

Once Tendered, Twice Shy

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The following is an opinion based on the state of the law as it exists today. This article is not intended to be relied on and you should consult a lawyer for an opinion regarding your specific circumstances.

Is there an obligation on the part of the owner to accept any tender at all? Can an owner cancel a tender after the submission of conforming bids?

When an owner tenders a project, the tender will usually give rise to what the courts have called a “Contract A”, under which the owner and the bidders must abide by the terms of the call for tenders. The principal obligation on the part of the owner is to award the actual construction contract (or the “Contract B”) in accordance with the explicit terms of the tender and also terms that are implied by law. The implied terms may include an obligation to award the construction contract to the lowest qualified bidder. Where owners have failed to abide by the terms of the tender call, they have been found liable for damages to the contractor who ought to have received the award.

Owners have responded to this prospective liability by including a “privilege clause” in tender documents. The privilege clause reserves to the owner the privilege or right to award “Contract B” to any person or not to award the contract at all. Despite the broad wording of privilege clauses, courts have tended to find that they do not ordinarily grant the owner full discretion in awarding Contract B. An owner may therefore still be legally obligated to award to the lowest qualified bidder in many cases.

When can an owner cancel the call for tenders?

First, consider whether there is a privilege clause in the terms of the tender. Before issuing a tender, owners should be sure to have a properly drafted privilege clause in their tender documents, and obtain advice on whether the clause they are using is appropriate for the specific tender in question. Without a privilege clause, the owner faces a risk that they will be obligated to award the contract to the lowest qualified bidder notwithstanding any factors that would



make a cancellation advantageous or necessary. Even with a properly worded privilege clause in place, the circumstances that justify cancellation are narrowly defined.

The next consideration is to determine what will follow cancellation. If the project is shelved or significantly re-designed, it will be relatively easy for an owner to justify the cancellation. However, where the cancellation is followed by a re-tender or, even worse, negotiations with one party, in respect of substantially the same project, the owner will have an uphill battle to show that the cancellation was done in “good faith” rather than as an exercise in bid shopping.

One fairly recent example where a re-tender was permitted was in the case of *Silex Restorations Ltd. v. Strata Plan VR2096*, (BC Supreme Court, December 2002). In *Silex*, the plaintiff contractor’s claim for breach of Contact A was dismissed because the contractor’s bid did not comply with the tender call. The Court went on to decide that, even if compliance were not in issue, the owner would not have been obligated to accept the bid. After the tenders had been submitted, the owner received a report from an independent architectural firm suggesting that there were serious potential difficulties in the planned work, which involved the remediation of a building envelope. Based on this information, the owner decided to revise the design significantly and re-tender the project, and allowed the disappointed bidder to participate in that process. The Court commented that this decision was entirely reasonable, and held that it was within the owner’s rights under its privilege clause. Other court decisions have considered that privilege clauses can permit an owner to reject all compliant bids where the specification in the tender documents were found to be inadequate after the bids were submitted, or where other unforeseen circumstances arise.

More generally, the B.C. Supreme Court has recently determined that a tenderer can be entitled to re-tender under a privilege clause, with different specifications, providing that the owner was acting fairly. By “fairly” the court meant that the re-tender was done for the legitimate purpose of ensuring that the tenders met the owner’s needs, and not for some ulterior motive such as favouring one bidder over another.

In addition to the change in specifications being legitimate, it is also important to consider whether the *extent* of the change justifies a re-tender. A very significant change can justify a re-tender, whereas a minor change generally would not. Re-tendering after a minor change would likely appear to the court to be nothing more than an attempt to shop prices. To use an extreme example, a change from a single-storey building to a thirty-story tower would likely fall within the owner’s entitlement to re-tender under a privilege clause while a change in the specification for interior paint in a large hospital project, however legitimate the change, would likely not justify re-tendering the whole project. For minor



changes, even those where the initial tenders all exceeded the owner's budget, the owner must award the contract and then negotiate a change order.

Owners should approach cancellation and then re-tender in the face of a compliant bid cautiously. The damages that are generally awarded are loss of profit.

On the other side, a contractor who submits the lowest qualified bid should be aware that a privilege clause does not permit the owner free reign. In particular, contractors should consider their position carefully where it appears the reason for the cancellation of the tender was disappointment that the bids were not lower and the project is then re-tendered or negotiated with little or no change.

All parties should remember that the courts would probably go further than simply looking at the wording of the privilege clause in determining their rights in a re-tender situation. The whole of the relationship between the parties will generally be considered in deciding the scope of the owner's right to reject some or all qualified bidders. In light of the uncertainties in such cases, and the high potential costs in litigation and potential liability, both owner and contractors would be well advised to obtain legal advice on the scope of their rights in the face of a cancellation.