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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.

He has been counsel in many important actions, arbitrations, and appeals before all levels of courts in many Canadian provinces as well as the Supreme Court of Canada.

Thomas Heintzman is the author of *Heintzman & Goldsmith on Canadian Building Contracts*, 4<sup>th</sup> 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

## **Can A Contractor Use Its Own Mistakes To Withdraw Its Bid?**

A contractor's worst nightmare is making a mistake in a tender and being stuck with a low bid. The next worse nightmare is submitting a winning bid but one which contains errors which arguably make the bid non-compliant.

What happens when both occur? Can the contractor get out of its low bid by its own errors? That is the issue that the Manitoba Court of Queen's Bench recently dealt with in ***Manitoba Eastern Star Chalet Inc. v. Dominion Construction Co Inc.***

The Supreme Court of Canada has revolutionized the law of tender by its Contract A/Contract B regime for tenders. Under that regime, Contract A is the contract formed by the contractor submitting a tender in response to the owner's invitation to tender, and Contract B is the subsequent construction contract awarded by the owner. Contract A converts what appear to be unilateral acts in the tender process into an enforceable contract.

The courts will typically imply terms into Contract A. Thus, the owner will generally have an implied duty not to accept a non-compliant bid absent a term in the invitation to tender to the contrary. The contractor will have a duty not to withdraw its bid during the period stated in the invitation for the owner to accept a bid.

But what happens when the contractor's bid is allegedly non-compliant due to the contractor's own faulty bid, and the contractor wants to withdraw it because it is seriously underpriced? Can the contractor do so? The Manitoba Queen's Bench has said No, unless the non-compliance is clear from the face of the bid. In its decision, the Court has provided an extensive and useful analysis of the law on this subject.

### **The Background**

Dominion was one of three bidders on an extension to a seniors housing complex being constructed by Manitoba Eastern Star Chalet. Dominion's bid was more than \$600,000 under the next bid on a project worth about \$2.5 to \$3 million, or about 25% under the next bidder.

When it was notified that its bid was accepted, Dominion sought to withdraw the bid on two grounds.

First, that it had failed to provide a resolution of its board of directors authorizing the signatory to the bid to sign it.

Second, that its bid failed to refer to Structural Addendum #4 included in the tender documents.

Dominion said that these items were required by the invitation to tender, and therefore its bid was non-compliant and incapable of acceptance by the owner. Admittedly, it was Dominion's own fault that these items were omitted, but Dominion maintained that the Contract A regime applicable to tenders precluded the owner from accepting its bid.

The trial judge rejected Dominion's position. In the course of his reasons, he examined the Contract A/Contract B law, all the way from the 1981 decision of the Supreme Court of Canada in ***Ron Engineering*** up to its 2007 decision in ***Double N Earthmovers***. The trial judge agreed that, unless the invitation to tender states otherwise, Contract A requires the owner to only accept a compliant bid. Therefore, if Dominion's bid was truly non-compliant under Contract A, then the owner could not accept it and Dominion could withdraw it, even if that non-compliance was entirely due to Dominion's fault.

The trial judge noted that an attempt by a contractor to withdraw its bid based on non-compliance due to its own fault gives rise to "mischief" which "effectively reward[s] a bidder who has made a mistake in its bid, but then can utilize its non-compliance for the purposes of not honouring a contract."

Nevertheless, the court held that logic and previously decided cases led to the conclusion that a contractor can do exactly that, if the circumstances permit it to do so.

However, the court held that the circumstances did not permit Dominion to withdraw its bid. As to Structural Addendum #4, the court held that it was effectively included in Dominion's bid, when the whole bid was properly read. In the alternative, the order of precedence in the contract documents overcame any error arising from the absence of this addendum.

In addition, the amount of the cost of this addendum was insignificant in relation to the total cost of the project. In the result, Dominion's bid was substantially compliant with the invitation to tender with respect to this issue.

As to the failure of Dominion to file with its tender a corporate resolution authorizing the signatory to sign the bid, the court found that Dominion had never done so in any bid, even when the invitation to tender required such a resolution. The person signing the bid for Dominion had authority to sign the bid and that person intended to sign and submit the tender on behalf of Dominion. Dominion's corporate seal was affixed to the tender. The Instructions to Bidders stated that a non-compliant bid could be accepted at the discretion of the owner. Even giving that discretion a narrow scope, the trial judge held that the non-compliance was not substantial and fell within the owner's discretion to accept it.

The trial judge also found that the amount by which Dominion's bid was less than the next bid was not a matter which ought to have alerted the owner to any non-compliance or other reason not to accept the bid. Any mathematical error in Dominion's bid was not apparent on the face of the bid. The trial judge held that "the divergence in the bid numbers did not raise the need for an investigation into the reasons, nor was there a duty to do so".

At the end of the reasons, the trial judge returned to the issue of whether Dominion was entitled to rely on its own fault to escape its bid. As noted above, early in the reasons, the trial judge held that, based on logic and previously case law, a contractor should be able to do so. But at the end of the reasons, the trial judge said:

"If there is any error in my analysis or my findings, I am satisfied that such an error would be sufficiently small that it is incumbent on the court to protect the integrity of the tendering process by not allowing Dominion to point to these alleged incidents of non-compliance to resile itself from a bid which it fully intended when it was submitted to be compliant, to be binding, and to be accepted."

This statement is strong evidence of the inclination of courts to ensure that the tendering process is not undermined by the faulty and unfair conduct of either the owner or the bidders. If a bidder asserts that it may escape the consequences of its own faulty bid due to non-compliance, then the court will scrutinize the alleged non-compliance very, very carefully. The court will place a high burden on the bidder to demonstrate that the non-compliance is so material and substantial as to be a true non-compliance and one not falling within the discretion of the owner to accept non-compliant bids, however that discretion is expressed in the tender documents.

This decision is useful in three other respects.

First, it contains a very helpful collection of the cases that deal with whether a contractor has a right to withdraw from its own faulty bid due to non-compliance.

Second, it addresses two circumstances in which this court held that the non-compliance was not substantial: failure to include reference to drawings (and the impact of the contractual order-of-preference provision on that failure), and the failure to provide a corporate resolution authorizing the execution of the bid. Anyone dealing with circumstances like these may look to this case for assistance.

Third, the decision effectively assumes, or holds albeit in *obiter* in the final result, that a bidding contractor may withdraw such a bid. It is, accordingly, an important update on that principle.

This decision does not address the situation that might arise if the contractor purposefully or recklessly puts a material non-compliant term into its bid, to protect itself from a possible mistake in its bid and hoping to negotiate around that non-compliance if it is awarded the contract. Whether a contractor would ever be so reckless as to do so is another matter. Whether a contractor could rely on that sort of non-compliance will await another day.

### **Tenders – Non-Compliance – Withdrawal of Bid**

*Manitoba Eastern Star Chalet Inc. v. Dominion Construction Co Inc., 2011 MBQB 320.*

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