**Thomas G. Heintzman, O.C., Q.C., FCIArb**

**Heintzman ADR**

**Arbitration Place**

**Toronto, Ontario**

**www.arbitrationplace.com**

**416-848-0203**

**tgh@heintzmanadr.com**

**www.constructionlawcanada.com**

**www.heintzmanadr.com**

Thomas Heintzman specializes in alternative dispute resolution. He acts as an arbitrator and mediator in commercial, financial, construction and franchise disputes.

Prior to 2013, Mr. Heintzman practiced with McCarthy Tétrault LLP for over 40 years with an emphasis in commercial disputes relating to securities law and shareholders' rights, government contracts, insurance, broadcasting and telecommunications, construction and environmental law. He has acted in trials, appeals and arbitrations in Ontario, Newfoundland, Manitoba, British Columbia, Nova Scotia and New Brunswick and has made numerous appearances before the Supreme Court of Canada. He was an elected bencher of the Law Society of Canada for 8 years and is an elected Fellow of the American College of Trial Lawyers and of the International Academy of Trial Lawyers.

Thomas Heintzman is the author of ***Heintzman & Goldsmith on Canadian Building Contracts,*** 5th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

## Evaluation Breached Tender Conditions: Alberta Queen's Bench Court

You would think that the owner would get one thing right before issuing an invitation for tenders: its standard for evaluating the tenders.

Yet, in ***Elan Construction Limited v South Fish Creek Recreational Association,*** the Alberta Court of Queen's Bench recently found that the owner's tender evaluation ***criteria*** were unfair and did not reflect the terms of the tender, and awarded nominal damages to the unsuccessful bidder. The decision is a good checklist for owners in establishing tender evaluation standards.

**Background**

In July 2010, the South Fish Creek Recreational Association ("SFCRA"), issued an invitation for tenders for the construction, as additions to its existing recreational facilities, of two ice surfaces and multi-purpose rooms and other spaces. Elan was a pre-qualified bidder and filed a bid.

The published evaluation matrix provided for a maximum of 100 points and contained the following elements: Price, 35 points; Date of completion, 35 points; Previous community and arena experience, 20 points; References, 10 points.

Elan was not awarded the contract and sued for damages. The trial judge found the following with respect to the bid criteria:

**Price**: Elan's bid was the lowest by $400,000.

**Completion Date:** The Invitation to Bid stated that SFCRA wanted the Project to be substantially completed by August 1, 2011, with that date highlighted in bold. The Instructions to Bidders contained a liquidated damages clause providing for liquidated damages in the event of late completion in the amount of $15,000 per day, later reduced to $3,000 per day.

Elan's bid provided for substantial completion by August 1, 2011 and completion of deficiencies by August 15, 2011. The successful bidder's completion date was August 31, 2011.

The adjudicator did not use August 1, 2011 as the relevant date. Instead, he took the average of the completion dates of certain, but not all, of the bidding contractors considered most relevant, arriving at a completion date of September 5, 2011; and then awarded bidders points out of 30 based on their proximity to that notional date. As a result, Elan received 25 points for its on–time date of August 1, 2011 for substantial completion, while the successful bidder received 34 points for its later substantial completion date of August 31, 2011.

The evaluator used the same approach to deal with the estimated time to complete deficiencies, arriving at an average figure of 45 days after his notional completion date of September 5, 2011. As a result, Elan received zero points for its 14 day estimate while the successful bidder received four points for its longer 30 day projection.

**LEED:** Leadership in Energy and Environmental Design ("LEED") experience was used as a factor in the evaluation criteria factor, but there was no indication in the Bid Documents to this effect.

**Court's Decision**

The Court of Queen's Bench found that on various accounts the evaluation factors used by the owner had not been disclosed in the bid documentation, and therefore the owner breached the

implied duty of fairness inherent in the tender process. Here are the reasons of the court on some of the factors:

> **Substantial Completion date**
>
> "Mr. Quinn's methodology, as described above, created an arbitrary standard that could not have been within the contemplation of the bidders. His testimony as to his method and rationale served only to underscore the arbitrary nature of his evaluation. Moreover, his approach created, in my view, the kind of undisclosed evaluation criterion that the Supreme Court of Canada has said constitutes a breach of Contract A."
>
> **Experience**
>
> "….SFCRA's approach to evaluating the relative experience of the bidders cumulatively amounted to breach of the Bid Contract….While I agree that it would not be unreasonable for SFCRA to put greater emphasis on arena experience given the nature of the Project, in my view, that emphasis should have been disclosed in the Bid Documents…..an explicit preference for such experience could and should have been indicated in the Bid Documents…."
>
> **Other undisclosed criteria**
>
> "I find that other undisclosed criteria influenced SFCRA's assessment of the bidders' experience. ….any consideration of LEED in the assessment of experience…..should have been brought to the attention of bidders….Similarly, while interviewing candidates may be useful and may fall within SFCRA's right to seek further information, bidders should have been made aware that interviews were a possibility. Further, Elan should not have been forced into the position of attending an important interview without key employees who were designated to work on the Project. In my view, both the use of interviews and the process by which they are conducted must be fair to all bidders.

In its analysis the court referred to the recent decision of the Supreme Court of Canada in ***Bhasin v* Hrynew**. In that decision, the Supreme Court held that there is a duty to perform contracts honestly. Applying that principle, the Court of Queen's Bench said:

> "I hasten to add that there is no suggestion that SFCRA acted dishonestly or with malice. Nevertheless, as the Supreme Court of Canada held in ***Bhasin***, a duty of good faith may require more than honesty. Where a bid evaluation has been conducted in an arbitrary manner or on the basis of undisclosed criteria, that is sufficient to constitute breach.

The court concluded that, absent the owner's breaches of contract, Elan would have been the successful bidder.

In assessing damages, the court held that either the cost of preparing the bid, or the lost profit on the construction contract that would have been awarded to Elan, is the proper measure of damages, but not both. In assessing damages under the second approach the court reduced Elan's claim:

a. because Elan had, in the court's view and based on the next lowest tender, underestimated the subcontracts. On this account Elan's claim should be reduced by $185,000, from $704,908 to $519,908

b. because the contractor who was actually awarded the contract was anticipating a $300,000 profit and made a loss of $600,000, and Elan would likely have encountered a similar experience. Accordingly, Elan's claim should be reduced from $519,908 to nominal damages of $1,000.

Having awarded damages based upon loss of profit, the court said that no damages could be awarded for the cost of preparing the bid, and in any event no proof of that cost had been provided.

**Discussion**

This decision is a good illustration of two perils relating to claims for breach of an invitation to tender, and the "smell tests" which the court will likely apply in the course of litigation over a tender.

**First**, a court will be very unsympathetic to an owner that has not prepared and applied tender evaluation criteria that fairly reflects the bid conditions. There is really no excuse for an owner applying criteria that do not accurately reflect the bid conditions which it has itself prepared and published. Interestingly, the court used the concept of "honest performance" of a contract, enunciated in the ***Bhasin*** case, to judge the owner's performance of its obligations under the invitation to tender.

**Second**, the court will carefully scrutinize the bidder's claim for damages. The court may well think: "Well, this contractor was fortunate not to have won that contract!"

***Elan Construction Limited v South Fish Creek Recreational Association,* 2015 ABQB 330**

**Construction law – tenders- Contract A/Contract B – honest performance – damages**

**Thomas G. Heintzman** **December 20, 2015**

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