated stipulated price, the Bondfield bid was the lowest.

There was some initial discussion among the town staff, consultants and legal counsel as to the correct interpretation of the numbers. In determining how to proceed, the Town considered an Ontario case involving an incorrect GST calculation that of *Bradscot (MCL) Ltd. v. Hamilton-Wentworth Catholic District School Board*², in which the Court determined that the GST error did not render the price of the bid uncertain. After a meeting with the Town’s lawyer, the Town decided to correct the presumed error and recalculate the bid based on the stated stipulated price.

The bidder, Bondfield, subsequently contacted the Town to clarify the error and confirm that the stipulated price was the correct amount, and that the GST and total cost as set forth in the bid were calculated incorrectly.

The Town then circulated to all bidders the results of the bids, showing Bondfield’s corrected bid as the lowest bid. Another contractor, Maystar, who would otherwise have had the lowest bid, immediately objected to the corrected results. At a special meeting the next day, the Town Council considered the matter, including the clarification from Bondfield, and decided to award the contract to Bondfield based on its corrected bid being the lowest.

The Decision

In ruling against the Town and in favour of Maystar, the lower Court made the following findings:

- Bondfield’s price set forth in its bid was uncertain; it was not clear which amount stated in the bid was correct. Since price is an essential element of any bid, an uncertain price cannot form the basis of a binding contract. The uncertain price rendered the bid non-compliant. The Court distinguished the facts of this case from the facts in *Bradscot* where the error did not render the bid price uncertain. In the *Bradscot* case the numbers were set forth correctly in one section of the bid documents and incorrectly in another section, which was held to be a superfluous or subordinate section.

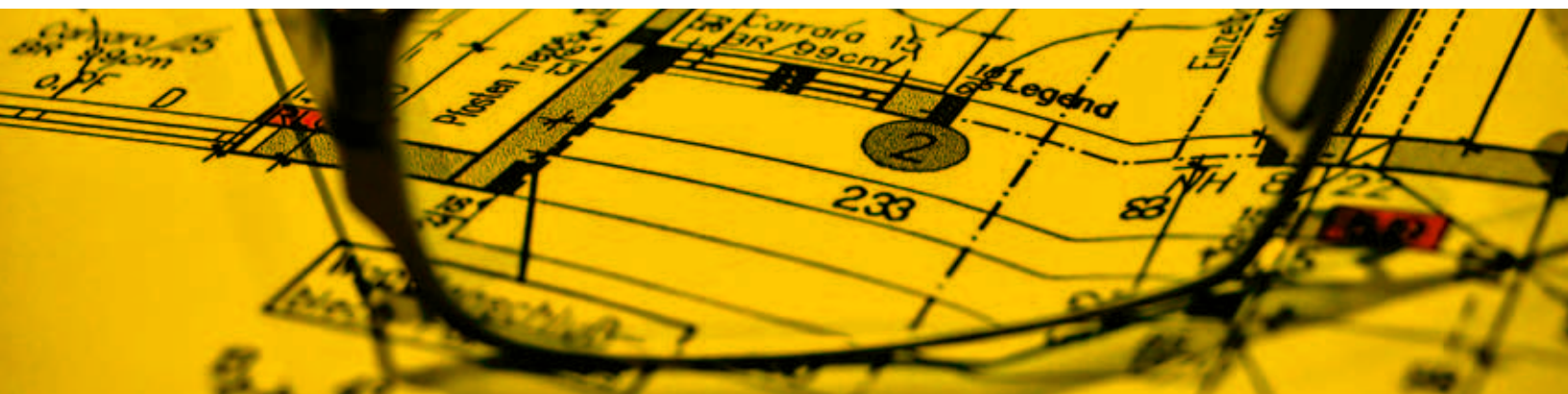
involved a requirement to pursue the matter up to the point where it became commercially unreasonable for them to proceed further. Further, in *Nelson* it was held that the addition of the adjective “all” before “reasonable commercial efforts” was found not to create a higher standard than “reasonable commercial efforts”.¹² According to Mr. Justice Ehrcke in *Nelson*, either efforts were commercially reasonable or they were not.

Concluding Thoughts

When a party sees one of these three terms in a contract, it should be aware of the level of flexibility available to the party who will have the obligation. To this end the parties are wise to clarify the standard by which the obligation will be measured, and to ensure that this standard conforms to what the parties intend and expect.

