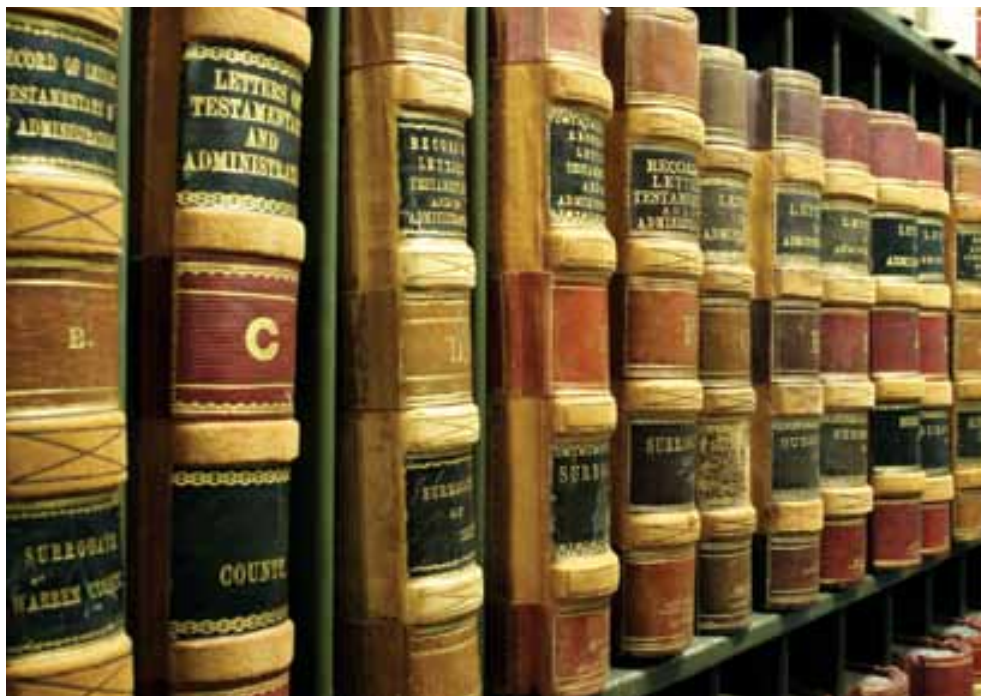


Recent Tender Law Case Lessons

BY KAREN MARTIN



Litigation by unsuccessful bidders continues to be very common in Canada.

The construction industry is aware that early in 2010, the Supreme Court of Canada released its judgment in **Tercon Contractors Ltd. v. British Columbia**, a five to four decision that the province could not rely on an exclusion clause in an RFP to avoid liability for what the court found was an egregious breach of Contract A, the contract that arises between a tendering authority and bidder upon submission of a compliant bid.

The Tercon case also made it clear that Contract A obligations may arise in RFPs, depending on their language.

However, since Tercon, other courts have continued to decide tender and RFP cases from which important lessons can be learned about procurement. Some of the lessons are not new, but the fact that tenders continue to spawn regular litigation indicate that a refresher for the industry is warranted. Here are a few more important top tender cases from 2010.

Cranbrook Interior Woodwork Ltd. v. D & T Developments Ltd., 2010 BCSC 550, was a reminder that in order for a bidder to recover damages against a tendering authority for breach of Contract A, its own bid must be compliant. In that case, a general contractor was found to have breached its Contract A obligations to compliant subcontractor bidders, when it awarded a subcontract based on a verbal reduction to a bidder's price contrary to the bid depository rules. However, since the complaining bidder's bid was also non-compliant (it was submitted after the closing time), its bid was not capable of acceptance and therefore its claim for damages was dismissed.

O'Connell Electric Ltd. v. BC (Hydro & Power Authority), 2010 BCSC 626, is a case

where the court concluded that the procurement did not give rise to any contractual obligations. The procurement was not in standard form since it sought bids to establish a list of approved contractors and prices for small value work. The important lesson from the case is that in any procurement, the first issue is whether, based on the wording of the tender documents, the parties intended to enter into contractual relations. This case reminds us that an owner should consider from the beginning whether or not it wants a Contract A (does it want enforceable bids, or does it want a process in which it has no contractual obligations?), and then should use language in the procurement documents that clearly expresses its intentions on this point.

In **Admiral Roofing Ltd. v. Prince George School District No. 57**, 2010 BCSC 1394, the low bidder sued when the owner refused to open its bid because the bidder had failed to attend all parts of the mandatory site visit. The tender documents stated that a mandatory site tour would start in one location and continue in a second location, and that "failure to attend and register will lead to the non-acceptance of the tender". The bidder arrived late to the site tour and missed the short tour of the first location, but joined the tour at the second location. He inspected the first location the next day. The bidder argued that he had attended the site tour and therefore that the owner had no right to reject its bid. The court held that the clause was clear that attendance was required at both locations and dismissed the bidder's claim. This is a confirmation of the importance to bidders of strictly complying with all the

requirements in the tender documents; but there is also a lesson for owners and their consultants. The owner was required to reject a low bid and to defend itself from litigation because of the wording of its clause. An alternative approach, using a clause that does not make the site tour mandatory, but rather deems all bidders to have attended and have knowledge of the site, would have allowed the owner to accept a lower bid and avoid the litigation.

Finally, a Newfoundland case, **CMH Construction Ltd. v. Victoria**, 2010 NLTD(G) 145 confirms two important legal points:

(1) a bidder has no claim against the owner's consultant for negligently administering a procurement (although the owner can); and

(2) an owner cannot issue for bidding purposes a set of specifications which it knows or should know cannot be built for its budget.

Litigation by unsuccessful bidders continues to be very common in Canada. The legal principles and results in the cases summarized in this article are not surprising; except that they perhaps demonstrate that many participants in the construction industry may still not be aware of the relevant law, how to comply with it, and importantly, how to use it to their advantage to achieve a fair and effective competition. **CB**

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