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Thomas Heintzman is counsel at McCarthy Tétrault in Toronto. His practice specializes in arbitration and mediation and litigation relating to corporate disputes, shareholder's rights, securities law, broadcasting/telecommunications and class actions.

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Thomas Heintzman is the author of *Heintzman & Goldsmith on Canadian Building Contracts,* 4th 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:

M.J.B. Enterprises Ltd. v. Defence Construction (1951), [1999] 1 S.C.R. 619 and
Double N Earthmovers Ltd. v. Edmonton (City), 2007 SCC3, [2007] 1 S.C.R. 116-2007-01-25 Supreme Court of Canada

Does A Tender Give Rise To Liability For Negligent Misrepresentation Or Bad Faith?

Can an informal tender process which is not part of a bid depository system give rise to liability for negligent misrepresentation?

Can it give rise to liability for bad faith conduct?

In ***Oz Optics Limited v. Timbercom, Inc.,*** the Ontario Court of Appeal recently answered Yes to the first question, and after agonizing over the second question, decided not to answer it.

The Background

Timbercom issued a purchase order to **Oz** for the purchase on consignment of manual optical products. Those products were part of the equipment to be supplied by Timbercom to **Lockheed Martin** for installation into fighter aircraft. Because Oz did not sign the purchase order the Court held that there was not a contract between the parties and dismissed Oz's claim for payment for manual optical products not used by Timbercom.

Timbercom and Oz also had discussions about the supply by Oz of automated optical products to be similarly supplied by Timbercom to Lockheed Martin. Timbercom repeatedly told Oz that Oz was the sole supplier and there was no competitive supplier.

Unknown to Oz, Timbercom obtained a competitive bid from another supplier. Timbercom advised the competitor that its price was higher than another competitor's price (being Oz), so the competitor reduced its price. Timbercom gave no such competitive "heads-up" to Oz. Then, when Timbercom submitted the two bids to Lockheed Martin, it marked up Os's bid by 72% but only marked up the competitor's bid by 42%. Lockheed Martin accepted the competitor's bid, but its employee testified at trial that, had Oz's bid been the only one, Oz's bid would have been successful.

The Court of Appeal for Ontario held that Tibercom was liable to Oz for negligent misrepresentation. The Court agreed with the trial judge that there was a special relationship between the parties concerning the statements made by Timbercom to Oz. Timbercom's statement that Oz was the sole supplier was a negligent misrepresentation, if not nearly fraudulent, the Court held. The evidence established that Oz had relied upon that statement to its detriment, and that if Oz had been aware of a competitive bid, it would have acted differently by changing its delivery schedule which was the only element in its bid that was less advantageous than the competitor's.

In view of its finding of liability for negligent misrepresentation, the Court of Appeal declined to decide whether Timbercom could be liable under a self-standing duty of good faith. Such liability could arguably result from an inferred contract based on the whole process. The Court noted that the process was not a bid depository system and therefore did not necessarily result in the Contract A - Contract B regime recognized by the Supreme Court of Canada in ***Ontario v. Ron Engineering*****, [1981]** 1 SCR 111 and ***M.J.B. Enterprises Ltd v. Defense Construction (1951)***, **[1999]** 1 SCR 619. Accordingly, a duty of good faith arising from a Contract A relating to the bidding process itself did not necessarily arise.

The Court of Appeal also noted that, in view of ***Martel Building Ltd v. Canada*****, [2000]** 2 SCR 860 and similar cases, the pre-contractual negotiations leading to a tender does not create a general duty of care. However, the Court said that, if a subcontractor is told that it is the sole

supplier, then there is arguably a stronger basis to infer a duty of good faith when "the bidder is unknowingly considered a bidder among many."

Having explored the legal and policy grounds for and against the existence of a duty of good faith in these circumstances, the Court of Appeal declined to decide the issue. The finding of negligent misrepresentation was, in its view, a sufficient basis to dispose of the appeal.

Moreover, the Court was of the view that the torts of negligent misrepresentation and fraud are available to address misconduct during an informal bidding process. Only if and when those torts were not sufficient to deal with liability should a court embark upon the difficult task of deciding if a self-standing duty of good faith arises in the circumstances of the particular tender.

This decision addresses one issue arising from informal tenders but leaves a big question mark around the other. The Court of Appeal has held that, when an owner or contractor engages in a tender process and makes specific statements during the tender process, a special relationship exists between the parties and those statements can lead to liability for negligent misrepresentation or fraud. So care must be taken about any statement contained in a call for tenders. The person issuing the tender may try to avoid the special relationship by stating in the tender that there is no such relationship, but it is unlikely that exclusionary language will avoid liability particularly for fraudulent misrepresentations.

Unanswered Questions

The unanswered questions are whether there is any need for a duty of good faith in an informal tender situation, and if there is, what the basis of that duty would be. The need for a duty of good faith could exist in at least two situations:

First, if the plaintiff's claim does not result from something stated by the party letting the tender, then the torts of negligent misrepresentation and fraud will not be available. But if there has been no statement by that party, what other circumstance could properly give rise to a claim by the plaintiff, especially if there is no duty of care during the pre-tender process?

Second, the plaintiff may recover damages on a more favourable basis under contract law than tort law. If so, the plaintiff may wish to recover damages for breach of an implied contractual duty of good faith and not for negligent misrepresentation.

If there is a need for the duty of good faith, what is its legal foundation? Does any tender, no matter how informal, result in an inferred contract? If so what are its terms? An obligation on the parties to deal with each other in good faith cannot be the only term. Would the court have to invent all the other terms, such as an obligation of the bidder to leave its bid open for some specified period, and if so what period, or the obligation of the party calling for the bid to accept only a complaint tender, and if so, complaint with what? The uncertainties surrounding the proposed contract seem daunting.

The specific circumstances of the particular case will determine all these factors. In one situation, the circumstances may arguably give rise to a special relationship even absent a specific misrepresentation; in another, no such circumstances may exist. In one situation, the dealings between the parties may be sufficiently clear that a Contract A relating to the bidding process may be inferred; in another case, the uncertainty of those dealings may preclude the existence of a Contract A.

In any event, we have heard the alarm bell, but not heard the last word, on the duty of good faith in informal tenders.

Construction Law - Tenders - Negligent Misrepresentation - Duty of Good Faith

***Oz Optics Limited v. Timbercom, Inc.*, 2011** ONCA 714

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