Footnotes

- ¹(1994), 89 B.C. L. R. (2d) 356 (B.C.S.C.)
²(1994) 27 Alta L.R. (3d) 78.
³*Wentworth Developments Inc. v Calgary (City)* [1998] A.J. No. 252 (Alta Q.B.)
⁴1997 CarswellOnt 6197
⁵*Supra*, Note 4, at para. 46
⁶[1998] O.J. No. 603 (Ont. Gen. Div.).
⁷*Supra*, Note 6, at para.59
⁸364511 Ontario Ltd. v. Darena Holdings Ltd. [1999] O.J. No. 1784 (C.A.)
⁹*Supra*, note 8 at para.5
¹⁰*Supra*, note 8 at para.4
¹¹2007 [2007] B.C.J. No. 2282
¹²*Supra*, Note 11, para.37



- The provisions of the tender documents did not entitle the Town to rectify Bondfield’s bid, and in fact included an express provision that amendments to bids would not be accepted or considered. Because Bondfield’s bid price was uncertain, the Town could not rely on provisions of the tender documents which entitled it (i) to correct obvious or patent errors in a bid, or (ii) to waive any informalities, requirements, discrepancies, errors or omissions or any other defects or deficiencies in a bid.
- The amendment and clarification by the Town and the consideration of the Town of the Bondfield letter explaining its bid constituted a breach of the duty of fairness the Town owed to the other bidders to treat them all fairly and equally.
- In the absence of clear and straightforward language in the tender documents, an owner cannot accept a non-compliant bid. Although the Town’s tender documents contained both a broadly worded provision allowing the Town to rely on undisclosed criteria the Town deemed relevant as well as a waiver by the bidder of bringing any action against the Town for failure to accept a bid; the tender

documents nevertheless did not contain a provision expressly entitling the Town to accept a non-compliant bid. Accordingly, the Town was not entitled to accept Bondfield’s non-compliant bid.

By unanimous decision, the Court of Appeal upheld the findings of the lower court. In rendering its decision, the Court of Appeal noted that the Town was in a difficult situation and had tried to act in the best interest of the public by accepting the lowest bid and had sought legal advice. However, regardless of the Town acting in good faith, the Court of Appeal reiterated the ruling of the Supreme Court of Canada in *MJB Enterprises Ltd. v. Defence Construction*³, that good faith is not a defence for breach of contract. The Court of Appeal stated at para.38 as follows:

However, the Supreme Court has made it clear in the cases it has decided that the integrity of the tender process is essential in order to foster a fair and orderly bidding process where contractors will expend the time, effort and expense to bid, knowing they will be treated fairly and equally. A public owner cannot undermine that process by purporting to

accept a bid with an uncertain price, or to encourage contractors to believe that they can communicate with owners after the fact to clarify or explain inconsistencies in their bids.

Importance for Owners & Contractors

Although the decision in this case depended on the specific facts, some practical tips for all owners and contractors can be drawn from it.

For owners:

- Ensure that the tender documents contain clear privilege clauses, particularly the ability to accept a non-compliant bid; and
- Regardless of an owner’s good faith intentions, an owner must adhere strictly to the provisions set out in the tender documents.

For contractors:

- Ensure that bid submissions are accurate to avoid inadvertent non-compliant bids.

Footnotes

- ¹2009 ONCA 675
²42 (O.R. (3d) 732 (C.A.))
³(1951) Ltd., [1999] 1 S.C.R. 619



A Clear Scope of Work Why do We Need to Bother?

by Kristen Dick¹, Student-at-Law

Introduction

Every construction contract requires a detailed description of the scope of work to be completed by a contractor. Such a description is necessary to outline the work to be done, the materials to be used, time frames to be followed, milestones and other details that complete the terms of the contract. Without clarity between the owner and contractor regarding scope of work, there is room for misunderstanding and confusion, often leading to delay and costly legal resolutions.

Common Issues

Some of the more common issues surrounding scope of work include the presence of ambiguous terms, the presence of contradictory terms, the absence of terms altogether and changes being made without confirmation by a change order or on the basis of the details outlined in a tender submission or other proposal materials or addenda are not in the contract's Scope of Work document. These problems require resolution after the contract has been signed. Once the contract is signed, if changes are

Issues often also arise when the scope of work is not sufficiently defined. Building plans are sometimes drawn up with insufficient detailed specification, and construction begins with the mutual understanding that issues will be settled later.

required, there is often a provision in the contract that requires all changes and additions to be made in writing and agreed by the parties, usually in the form of a change order. These problems are complicated further by the fact that, often commercial contracts stipulate that all past correspondence and contracts between the parties with respect to the subject matter of the contract are overridden by the provisions of the contract thereby, in law, nullifying details of past “scope of work” agreed to by the parties during a tender process. However, the reality is that owners and contractors sometimes find it is time consuming and impractical to wait for written confirmation of each change or clarification. Therefore, many changes and additions to the scope of work are made verbally, given that time is of the essence, and contractors proceed without written confirmation of the change. This frequently results in disputes at the end of the job about what work constitutes changes, disputes that often emanate from the question of who should be responsible for the additional costs involved.

