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Thomas Heintzman specializes in alternative dispute resolution. 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.

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 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.

Heintzman & Goldsmith on Canadian Building Contracts has been cited in over 183 judicial decisions including the two leading Supreme Court of Canada decisions on the law of tendering:

Eight Rules of Tender Law Pronounced By The Ontario Court of Appeal

In *Rankin Construction Inc. v. Ontario,* *the* Ontario Court of Appeal recently made a number of significant rulings in a tender case. While the rulings were based upon the specific wording of the tender in that case, they were made in the context of a major Ontario highway tender and appear to have wider application.

Factual Background

The Ministry of Transportation of Ontario (MTO) issued an invitation to tender for the widening of Highway 406. The invitation to tender required a bidder to declare the value of imported steel in its bid. The invitation stated that a 10 percent preferential allowance would be granted for domestic steel but that allowance did not apply H-Piles. Rankin did not declare the value of H-Piles as imported steel, believing that its steel qualified as domestic steel even though manufactured outside Canada. A competitor complained that Rankin's bid was non-compliant and Rankin's bid was disqualified and the contract was awarded to the second lowest binder.

The trial dismissed Rankin's claim against Ontario and that dismissal was upheld by the Ontario Court of Appeal but for different reasons.

Rulings of the Ontario Court of Appeal

The Court of Appeal made the following rulings:

1. **Under the formula set forth in *Ron Engineering*, Contract A governing the tender process arose when bidders submitted their tenders.**

This point may seem obvious but other decisions have raised doubts as to when Contract A is formed: Is it the moment before a bid is submitted; or when the bid is submitted, or when the bids are opened or when the bids are published? In this decision the Court of Appeal has said that "Contract A arose when the appellant submitted its tender."

2. **Contract A was formed with any bidder who submits a bid, not just with a compliant bidder**

This is an important point since some decisions, including that of the trial judge in this case, have held that Contract A is only formed between the person issuing the invitation and a compliant bidder. That approach does not make sense since if it is only Contract A that requires the issuer to deal fairly with the bidder in determining compliance. So there must be a Contract A in order for the treatment of compliance to be a binding factor between the issuer of the tender and the bidder. The Court of Appeal was clear that Contract A is formed with any bidder who submits a bid:

> "The significance of the appellant's non-compliance with the tender documents is that, pursuant to the express or implied terms of that Contract A, it may not be awarded Contract B, even if it is the lowest bidder — not that no Contract A is formed. I come to this conclusion based on the language of the Instructions to Bidders, which form part of the tender documents. In this case, the tender offer contemplated that tenders submitted might not be compliant….Paragraph 7.3 of the Instructions to Bidders specifically requires that a bidder include a tender deposit with its tender. This requirement is clearly material. However, para. 11.2 of the Instructions to Bidders also provides that "Tenders not accompanied by a Tender Deposit in the required amount may be rejected." The fact that the MTO specifically addresses the consequences of the submission of a materially non-

compliant tender — when viewed in conjunction with the other provisions in the Instructions to Bidders discussed below — is evidence that it intended that a Contract A come into effect, even if the tender submitted is non-compliant.

Respectfully, the trial judge erred in concluding that the necessary consequence of ***Ron Engineering…*** referred to in *Tercon*, is that no Contract A can come into existence where a bid is not materially compliant with the tender documents, without considering the effect of the tender documents. In other words, the terms of the offer to consider bids made by the request for tenders, as reflected in the tender documents, must be scrutinized to determine whether the parties intended contractual relations to arise on the submission of a tender: see *M.J.B. Enterprises…*. In my view, subject to the governing documentation, contractual relations would usually come into existence on the submission of a bid. This is a desirable result: it provides greater certainty as to the rights and obligations of the bidders and the owner, and may reduce the frequency of litigation arising out of the award of tenders."

3. The person issuing the invitation to tender has a right, but not an obligation, to investigate the bids

The trial judge had held that in the decision in ***Double N Earthmovers Ltd. v. Edmonton (City)***, [2007] 1 S.C.R. 116, the Supreme Court had found that the owner issuing an invitation to tender does not have an implied duty to investigate allegations of non-compliance by a rival bidder, but that the owner has a right to do so. The Court of Appeal agreed:

"…the tender documents do not preclude the MTO from conducting an investigation. They do not expressly provide that the MTO will not investigate any complaints, and I see no basis for implying such a term….Like the trial judge, I reject the appellant's argument that an owner cannot investigate allegations of non-compliance unless the bid documents specifically give the owner the right to do so or the owner has a written policy that it will do so.

