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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, broadcasting and telecommunications, construct and environmental law

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Can An Owner Look Behind A Bid And Find It Non-Compliant?

Is an owner entitled to look behind a bid submitted in response to an invitation to tender and determine whether it is compliant with the terms of the invitation to tender, even though on its face the bid is compliant? And if the owner does so, and determines that the bid is non-compliant, can the owner then disqualify the bid? According to the recent decision of the Ontario Superior Court in ***Rankin Construction Inc. v. Her Majesty the Queen in Right of Ontario,*** 2013 ONSC 139, the answer to both questions is yes.

This decision raises important issues about the discretion of an owner once it decides to look behind a bid. In ***Double N Earthmovers v. Edmonton (City),*** 2007 SCC 3, the Supreme Court of Canada held that the owner is not obliged to go behind a bid which is compliant on its face, to determine whether the bid really complies with the tender documents. The ***Rankin*** decision deals with the implications for the owner and the bidders if the owner decides to do so.

The Background

In 2005, Rankin was a pre-qualified bidder in an invitation to tender issued by the Ministry of Transportation of Ontario (MTO) for the widening of Highway 406 near Niagara Falls, Ontario. The tender package provided an advantage for using Canadian domestic steel. It did so by allowing a 10 per cent discount to the tender price to arrive at the Adjusted Total Tender. That adjustment did not apply, however, to imported steel and each bidder was required to declare the amount of imported steel in its bid.

The MTO specifications called for the supply of H-Piles made of rolled steel. The H-Piles were to be driven into the ground to provide support for bridge structures. Rankin did not declare the H-Piles to be made with imported steel. In fact, they were manufactured in the United States. The value of the H-Piles in Rankin's bid was about $500,000 out of a total adjusted bid of about $18.6 million or about 2.7 per cent. All the other bidders declared the H-Piles to be made of imported steel.

The tenders were opened and Rankin's bid was the lowest, both as to the total tender and the adjusted tender. The MTO then received complaints that Rankin's bid was non-compliant due to its failure to declare that its H-Piles were made of foreign steel.

MTO's practice was not to ask for supporting documents or other proof of bidder's declarations. Apart from one previous occasion, the MTO had never reviewed a bidder's declaration of imported steel. Nevertheless, a local MTO investigator undertook an investigation and reported that the contract should be awarded to Rankin. That report was not accepted by the local MTO manager who recommended that Rankin's bid be rejected and the contract be awarded to the next highest bidder. That recommendation was accepted and after consultation with the MTO's legal department and the contract was awarded to the next highest bidder. No reasons for rejecting its bid were given to Rankin.

The MTO witnesses testified that Rankin's bid was rejected to maintain the integrity of the bidding process. While the MTO had, under its Instructions to Bidders, the right to reject any or all tenders and to waive irregularities "in the Ministry's interest", the MTO witnesses said that a waiver of the non-compliance would compromise the bidding process.

The MTO argued that Rankin's bid was non-compliant and accordingly, no Contract A came into being under ***Ron Engineering*** formulation. Therefore, MTO asserted that it owed Rankin no contractual duties. Rankin argued that its bid was compliant on its face and that MTO was not

entitled to investigate Rankin's tender and then, based on that investigation, rule that tender to be non-compliant.

Reasons of the Trial Judge

The trial judge noted that the situation in the present case was the opposite of that presented in ***Double N.*** There, the Supreme Court held that the owner was not obliged to go behind an apparently compliant bid. Here, the MTO had gone behind Rankin's bid and investigated its compliancy and the issues were "whether an owner is disentitled to carry out such an investigation, and whether, if it does so at the instance of a rival bidder, [the owner] thereby breaches an obligation to the low bidder whose bid is found to be non-compliant as a result of the investigation."

The trial judge held that the contract formed in the tender process, Contract A in the ***Ron Engineering*** analysis, should not be found to contain a term prohibiting the owner from "investigating whether a bidder is capable of fulfilling the material terms of its bid, in the face of information that it may not be." In his view, such a term would not

> "promote the integrity of the bidding process. Public sector owners, such as the MTO in this case, have a long-term interest in protecting of the integrity of the bidding process. Their concern is not necessarily restricted to the individual project under consideration, but with the maintenance of a vigorous and competitive tendering process on future projects. Anything which would dissuade potential bidders from participating in the bidding process in the future, due to a perception of unfairness in the process, would not be in the public interest."

The trial judge found that there was nothing in the MTO's procurement policies which precluded the MTO from investigating Rankin's bid, even if it was not MTO's practice to do so. In addition, the trial judge said that, even if those policies had that effect, Rankin could not rely on them because the terms of the tender were governed by the tender documents, not MTO's policies. Unless the MTO's procurement policies were incorporated into the tender package, a deviation from those policies did not give rise to any breach of duty to a bidder. Those policies were not expressly incorporated into the tender package, and an implied incorporation would "give rise to unnecessary uncertainty and potential confusion and would therefore be unjustified." Accordingly such incorporation would satisfy neither the business efficacy nor officious bystander tests for implying a term into the tender contract.

