Thomas G. Heintzman, O.C., Q.C.
McCarthy Tétrault
Toronto, Ontario
www.mccarthy.ca

416-362-1812

theintzm@mccarthy.ca

www.constructionlawcanada.com

www.heintzmanadr.com

Thomas Heintzman is counsel at McCarthy Tétrault in Toronto. His practice specializes in litigation, arbitration and mediation 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 *Goldsmith & Heintzman on Canadian Building Contracts,* 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Goldsmith & Heintzman 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

When and How is a Subcontractor Bound by its Tender in a Bid Depository System?

The process by which subcontractors' tenders are accepted in a bid depository is fundamental to the efficacy of that system. If that process does not effectively bind the subcontractors, then the subcontractors will be able to unilaterally withdraw their bids later. The British Columbia Supreme Court addressed this issue in its recent decision in ***Civil Construction Co Ltd v. Advance Steel Structure Inc.***

This case required the court to unscramble the "Contract A - Contract B" legal structure created by the Supreme Court of Canada in ***Ontario v. Ron Engineering & Construction (Eastern) Ltd,*** [1981] 1 SCR 111 and apply it to the relationship between a contractor and subcontractor. In *Ron Engineering,* a distinctly Canadian legal structure was created for contracts between the owner and the contractor in a bid depository system. Under that structure, there are two contracts which are potentially formed in such a bidding system. The first contract, **Contract A**, is the contract formed by the submission of a bid. That contract is a judge-made creation arising from the wording of a bid depository system. It is based upon and regulates the bid system itself and requires the bidding contractor to leave its price in place for the duration of the bid and requires the owner to award the contract only to a compliant bidder. The second contract, **Contract B**, is the ultimate construction contract which may be entered into if the bidder is successful.

That process is workable at the owner-contractor level but becomes more difficult to apply at the contractor-subcontractor level. Nevertheless, in ***Naylor Group Inc. v. Ellis-Don Construction Ltd***, [2001] 2 SCR 943, the Supreme Court held that the same structure applies to the relationship between a contractor and subcontractor when the subcontractor files a bid in a bid depository system and the contractor carries that bid in its bid to the owner.

What Binds a Subcontractor to a Bid?

In ***Naylor v. Ellis-Don***, it was the contractor, Ellis-Don, which refused to award the subcontract to the subcontractor, Naylor, whose bid it carried in its bid to the owner. So the dispute dealt with whether the contractor was in breach of its obligations, not whether the subcontractor was. The Supreme Court held that, by carrying the subcontractor's bid in its own bid, a **Contract A** was created between the parties which "required the successful prime contractor to subcontract to the firms carried in the absence of a reasonable objection." (My emphasis added).

In the Ontario Court of Appeal, the result was stated somewhat differently. There the Court of Appeal said: "Thus, unless the successful prime contractor has a reasonable objection to the subcontractor it has proposed, the prime contractor must communicate its acceptance of the subcontractor's bid." (Again, my emphasis added, for comparison purposes).

In ***Civil Construction v. Advanced Steel***, it was the subcontractor that refused to adhere to its bid. And it said that its bid had not been accepted by the contractor. In these uncharted waters, what is the right result under the *Ron Engineering* structure, or is the structure being bent so out of shape that it cannot apply? What event binds the subcontractor to its bid, a communicated acceptance or the filing of the contractor's bid?

Civil Construction was a bidder as the general contractor in a tender by the City of Richmond, British Columbia for the construction of a drainage pump station upgrade. Advanced submitted an unsolicited bid dated June 10, 2009 to Civil Construction for the structural steel subcontract work. In its bid, Advanced stated that its bid was "valid for acceptance for the next 30 days and

valid for delivery within 90 days after acceptance". Civil incorporated Advanced's bid into its own bid dated June 10, 2009 to the City of Richmond.

On July 10, 2009, Civil was advised by the City that it was the successful bidder. Civil's project manager testified that, on that same day, he called each of the subcontractors, including Advanced, to advise them that they were named as sub trades in its tender submission. On July 13, 2009, the City wrote to Civil to formally award the general contract on the project to Civil, and Civil wrote to Advanced on the same day to award it the structural steel subcontract.

Advanced refused to enter into the subcontract for two reasons:

First, it said that Civil's acceptance on July 13, 2009 of Advanced's bid of June 10, 2009 was outside the 30 days stipulated in that bid.

Second, it said that Civil's acceptance of its bid contained conditions not set forth in its bid, and therefore amounted to a counter-offer, which Advanced refused to accept.

Civil proceeded to hire another structural steel subcontractor and sued Advanced for the extra cost of that subcontract.

The Court rejected both of Advanced's arguments

First, it held that the relevant acceptance by Civil of Advanced's bid occurred on June 10, 2009. That acceptance occurred by reason of Civil including Advanced's bid in Civil's own bid to the owner. By doing so, Civil created the Contract A with Advanced under the bid depository system.