4. The effect of non-compliance clause and the privilege and discretion clause was that the owner might, but was not obliged to, waive the non-compliance and accept the bid

The privilege clause said that "the Ministry reserves the right to reject any or all tenders, and to waive formalities as the interests of the Ministry may require without stating reasons, therefore, the lowest or any tender may not necessarily be accepted."

As the Court of Appeal noted, this paragraph "constitutes both what are often referred to in cases involving the law of tender as a "privilege clause" (the right not to accept the lowest or any

tender) and a "discretion clause" (the right to waive formalities as the interests of the MTO may require)."

The Court held that this paragraph allowed, but did not require, the MTO to waive a "formalities":

> "In my view, where an owner has the discretion to waive formalities and exercises that discretion reasonably and in good faith, it cannot be sued for failing to waive a "formality" and entering into a Contract B with a non-compliant bidder."

In arriving at this conclusion, the Court of Appeal apparently considered that "formalities" are what might be called "informalities", that is, something that is a mere formality and not significant.

Accordingly, the Court of Appeal held that the MTO had the right not to waive the non-compliance in Rankin's bid.

5. **A formality which could be waived was one which arose honestly and which does not substantially affect cost or the resulting comparative bids and maintains the integrity of the bidding process.**

The Court of Appeal gave two reasons for its decision that the non-compliance was in respect of a formality which could have been waived by the MTO.

First, it applied what it called the 'generous view of "informality"' of the Supreme Court of Canada in ***Double N Earthmovers*** and then held that the non-compliance could have been waived:

> "because of the appellant's honest intention to use Canadian steel and the fact that the outcome, and the cost to the MTO, would have been the same had it declared that the H-Piles are imported steel. The price preference for Canadian steel was a mechanism for evaluating the competing bids. It did not affect the actual price to be paid by MTO to the successful bidder. And the MTO expected that American H-Piles would be used in the project. The appellant's non-compliance "did not materially affect the price or performance of Contract B" [quoting from *Double N Earthmovers*], and therefore amounts to an informality…."

The Court of Appeal then gave a **second reason**: waiving the non-compliance maintained the integrity of the bidding process. It said:

> "I would add the following. Maintaining the integrity of the public bidding process is thought to encourage more bidders to participate in the process. And increased competition, in turn, promotes the public's interest in the government obtaining the best price possible. Here, the tender process was essentially fair and the

appellant's bid was materially less costly to the public purse. Given this, in my view, a balancing of the public interest in promoting the integrity of the public bidding process so that the government can generally obtain the best prices, against the public interest in the MTO obtaining the best price possible in this particular case for widening Highway 406, also weighs in favour of the conclusion that the appellant's non-compliance was a formality".

6. The owner could not waive a material non-compliance

On its interpretation of the invitation to tender, the Court of Appeal held that the MTO could not waive a non-compliance that was not a mere formality:

> "In my view, a requirement that the MTO would not accept bids that were non-compliant, if the non-compliance amounted to more than a "formality", can in this case be implied in Contract A on the basis of the presumed intention of the parties."

The Court of Appeal held that, by not waiving the non-compliance in Rankin's bid, the MTO had adopted the more cautious route in a sensible effort to avoid litigation.

7. **The owner was not obliged to notify bidders of non-compliant bids within 10 days**

The tender documents contained two stipulations, as follows:

> 6.3 Bidders whose Tender has been rejected by the Ministry will be notified of the reasons within 10 days of Tender Opening.
>
> 12.1 The Ministry will notify the successful bidder that the Tender has been accepted within 30 days of the Tender Opening.

Paragraph 6.3 appeared in Part 6 of the tender documents headed Unbalanced Bids and Discrepancies. Paragraph 12.1 appeared in Part 12 of the tender documents headed Contract Award Procedures. MTO did not advise Rankin that its bid was non-compliant within the 10 days. Accordingly, Rankin argued that the rejection of its bid was invalid and MTO was obliged to award the contract to it as the lowest bidder.

The Court of Appeal rejected Rankin's arguments for a number of reasons.