The trial judge found that Rankin's declaration of imported steel was "crucial" to the determination of the lowest bidder. The process for declaring imported steel was "integral and fundamental" to the tender scheme. Even though the resulting price difference was only $50,000 (10 per cent of the $500,000 value of imported steel H-Piles) and even though Rankin

would still have had the lowest adjusted bid and total bid if H-Piles had been properly declared, that was not sufficient, for the following reasons:

> "[The] materiality [of the non-compliance} is to be determined objectively having regard to the impact of the defect on the tendering process and the principles and policy goals underlying the process. The focus is not on the impact of the defect on the *outcome* of the particular tender process, but on the impact on the process itself, including the reasonable expectations of the parties involved in the process, including rival bidders….three elements [are] to be considered on an assessment of materiality of the non-compliance, namely, whether it undermines fairness of the competition or the process of tendering, impacts the cost of the bid or performance of Contract B, or creates a risk of action by other (compliant) bidders. This list is stated disjunctively, and accordingly, not all of them need to be present in order for there to be a finding of material non-compliance.....To require the MTO, at the stage of determining compliance with the tender documents, to undertake a consideration of whether an inaccuracy in the Declared Value of Imported Steel will in fact alter the ultimate outcome of the tender process, as a pre-condition to a finding of material non-compliance, would, in my view, be inappropriate and could introduce an element of uncertainty to the process and the imposition of an unjustified risk on the MTO."

The trial judge then found that the owner, MTO, was "incapable of accepting a bid containing a material non-compliance" and that, therefore, "once the material non-compliance in the Rankin bid was discovered, the MTO was bound to rule it to be non-compliant and therefore not capable of acceptance."

The trial judge also dealt with a paragraph of the tender documents which required the MTO to notify bidders whose tenders had been rejected within 10 days of the opening of bids. He found that this paragraph did not apply because, by its heading it only applied to unbalanced tenders and discrepancies and not to non-compliant bids, and because the Rankin tender was not "rejected" but simply non-complaint.

The trial judge found that, in any event, the MTO was protected by an exclusion clause which read as follows:

> "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 the acceptance of a Tender, except as provided in the tender documents."

The trial judge applied the reasoning of the Supreme Court of Canada in ***Tercon Contractors Ltd. v British Columbia (Transportation and Highways),*** [2010] 1 S.C.R. 69 and held that, unlike in that case, the exclusion clause covered MTO's alleged misconduct and was a complete defence. Applying the unconscionability and public policy test in ***Tercon,*** the trial judge found that the exclusion clause was not invalid. In his view, even if the MTO erred in investigating whether Rankin's bid was compliant, it did so, "not to subvert the integrity of the tender process in order to gain some unfair advantage, but rather to promote the integrity of the process." Accordingly, its conduct was protected by the exclusion clause.

Comments

The background and the reason of the trial judge have been dealt with at some length because they address many of the "hot button" issues relating to tenders. Here are a few issues which arise by comparing the ***Rankin*** decision to the decision of the Ontario Court of Appeal in ***Bot Construction Limited v. Ontario (Transportation*)**, 2009 ONCA 879:

1. The trial judge found that the owner was prohibited from accepting Rankin's tender once it found it to be non-compliant. In ***Bot,*** the Court of Appeal was, again, dealing with a MTO tender and foreign steel components. The successful contractor, Cavanaugh, specified welded steel components in its bid when the tender package called for rolled steel. The Divisional Court held that this change made Cavanagh's bid non-compliant, in the same fashion as the trial judge did in the ***Rankin*** case. The Court of Appeal in ***Bot*** reversed the Divisional Court and held that a standard of reasonableness should be applied to the MTO's decision and that "the decision that Cavanagh was compliant with the tender process fell within "a range of possible, acceptable outcomes that are defensible in respect of the facts and law."

2. The decision in ***Rankin*** may be at odds with the decision in ***Bot*** on another point, namely the degree to which the non-compliancy mattered.

Here is what the Court of Appeal said in ***Bot****:*

> "The amount of steel required for the bridge beams was small (1.14 per cent of the total steel required for bridges by the Contract) and minor (0.26 per cent of the value of the Contract). … Even if the use of Canadian steel required a change in the project specifications, this change would be a minor one and would be readily approved. Finally, even if Cavanagh had declared imported steel for use on the bridge beams, it would not have affected the order of bidders because of the large gap ($2,259,000 in the total bids,

$2,230,000 in the adjusted bids) between Cavanagh, the lowest bidder, and Bot, the second lowest bidder".

These are the sort of factors that Rankin pointed to, unsuccessfully, so far as its bid was concerned.

3. But where ***Bot*** and ***Rankin*** may come together is the different effect of a stated or unstated non-compliance. In *Bot*, the successful bidder expressly and openly bid Canadian welded steel and asked for it to be accepted within the bid or that any non-compliancy be waived by the owner. In *Rankin,* Rankin's tender contained a non-compliancy which was not apparent on the face of its bid. That non-compliance might have slipped through a *Double N* type of bidding process, namely one in which the owner does not examine into the bids which on their face meet the requirements of the bid.

So a bidder faces a choice if its tender contains a potential non-compliancy:

> If the bidder openly states the compliancy issue, then the bidder faces the possibility of being disqualified. But if the issue is accepted by the owner as not involving a non-compliancy, or if the non-compliance is waived by the owner, then the owner's decision to accept the tender may be upheld as reasonable, according to *Bot*.
>
> If the bidder does not openly state the non-compliance issue, then the bid may be accepted as being apparently compliant, under ***Double N*****.** But if the owner does investigate and decides that the bid is non-complaint, then its decision may be upheld, according to ***Rankin*****.**

See *Heintzman and Goldsmith on Canadian Building Contract*, 4th ed. chapter 1, part 1(f).

***Rankin Construction Inc. v. Her Majesty the Queen in Right of Ontario*, 2013 ONSC 139**

Building Contracts – Tenders – Non-Compliant Tender - Waiver

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