Under that system, the B.C. Court held that Advanced's bid was accepted by Civil under Contract A once that bid was submitted by Civil as part of its bid to the owner. Relying on previous decisions in the Supreme Court of Canada and Alberta, the Court held as follows:

> "[C]ontract A is formed when a subcontractor tenders in response to a general contractor's invitation and the general contractor incorporates that bid as part of its tender to the owner. Under contract A a subcontractor may not withdraw its tender for a set period and must enter contract B upon acceptance of its bid, which is when the general contractor's bid with the subcontractor's tender included is accepted by the owner.
>
> The general contractor's obligation to a subcontractor under contract A arises once the general contractor chooses to carry the subcontractor's bid in its tender to the owner.
>
> In return for the subcontractor being bound by its bid, the general contractor, upon acceptance of its bid, which includes the subcontractor's bid, is obliged to enter into a construction subcontract B with the subcontractor."

The Court accordingly held that, since Civil had included Advanced's bid in its own bid on June 10, 2009, the relevant acceptance had occurred within the 30 days set forth in Advanced's bid. In effect, the Court interpreted the words "valid for acceptance" in Advances' bid as meaning "valid for acceptance for Contract A, not Contract B". The Court did not refer to any communication of that acceptance by Civil to Advanced, or any necessity for such a communication.

Second the Court also held that Civil's purported addition of further work in the subcontract was not permissible under the Contract A system. Therefore, Civil and Advanced were bound to enter into a Contract B that conformed to the bid, and the additional work specified by Civil was ineffective and Advanced was bound by a subcontract which did not include that additional work. Accordingly, Advanced was liable in damages to Civil based upon that subcontact.

Two Disquieting Features:

While this decision is the common sense result of a bid depository system, it does have two disquieting features.

First, when the contractor includes the subcontractor's bid in its tender to the owner, should the contractor be obliged to tell the subcontractor, at that time, that the latter's bid is included in the contractor's tender?

Normally, an acceptance only occurs when the acceptance is communicated to the offeror. There could be many subcontractors who tender for the work. If there is no communication from the contractor to the subcontractor when the contractor submits its bid, should the subcontractor be presumed to know that its bid is the one which has been accepted for inclusion in the general contractor's bid?

As noted above, in ***Naylor v. Ellis-Don***, the Ontario Court of Appeal said that the contractor "must communicate its acceptance of the subcontractor's bid" to the subcontractor. But what if it doesn't? Does that let the subcontractor off the hook? And while the Supreme Court said in that case that Contract A "required the successful contractor to subcontract to the firm carried", is the subcontractor similarly bound to proceed with the subcontract in the absence of an express and timely acceptance by the contractor?

The courts can, of course, create exceptions to the normal rule that an acceptance occurs when it is communicated to the offeror. Those exceptions are based upon business efficacy and the presumed intent of the parties. One such exception is the old rule that a posted acceptance is deemed to occur at the time of posting, not the time of receipt.

The Court Constructed a New Exception for Subcontractors

It appears that in the present case, the court constructed a new exception for subcontractors' bids in the bid depository system. According to this decision, the acceptance of a subcontractor's bid for purposes of Contract A occurs when the contractor includes the

subcontractor's bid in its own bid, even though that is not communicated to the subcontractor. The real question is whether that is a good rule, and if it is, whether the rule should be specifically set forth in the bid documents. Otherwise, it could be argued that the contractor should be required to notify the specific subcontractor whose bid has been included in the contractor's bid to the owner, so that the subcontractor knows that its bid has been accepted for the purpose of Contract A.

For the moment, and based on this decision, contractors and subcontractors may proceed on the basis that if a subcontractor states a time for acceptance in its bid, then that statement will be taken to mean the time in which the contractor has to insert that bid into its own bid to the owner, that there is no need for the contractor to advise the subcontractor that that has occurred, and that it is up to the subcontractor to inquire, if it wishes to know, whether its bid has been included in the contractor's bid.

Warning to Contractors:

The other question which is raised by this decision is whether a subcontractor can avoid this result by a more specific tender. Can the subcontractor specifically state in its bid that its offer of a construction contract (ie: Contract B) must be accepted within a specific period of time, and a time period shorter than the contractor's bid period? In other words, could the subcontractor specifically state that its bid could only result in a construction contract if that construction contract is entered into within a specific period of time which is less than the bidding process allows?

The short answer is that such a bid is non-compliant with the bid depository system and Contract A under the ***Ron Engineering* structure**. This answer follows from the requirement in Contract A that the subcontractor keep its bid open during the bid period and enter into Contract B on the terms set forth in the bid, that is, up to the time the contract is awarded and a reasonable time thereafter. But if this is the right answer then contractors will have to be alert to ensure that any subcontractors' bids they receive do not have such a short fuse in them, and if they do, to disqualify them from the bidding process.

Advanced may have intended to raise this question in the present case. But the court did not answer the question by holding that Advanced's bid was non-compliant with the terms of the bid. Rather, it interpreted the word "valid for acceptance" in Advance's bid to mean "valid for acceptance under Contract A", and it arrived at that conclusion by reference to the bid depository system and *Ron Engineering*. It will require a more specifically drafted subcontractor's tender to raise the "non-compliant acceptance period" issue.

Construction Law - Subcontractors - Bid Depository System
***Civil Construction Co Ltd v. Advance Steel Structure Inc.,* 2011 BCSC 1341**

Thomas G. Heintzman O.C., Q.C. **November 13, 2011**

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