First, it held that paragraph 6.3 only applied to unbalanced bids, not non-compliance:

> "….given that para. 12.1 gives the MTO 30 days to determine the successful bidder, I agree with the trial judge that interpreting para. 6.3 to require the MTO to determine whether it will waive "formalities" and, if not, notify non-compliant bidders, within 10 days of tender opening, makes no sense. To require the MTO to notify all unsuccessful bidders of the reasons why it will not accept their bids

> within 10 days of Tender Opening, would effectively require the MTO to determine the successful bidder within 10 days, rather than 30 days as expressly provided for under para. 12.1."

Second, paragraph 6.3 did not convert an invalid and non-compliant bid into a valid and compliant bid. As the court said, the clause "does not provide that a "rejection" is invalid if the bidder is not notified of the reasons for the rejection within 10 days of Tender Opening."

8. The Exculpatory clause excluded all liability

Paragraph 11.3 of the tender documents said:

> "The Ministry shall not be liable for any costs, expenses, loss or damage incurred, sustained or suffered by any bidder prior, or subsequent to, or by reason of the acceptance or the non-acceptance by the Ministry of any Tender, or by reason of any delay in acceptance of a Tender, except as provided in the tender documents".

The Court of Appeal applied the tests in the Supreme Court of Canada's decision in ***Tercon*** to determine the proper interpretation and enforceability of this exclusion clause. It found that the paragraph was a complete defence to any claim in the present circumstance. Rankin did not argue that the clause was unconscionable or unenforceable due to public policy. Rather it argued that the paragraph did not apply if MTO breached the conditions of tender. The court rejected that argument:

> "The language is in my view clear — both in the paragraph itself and in the context of the Instructions to Bidders as a whole. A bidder presumably would not sue unless it alleged that the MTO had breached a term — express or implied — of the tender documents by accepting another's bid, or not accepting its bid. To interpret para. 11.3 as not applying where a breach by the MTO of the tender documents is alleged would effectively render it meaningless. Paragraph 11.3 is a commercial response to the increased litigation faced by owners arising out of the acceptance, and corresponding non-acceptance, of bids."

The court did say that in some circumstances the "the conduct of the owner in the bid process is so aberrant that it would justify a court's refusal to enforce an exculpatory provision in the tender documents on public policy grounds. This is not such a case."

Comments

The first three principles adopted by the Court of Appeal are helpful clarifications of the tender law relating to Contract A.

Principles 4 to 6 are more contentious since they involve three possible layers of discretion. The first layer involves the determination of the boundary between the two categories. Clearly, the court is hesitant to interfere with the owner's determination that the non-compliance is a mere

formality or is a substantial non-compliance. The second layer of discretion is introduced by the court's finding that the tender documents allow the owner to waive something which is a mere formality. But the third level of possible discretion goes the other way. The court interpreted these tender documents as not giving the owner the discretion to waive material non-compliances. Differently worded tender documents might change either of these latter two discretions, requiring the owner to waive a mere formality or allowing the owner to waive a material non-compliance, but it seems that tender documents would have to be clearly written to achieve the latter result.

Principle 7 involves principles of contract interpretation that were used to rescue MTO from what were less than well-drafted tender documents. Besides arising from an analysis of the different parts of those documents, the principle appears to be based on a distinction between the substantive and procedural provisions of tender documents. The owner's failure to follow the procedures – giving the bidders notice of non-compliance – cannot convert what is a non-compliant bid into a compliant bid.

Principle 8 is probably the most important and contentious. The Court of Appeal appears to have held that the exclusion clause drafted by MTO is the elusive "magic bullet" that removes all the owner's liability arising from breach of any term of a tender. The court was at pains to say that egregious conduct by the owner might, in another case, not be protected by this exclusion clause. But absent such conduct, the court appears to have held that this clause gives the owner complete protection in respect of the tender.

If that is so, then many questions arise. Is there a Contract A at all? What is the consideration for the contractor's bid if the contractor has no effective remedies? If the owner inserts such a sweeping exclusion clause into the tender documents, should the contractor be able to say that there is no Contract A and withdraw its bid? Or is such an exclusion clause so sweeping that it is contrary to public policy or unconscionable from the standpoint of the law of contract formation – something not argued by Rankin. Further cases may have to explore the answers to those questions.

Rankin Construction Inc. v. Ontario, 2014 CarswellOnt 12595, 244 A.C.W.S. (3d) 79

Construction Law – Tenders – Waiver - Non-Compliance – Exclusion Clauses

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