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

Heintzman ADR

Arbitration Place

Toronto, Ontario

tgh@heintzmanadr.com

416-848-0203

www.constructionlawcanada.com

www.heintzmanadr.com

Thomas Heintzman specializes in alternative dispute resolution. He has acted in trials, appeals and arbitrations in Ontario, Newfoundland, Manitoba, British Columbia 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, broadcasting and telecommunications, construct and environmental law

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.

Is There An Intermediate Position Between An Invitation To Tender And A Request For Proposal?

Not all requests for bids issued by an owner are the same. A request for bids that will be binding on the chosen bidder is usually referred to as an Invitation to Tender. On the other hand, a request for bids which is not binding on the chosen bidder is usually referred to as a Request for Proposals (or RFP). The RFP results in proposals which can be considered by the owner but are not binding on the bidder.

But how do you really tell an Invitation to Tender from a Request for Proposals? What sort of clause in the owner's request results in a RFP rather than an Invitation to Tender?

And is there in intermediate position in which the owner and bidders do not have an obligation to enter into a contract but only an obligation to negotiate exclusively with each other for a period of time?

This was the issue faced by the Ontario Superior Court in ***Everything Kosher Inc. v. Joseph and Wolf Lebovic Jewish Community Centre***.

Facts

In 2006, the Campus issued an RFP for food services and the lease of a kitchen at a community centre which the Campus was building in north Toronto. When fully developed the community centre was to include a private high school owned and run by a separate organization (the Academy). When the 2006 RFP was issued, the construction of the community centre had not begun, and the 2006 RFP stated that it was subject to design change.

The 2006 RFP stated that the Campus might reject any proposal or might negotiate with more than one party responding to it. The RFP contained a provision which stated as follows:

> …The submission and acceptance of any proposal does not obligate [the Campus] to enter into a binding legal contract with the successful proponent, nor does acceptance of the proposal imply that a contract has been entered into with [the Campus]. The implementation of the project by the successful proponent is dependent upon entering into a separate legal contract with [the Campus], to be negotiated and signed prior to implementation of the project.

The Plaintiff made a proposal which was favoured by the Campus. The parties entered into an exclusive 90 negotiation period. A final agreement was never reached, but the parties continued to negotiate until October 2007.

The Plaintiff began providing food services to the Academy which commenced operations in the campus premises in the fall of 2007. The high school submitted a Memorandum of Understanding to the Plaintiff but that MOU was never signed.

By 2011, the Campus' plans had changed and it issued a new RFP for the provision of food services to the community centre. The Plaintiff protested that it already had a contract for those services. However, it did participate in the 2011 RFP, but was not successful. After the issuance of the 2011 RFP, the Plaintiff continued to provide food services to the Academy but those arrangements were terminated in 2012. The Plaintiff then sued the Campus to assert that it held a contract to provide for food services to the community centre.

Decision of the Trial Judge

The trial judge held that the 2006 RFP did not lead to a contract between the parties for the provision of food services. The trial judge said that the 2006 RFP:

> "made it clear that it was not an offer that would lead to a firm acceptance. Rather, as the courts have said elsewhere, the 2006 RFP was "a request for proposals and nothing more. The prize at the end of the exercise was…the opportunity to negotiate for a contract"…. While the 2006 RFP created an obligation to negotiate terms over a 90 day period, it presented to the Plaintiff nothing more than an opportunity to attempt to conclude an agreement. It was not itself a binding document.

The trial judge also concluded that the negotiations after the 2006 RFP did not lead to a written agreement for the provision of food services which was a specific requirement of that RFP before any contract could arise. The final draft agreement which was exchanged in October 2007 was not signed because there were still terms and issues to be concluded.

Discussion

The challenge of this case is to fit it into the **Contract A - Contract B** analysis under the ***Ron Engineering*** decision of the Supreme Court of Canada. Did the trial judge find that a contract arose for the tender process (Contract A in Canadian tender law under the ***Ron Engineering***), but that no Contract B arose from the bidding process? Or did the trial judge find that there was no Contract A because the Contract B that was being offered by the owner was too indefinite for Contract A to arise?

The first sentence of the provision in the request issued by the owner referred to above into bid documents appears to be very similar to a standard privilege clause. A privilege clause is usually inserted by owners to state that the owner has no obligation to accept the lowest or any tender. Such a privilege clause would not normally preclude a Contract A arising in a true tender situation, namely a contract for the purpose of the tender. That contract would normally carry with it the implied terms discussed in many decided cases, including an obligation on the owner to act fairly and not accept non-compliant bids. A privilege clause may allow an owner to accept a bid other than the lowest bid and not to accept any bid if the privilege clause specifically allows that to happen.