Ambiguous Terms

One of the more recent Alberta cases dealing with ambiguous and contradictory terms in the scope of work is *Tulsa Heaters Inc. v. Syncrude Canada Ltd.*² (“Tulsa Heaters”). In that case, Syncrude Canada Ltd. (“Syncrude”) entered a contract with Tulsa Heaters Inc. (“THI”) for the manufacture of a large industrial heater, requiring pipes of a certain material and diameter. At the time, it was standard industry practice to use seamless pipe for this type of manufacturing, and one footnote of the contract stipulated that seamless pipe was mandatory. However, other parts of the contract required compliance with certain standard codes that did not contemplate the use of seamless pipe of that particular diameter, other specifications described four types of pipes, three of which were welded, not seamless. THI did not use seamless pipe and Syncrude, although it had approved the use of welded pipe at the time, later commenced proceedings against THI for failure to use seamless pipe. The Court in *Tulsa Heaters* found a significant amount of ambiguity and contradiction in these terms and determined the requirements were incompatible. Ultimately, the Court did not allow Syncrude to rely on the term of the contract requiring seamless pipe, given the other unclear terms on this issue within the contract, and based on the fact Syncrude had agreed to the use of welded pipe both in writing and by its conduct.

Changes Without a Change Order

Problems with scope of work also arise when changes or additions are made to the scope of work (sometimes before the contract is signed) without a written record being made and where the obligation to submit a change order is ignored. Once the new work is conducted, the question arises as to which party is liable to cover the costs. In the face of this issue, a test was developed to determine liability for the cost of extra work. In the case of *Kei-Ron Holdings Ltd. v. Coquihalla Motor Inn Ltd.*³ (“*Kei-Ron Holdings Ltd.*”) the Court set out a three part test.

- First, did the work fall outside of the scope of work originally contemplated by the contract? If not, did the owner give express or implied instructions for the work to be done?
- Second, was the owner aware that the extra work would increase the cost of the job?

- Third, did the owner waive the requirement for changes to be made in writing or acquiesce by ignoring the provision?

If the answer is yes to these questions, the owner will be responsible for the cost of the extra work. If not, the contractor remains liable for the costs. Therefore, it is extremely important that changes and additions to the scope of the work are made in writing, or alternatively, that the owner is aware of the extra work, knows it will cost more money, and that a practice has been established whereby changes are not confirmed in writing. Otherwise, the contractor will likely be liable for the cost of extra work done.

Premature Definition

Issues often also arise when the scope of work is not sufficiently defined. Building plans are sometimes drawn up with insufficient detailed specification, and construction begins with the mutual understanding that issues will be settled later. Then, in the course of building, changes and additions are agreed upon verbally between the owner and the contractor, but there is no discussion about additional cost, nor are the changes put into a change order. Occasionally, the contractor draws up a change order after the work has already been done, at which point an owner is often not under any obligation to sign it. Such a situation happened in the case of *Spruce Hill Tree Movers Ltd. v. Moxham*⁴ where at the end of the project, the contractor sued the owner for almost \$10,000 of extra work done that was never agreed to in writing. The Court applied the three-part test in *Kei-Ron Holdings Ltd.* and decided that the contractor had not made out a case for payment. The contract clearly stated all changes had to be made in writing, which was never done. The charges for the extra work were never agreed to between the parties, and it was unclear what was within the scope of the contract, given the absence of specifications. There was no established practice of work being done and approved without a written change order so the contractor was unsuccessful in arguing that the requirement in the contract that change orders be made in writing had been waived by the parties’ conduct.

Conclusion

A scope of work needs to be clear and detailed in order to avoid potential issues during and at the end of the project. As it is inevitable that there will be changes and additions made to the scope of work in any construction project as work progresses, the process of how changes to the scope of work will be agreed and recorded needs to be negotiated in advance, and included within the body of the contract. Owners should be aware that simply because the contract says changes must be in writing, the owner is not necessarily excused from paying for changes it knew about and approved without a written change order. Likewise, contractors may be held responsible for expenses for changes if it is not clear whether or not the owner knew and approved those changes.

Footnotes

¹ with acknowledgement to Morella De Castro, formerly of BD&P

²[2009] A.W.L.D. 1366

³[1996] B.C.L.D. 1895

⁴[2006] A.W.L.D. 2035

BD&P and Habitat for Humanity

Habitat Calgary works in partnership with low-income families and the community to build hope through the construction of simple, decent and affordable homes for Calgary's families in need. BD&P has partnered with Habitat for Humanity Calgary since 2002 to help address the crisis in affordable housing in our city. Together, we have built a relationship of which we are immensely proud.

BD&P is very excited about its 2009/2010 build — its 7th build with Habitat for Humanity Calgary. BD&P will fund the building costs and provide significant volunteer labour and resources for one half of a duplex in the Elgin area in Southeast Calgary. Staff at BD&P joined the prospective new homeowner on VIP or Framing day on October 17, 2009 and made significant headway. The structure will be home before they know it, to a single mom and her 4 young daughters who are anxiously awaiting the move to their new home.



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