



THE PROBLEM WITH 2-STEP TENDER CALLS

By Matthew R. Alter¹

IN THIS ISSUE

1 The Problem With
2-Step Tender Calls
– Matthew R. Alter

7 When Is A Tender Not
A Tender: Graham
Revisited
– Christopher O'Connor
Douglas R. Sanders

The recent *Toronto Transit Commission v. Gottardo Construction Limited and CGU Insurance Company of Canada* decision of Madame Justice Kiteley of the Ontario Superior Court of Justice, released December 18, 2003, is important in its analysis of bid acceptance in response to a two-step tender call.

The case involved an action by the Toronto Transit Commission ("TTC") against Gottardo Construction Limited, a tendering contractor, and Gottardo's bonding company, CGU Insurance Company of Canada. The TTC claimed that Gottardo, having submitted the low tender for a bus garage construction project in response to a public tender call, was liable to the TTC for damages for refusing to enter into a construction contract and perform the work. The TTC also claimed on the bid bond issued by CGU and submitted by Gottardo.

At trial, counsel for the TTC relied on the principles enunciated by the Supreme Court of Canada in the landmark decision of *R. v. Ron Engineering & Construction (Eastern) Ltd.*, which the TTC argued was "remarkably similar" to the case at issue. *Ron Engineering*, decided

¹ Matthew Alter is a Partner with Borden Ladner Gervais LLP and Certified by the LSUC as a Specialist in Construction Law. He was counsel at trial for the Defendant, CGU Insurance Company of Canada (now known as Aviva Insurance Company of Canada).

in 1981, laid the framework for the Contract A/Contract B model for competitive tendering in Canada. Under *Ron Engineering*, it was held that an owner's call for tenders gives rise to two separate contracts:

Contract A: A unilateral contract between the owner and each tenderer who submits a compliant tender in response to the owner's tender call; and

Contract B: A construction contract between the owner and successful tenderer, once the owner accepts one of the compliant tenders, within the stated time for accepting tenders.

The Defendants resisted the TTC's claim for damages and forfeiture of the bid bond on several grounds, but primarily on the basis that no tender contract (Contract A) came into existence between Gottardo and the TTC because there was an "error on the face of the tender", according to the tender documents called for by the TTC, which error was known to the TTC before it purported to accept Gottardo's tender. Further, the Defendants argued that Gottardo's tender could not be accepted because it was non-compliant, in that it did not include all of the requested tender documents. Madam Justice Kiteley, in dismissing the TTC's claims, ruled in favour of the Defendants on both grounds. Of particular significance in this case, was her Honour's analysis of the TTC's two-step tender call process, which required Gottardo and the other tenderers to submit additional tender documents after the initial

closing date for the first set of tender documents.

Briefly, the significant facts of this case were as follows:

- The TTC issued a public tender call in October 2000 with respect to a bus garage construction project.
- The TTC's Instructions to Tenderers established the following two-step tender call:
 - (i) The first, or preliminary, step required Gottardo to submit, by a December 20, 2000 closing date, a prescribed Tender Form, Bid Bond, Agreement to Bond and Alternatives List; and
 - (ii) The second step of the tender call required Gottardo to furnish, within two business days of a written request from the TTC, additional tender documents including, a Cost Breakdown Summary, a list of Gottardo's current contracts and references, and information on Gottardo's qualifications, including bond and credit information.
- Gottardo submitted the initial tender documents by the closing date.
- In response to the TTC's written request, Gottardo subsequently submitted a Cost Breakdown Summary that contained a different price than the Tender Form.
- Gottardo failed to furnish the other tender submission documents requested by the TTC.
- The TTC purported to accept Gottardo's tender. When Gottardo refused to enter into a construction contract for the project, the TTC awarded the contract to the next lowest bidder who had submitted the requisite Tender Documents and commenced action against Gottardo and the bonding company.

The Court accepted the uncontroverted evidence that Gottardo had made an honest and inadvertent arithmetical mistake in its initial tender price, which was communicated by Gottardo to the TTC after the deadline for submitting the initial tender documents, but before the TTC had given any consideration to



the tenders and before the TTC had altered its position in reliance on Gottardo's tender.

The Defendants maintained that, in accordance with the terms of the TTC's Instructions to Tenderers, both sets of tender documents (collectively the "Tender Documents") were required for a valid, compliant tender. Moreover, the Defendants established that the Cost Breakdown Summary submitted by Gottardo, in response to the TTC's written request, contained a substantial discrepancy with respect to the cost of the work that could not be reconciled with the price in the Tender Form. The Court accepted that when the Tender Documents were read together, there was an "error on the face of the tender" submitted by Gottardo. The Court further found that Gottardo's failure to submit all of the required second step Tender Documents rendered Gottardo's tender non-compliant, and incapable of acceptance by the TTC.