Interpreted as a privilege clause, the provision referred to above should have been sufficient for the court to decide the case. Based upon the owner's original request, the owner had no obligation to accept any bid, including the Plaintiff's bid

But the plaintiff had a second agreement. It said that the conduct after the initial request by the owner resulted in, or evidenced, a contract. By selecting the Plaintiff's bid as the preferred bid and by negotiating with the Plaintiff, the owner had moved beyond the privilege clause. It was no longer a question of the owner's right to not enter into any contract. The owner had effectively waived the privilege clause and entered into a contract with the Plaintiff by its conduct.

To address this point, the court seems to have adopted a hybrid conclusion. The trial judge seems to have concluded that, yes, there was an obligation between the parties. But that obligation was to negotiate with each other exclusively for a period of 90 days, not a final contract for food services. That "exclusive negotiation" obligation explained the subsequent conduct of the parties. And when no final contract resulted for those negotiations, then there were no continuing contractual relations between the parties.

There is no question that a contract to negotiate exclusively with one party is a binding contract. The contract is not too indefinite to be enforced because it requires negative conduct, that is, no negotiation with another party, and it sets a specific period for that negative conduct to occur. But what an "exclusive negotiation" contract cannot compel is a specific result, a specific substantive contract at the end of the negotiation period.

In this sense, the trial judge may have been incorrect, and contradictory, to say that "while the 2006 RFP created an obligation to negotiate terms over a 90 day period, it presented to the Plaintiff nothing more than an opportunity to attempt to conclude an agreement. It was not itself a binding document." The obligation to exclusively negotiate with a party can be a binding contract. But it is only a contract not to negotiate with other parties. It is not a binding contract to conclude an agreement on the substance of the negotiations. In the present case, it was not a binding contract for the food services contract.

The present case creates, therefore, a potential intermediate or hybrid position between the normal Invitation to Tender and RFP, or between Contract A and Contract B. Under this hybrid position, a Contract A does arise for the bidding process. That Contract may well contain the usual implied terms that apply to Contract A. But the Contract B that the owner is offering is not a substantive building or supply contract on specific terms. Rather the owner is offering an "exclusive negotiation" contract for a specific period of time. That sort of Contract B is specific enough to allow Contract A to come into existence. But it does not compel the owner to agree to any specific terms for the final supply or building contract, except to the extent that those terms are stated in the original request.

The advantage to a bidder of this sort of arrangement is that it means that the Contract A-Contract B analysis applies to the original request by the owner. That analysis requires the owner to comply with the implied terms of Contract A, including the obligation to treat the bidders fairly. The disadvantage to a bidder is that, if the bidder is successful, the bidder will only obtain an exclusive right to negotiate with the owner for a specific period of time. But this disadvantage may not be a severe one since that sort of negotiation may be the reality in a tender process involving a privilege clause.

The advantage to the owner of this arrangement is that the result of the process is only an obligation to negotiate with one or a number of preferred bidders for a specific period of time, but not to agree to any specific terms other than those mandated in the original request. This arrangement gives the owner the flexibility to deal with one or a few bidders and arrive at the best arrangement. The disadvantage may be that, during the initial request, the owner will have

to abide by the Contract A obligations, including the obligation of fairness and the obligation not to deal with a non-compliant or higher priced bidder unless a privilege clause expressly permits it to do so.

This case demonstrates that the Contract A - Contract B analysis of ***Ron Engineering*** is not just a strait jacket as is often assumed. The analysis permits various types of Contract A and Contract B to emerge. And it permits variants between a strict Invitation to Tender and a strict RFP.

The genius behind ***Ron Engineering*** is that it separates the bidding contract - Contract A - from the contract emerging from the bidding contract. It enables the court to imply into the bidding contract the necessary elements to allow the bidding process to proceed fairly. But it allows the contract emerging from the bidding process to be whatever contract the bidding process may contemplate.

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

Everything Kosher Inc. v. Joseph and Wolf Lebovic Jewish Community Centre, 2013 ONSC 2057

Building Contract - Tenders

Thomas G. Heintzman O.C., Q.C., FCIArb **April 29, 2013**

www.heintzmanadr.com
www.constructionlawcanada.com