REAL PROPERTY

COMMENTARY: Outcome of adjudication between owners and bidders hard to predict

Build fairness, clarity and flexibility into documents to limit inherent risks

By Roy Nieuwenburg

The Supreme Court of Canada has issued another "bidding and tendering" decision, *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3. With the booming real estate market, this case may cause real property lawyers greater difficulty in advising their clients.

The reasoning in the case is rational and sensible. At the same time – going in – that is, standing on the courthouse steps - it would be hard to predict whether the outcome would be in favour of the owner (which it was) or the disgruntled bidder (who lost) based on prior decisions of the Supreme Court of Canada, including the celebrated case of *MJB Enterprises* decided in 1999. You would have to shake your head if you tried to predict the outcome of some of these cases. The essence of the *Double N Earthmovers* case is that the tender call (for the supply of equipment and operators) issued by the City of Edmonton stated that all equipment supplied must be "1980 or newer". Sureway had listed a 1977 unit in its bid, but was awarded the contract anyway. *Double N Earthmovers* was a disgruntled bidder – they challenged the award to Sureway. After going through the various levels of court proceedings (and all the legal expense that entailed) *Double N Earthmovers* lost at the Supreme Court of Canada, by (not surprisingly) a five to four majority decision. In *MJB Enterprises*, decided several years earlier, the bidder quoted a unit rate for the amount of fill that would be required. The tender documents required a fixed quote for fill, regardless of the quantity that would be required. In *MJB Enterprises*, the Supreme Court of Canada determined that this discrepancy was so great that the owner could not accept the bid – it was, pure and simple, a non-compliant bid. The court's reasoning was, again, rational and sensible.

Where does this leave us? Owners, consultants, contractors and subcontractors are left unable to predict with a high degree of certainty what the outcome of court adjudication will be. The one certainty we have is that the weather is foggy. So be prepared — dress accordingly. As we all know, when faced with these kinds of issues, we have to appreciate that if the owner awards to bidder No. 1, then the owner might be successfully sued by bidder No. 2, and at the same time if the owner were to award to bidder No.2 the owner might be successfully sued by bidder No.1. Bidding and tendering have inherent risks. So what do you do? The best advice that I can offer is: (1) be fair (2) be clear (3) build in "strident flexibility" in your documents.

Your first line of defence against a successful lawsuit is to have acted in a reasonable and fair manner. After three years of law school and 25 years of practice, one thing I know is: if the judge does not like what the owner did because it offends the judge's sense of fairness, then there is always a legal principle that can be drawn upon to make the owner liable if the Judge is so inclined. Try to act as fairly as you can, as if angels were watching over your shoulders.

Your second line of defence is being clear – stipulate expressly

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Owners must clearly present "rules of the game" to bidders

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what your requirements are, and which are mandatory or not mandatory. And – this is key – keep the mandatory ones to a minimum. Determine which of the requirements are so essential to the owner that the owner would be willing to say "if I receive an otherwise crackerjack, outstanding bid that I really want to accept, failure to comply with this requirement would be so grave and egregious that I will, in advance, eliminate any ability I would have to legally accept that bid". You are better off to express almost everything as being "desirable, but not mandatory", and give yourself the flexibility to waive the requirement, or not, according to what is in the owner's best interest after you've seen all the bids.

Third - build in flexibility in your documents. By this I mean build in strident provisions to the effect that the owner can do what the owner wishes to do, in the owner's best interests, and so long as the owner has been fair and clear, the owner will not have any liability. When it comes to "building in flexibility", I observe that a lot of tendering packages underestimate the vigour with which the courts will brush aside "flexibility language". A recent case demonstrates this vigour. In *Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation and Highways)*, [2006] B.C.J. No. 657, decided by the B.C. Court of Appeal, Tercon was second bidder on a $35-million highway construction project. Tercon claimed that the ministry wrongfully awarded the project to an ineligible bidder. The case could have gone either way, in my opinion. Ultimately, the court sided with the plaintiff Tercon, and awarded damages of $3,293,998 for lost profits, plus costs. In doing so, the court swept aside strong language purporting to give the owner flexibility, including a limitation clause stating:

"... no Proponent shall have any claim for any compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a proposal each proponent shall be deemed to have agreed that it has no claim."

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In setting this aside, the court reasoned that:

"A party should not be allowed to commit a fundamental breach sure in the knowledge that no liability can attend to it and the court should not be used to enforce a bargain that a party has repudiated [...] In the circumstances here, it is neither fair nor reasonable to enforce the exclusion clause. Although both parties are sophisticated, it could not have been contemplated that there would be no recourse if the Ministry accepted a non-compliant bid ..."

Given this example, don't think your usual "privilege" clause and "right to waive" clauses will do the job. You have to include strident provisions that will match the vigour that the courts are willing to assert for the benefit of bidders they perceive to be unfairly treated. You have to lay some groundwork in the document supporting the reasonableness of the owner's perspective, and fairly presenting to all bidders the "rules of the game" for the tender (so that those angels are nodding their heads in agreement).

It isn't surprising that "it's foggy out there". Nor is this description intended to be a criticism or lament of the courts. Think about this – how many times do you see the words "acting reasonably" in commercial agreements? A good example would be any commercial lease; this phrase might appear 50 times. The concept of reasonableness has a lot of meaning (some things would be clearly "black", or clearly "white"), and is regularly left to be interpreted by the courts. Yet it also leaves a large "grey" zone. That's the way it is for many commercial agreements. So too in the field of bidding and tendering (whether for construction, or for the sale or leasing of real estate).

The law of bidding and tendering is well enough evolved that the landscape is pretty much settled. Unavoidably, we are left to navigate the landscape through some foggy patches.

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