Throughout the trial and in argument, the Defendants urged the Court to focus on the terms of the TTC's Tender Documents, in order to distinguish the facts of this case from the facts in *Ron Engineering*. The TTC maintained

that the second step Tender Documents requested after the closing date were irrelevant to the TTC's deliberations and merely "belt and suspenders" information. The Court did not accept the TTC's arguments on this point and focused on the mandatory language of the TTC's Instructions to Tenderers, finding that all of the Tender Documents were significant to the TTC's evaluation process, stating:

"In an open, public and transparent process such as that contemplated by the Instructions to Tenderers, TTC expected to vigorously assess the commercial strength of all of the bids and needed the Clause 7.2 documents to do so."

and

"I find that Contract A could only be created when the following steps had occurred: TTC issues the Instructions to Tenderers; in response, a contractor makes a bid; TTC demands that Clause 7.2 documents and information; the contractor responds to that demand; TTC conducts the evaluation and acceptance pursuant to Clause 8 along with Clause 11."



Clause 8 of the TTC's Instructions to Tenderers required each tenderer to submit a tender that was "fully responsive to the Tender Documents" and stipulated that the TTC's evaluation of tenders would be based on, among other things, the information requested by the TTC after the closing date.

The Court found that in addition to the error in the tender price, evidenced when the Tender Documents were read together, Gottardo's failure to submit all of the second step Tender Documents resulted in a tender that was non-compliant with the TTC's tender call. The Court stated:

"Absent the clause 7.2 documents and information, I agree with the defendants that the Gottardo bid was non-compliant. Clause 8.7 allowed the TTC to waive non-compliance. However, it is reasonable to infer that only a compliant tender would be accepted. The owner cannot rely on clause 8.7 to accept one of the bids contrary to the terms of the bid solicitation."

In spite of the TTC's protestations, the Court found that Gottardo's tender was

non-compliant and in doing so, accepted the Defendants' contention that a tenderer can rely upon its own non-compliance to avoid the formation of Contract A. The Court further accepted that tender compliancy was to be determined by the very terms of the TTC's tender call.

Although not mentioned in the Court's decision, evidence was adduced on the cross-examination of the TTC's witness at trial of the TTC's current form of Instructions to Tenderers, which had been revised so that the second step tender documentation was no longer mandatory.

In summary, this appears to be the first Canadian judicial ruling to consider the effect of a two-step tender call on the formation of Contract A. Further, it is one of several recent cases since *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, where a contractor has successfully avoided Contract A obligations and the collateral obligation to perform a construction project, by reliance upon its own non-compliant tender.²

² *Graham Industrial Services Ltd. v. Greater Vancouver Water District* (B.C.C.A., December 1, 2003). *Derby Holdings Ltd. v. Wright Construction Western Inc.* (2000), 17 C.L.R. (3d) 64 (Sask. Q.B.), upheld [2003] S.J. No. 588 (Sask. C.A.).

Justice Kiteley further found, in obiter dicta, that the TTC's Instructions to Tenderers were flawed in their failure to include a provision entitling the TTC to look to the Bid Bond for compensation, noting:

"The Instructions to Tenderers is silent as to the consequences vis-à-vis the bid bond if a contractor declines to enter into Contract B. The contractor will be exposed to damages. However, there is nothing in the TTC's own Instructions to Tenderers which entitles the TTC to keep the bid bond or to look to the bid bond for compensation. Even if Contract A has been breached, the TTC on the terms of this contract, has no right to retain the bid bond and therefore must deliver it up."

The obvious lesson from this case is that owners and consultants, alike, must pay careful attention to the drafting of tender documents, since ultimately, tender disputes, as with any other contractual dispute, are decided on the unique facts of each case and in particular, in accordance with the terms and conditions of the tender call and the related documents upon which tenders are submitted.

Common sense suggests and the writer's experience in this case and in others confirms, that by complicating the process through the introduction of additional steps and/or mandatory requirements, owners significantly increase the odds that one or more of the tenderers will fail to comply with all of the additional requirements, or that a tenderer may use the opportunity to establish a mistaken bid, to avoid contractual obligations. Further, owners who insist on using a two-step tender call process may find that, not only are they precluded from recovering damages from a low tenderer seeking to avoid a contract, but that they are subject to challenges by the other tenderers on the grounds that a contract cannot be awarded to a tenderer who is not in compliance with all of the mandatory tender requirements.

In an area that is already ripe with litigation, owners should decide whether the benefits to be derived from such a process outweigh the risks.

