



POST-TENDER RESUBMISSION: THE DUTY TO CARRY SUBCONTRACTORS

By Michal Jaworski

In times of cost escalation, owners sometimes revise the scope of work and ask the lowest bidder to resubmit. What is a general contractor's duty to its subcontractors in this situation? In *G&S Electric Ltd. v. Devlan Construction Ltd.*, the court held that the general contractor must only seek resubmissions from subcontractors it originally carried. This is so even if another subcontractor can offer a lower price.



The facts in this case are straightforward. The Town of Tillsonburg, Ontario, put out a call for tenders for a community centre renovation. Devlan, as general contractor, submitted a bid naming G&S as the electrical subcontractor. G&S was the low bidder on the related call for tenders by Devlan. Devlan's bid to the Town was the lowest bid but was considerably over the Town's budget. The Town asked each bidder to alter, re-price and/or delete certain portions of the work and resubmit its bid.

Devlan asked G&S to revise its bid but also asked an electrical subcontractor named Prouse to submit a bid. Prouse submitted a lower bid and Devlan carried Prouse. G&S sued Devlan.

The court sided with G&S on the basis that Devlan's call for tenders created an implied duty to treat G&S "equally, consistently and fairly". In the court's view, being treated "equally, consistently and fairly" meant that G&S had to be carried through the resubmission, even if another subcontractor could provide a better price.

Two factors were key to the court's decision. First, Devlan's own internal policy was to obtain resubmissions only from subcontractors it originally carried. Second, the guidelines set out in section 4.5 of the CCA 29-1995 Guide on Standard Contracting and Bidding Procedures (as it was then) provided that if a project is over budget "the Owner should negotiate with the low bidder and named Subcontractors or suppliers". The court accepted that this represented industry practice at the time. The court concluded that, if a project is overbudget, an owner should negotiate with the low bidder, and the low bidder, in turn, should negotiate with the low bidding subcontractors.

Devlan was ordered to compensate G&S for its lost profits. Devlan argued that the Town should contribute to G&S' damages because the work was in fact completed by

Prouse and therefore, the Town obtained the benefit of a lower price for the work. The court, in a brief statement, concluded that there was no contract between G&S and the Town and therefore the Town did not owe and therefore could not have breached any express or implied contractual duty to G&S. Also, the court ruled that the Town's savings on the work did not amount to unjust enrichment—the court did not discuss this point, but one possible reason is that it was not suggested that the Town was involved in the decision to avoid G&S.

This decision establishes that the practice of "carrying" subcontractors must continue through any bid resubmission process, unless there is an express clause in the bid documents to the contrary. An owner's decision to change the scope of work does not result in a new bid process whereby the general contractor may seek new bids.

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