Matthew R. Alter

Borden Ladner Gervais LLP

Tel: 416-367-6196

Fax: 416-361-2728

Email: malter@blgcanada.com

WHEN IS A TENDER NOT A TENDER: GRAHAM REVISITED

By Christopher O'Connor and Douglas R. Sanders, P.Eng.

The Court of Appeal has issued reasons in *Graham Industrial Services Ltd. v. Greater Vancouver Regional District* (B.C.C.A., December 1, 2003).

In *Graham*, the owner had pre-qualified four bidders, each of whom submitted tenders. Graham, one of the four bidders, submitted a bid but, shortly after tenders closed, determined that its bid contained a significant error and informed the owner that it was withdrawing its bid. Later, Graham advised that its bid was incapable of acceptance because it had failed to comply with a number of mandatory, material requirements. Despite such, the owner sought to accept Graham's bid.

The B.C. Court of Appeal in *Graham* dismissed the appeal of the owner and held that a submission only becomes a tender if it complies with all mandatory, material requirements. As such, any clauses within the tender documents that purport to permit an owner discretion to accept bids irrespective of whether they are compliant cannot save materially non-compliant tenders. However, although the Court did find that a discretion clause is effective in permitting an owner to waive non-material non-compliances, the Court further held that the test for determining whether a bid is compliant is an objective one. On the facts in *Graham*, the Court held that Graham had failed to meet two mandatory, material requirements and, as such, its bid became a counter-offer, but that such counter-offer was revoked before the purported acceptance by the owner.

The Court briefly considered the case of *Kinetic Construction Ltd. v. Comox Strathcona (Regional District)*, 2003 BCSC 1673. In *Kinetic*, the B.C. Supreme Court found that a non-compliant tender was capable of being considered a counter-offer and could be considered alongside compliant tenders. The Court distinguished *Kinetic* on the basis that Graham had sought to withdraw its "counter-offer" before acceptance, unlike the non-compliant bidder in *Kinetic*. The Court was, we believe, aware that *Kinetic* is under appeal and refrained from commenting on whether, from a fairness and equity standpoint, the Court in *Kinetic* was correct in permitting an owner to consider both compliant and non-compliant tenders together.

Owners should be aware that clauses that purport to permit acceptance of bids that are materially non-compliant are ineffective. Owners should also be careful in drafting their tender documents such that only absolutely necessary elements of the bid are shown as mandatory.

Christopher J. O'Connor, C.Arb., FCI Arb.

Borden Ladner Gervais LLP

Tel: 604-640-4125

Fax: 604-622-5825

Email: coconnor@blgcanada.com

Douglas R. Sanders, P. Eng

Borden Ladner Gervais LLP

Tel: 604-640-4128

Fax: 604-622-5924

Email: dsanders@blgcanada.com

These articles were created to keep you abreast of recent legal developments in the law of tendering. They provide only general information, and do not constitute legal or other professional advice. Readers are encouraged to obtain legal advice from a competent professional regarding their particular circumstances. If you would like to receive a copy of either of these decisions, please contact the authors.

CONSTRUCTION, SURETY, FIDELITY GROUP COORDINATORS:

National

Toronto: R. Bruce Reynolds
416-367-6255
breynolds@blgcanada.com

Regional

Calgary: Jeffrey D. Vallis Q.C.
403-232-9404
jvallis@blgcanada.com

Montréal: Daniel Ayotte
514-954-3138
dayotte@blgcanada.com

Ottawa: David Sherriff-Scott
613-787-3527
dsherriff-scott@blgcanada.com

Toronto: Richard H. Shaban
416-367-6262
rshaban@blgcanada.com

Vancouver: Christopher J. O'Connor, C.Arb., FCI Arb
604-640-4125
coconnor@blgcanada.com

Borden Ladner Gervais LLP Lawyers • Patent & Trade-mark Agents

Calgary

1000 Canterra Tower
400 Third Avenue S.W.
Calgary, Alberta, Canada T2P 4H2
tel: (403) 232-9500 fax: (403) 266-1395

Montréal

1000 de La Gauchetière Street West
Suite 900, Montréal, Québec, Canada H3B 5H4
tel: (514) 879-1212 fax: (514) 954-1905

Ottawa

World Exchange Plaza
100 Queen St., Suite 1100
Ottawa, Ontario, Canada K1P 1J9
tel: (613) 237-5160 1-800-661-4237
legal fax: (613) 230-8842 IP fax: (613) 787-3558

Toronto

Scotia Plaza, 40 King Street West
Toronto, Ontario, Canada M5H 3Y4
tel: (416) 367-6000 fax: (416) 367-6749

Vancouver

1200 Waterfront Centre
200 Burrard Street, P.O. Box 48600
Vancouver, British Columbia, Canada V7X 1T2
tel: (604) 687-5744 fax: (604) 687-1415

www.blgcanada.com

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