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Building Liability – Procurement and Project Delays: Covering All the Bases

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Part I – How to avoid liability for not having transparent procurement procedure on construction projects

Municipalities and provincial entities typically use a procurement or tendering procedure to enter into contracts to complete construction projects.

(1) Qualification stage – where the municipality requests potential contractors to submit their qualifications to complete the work by way of RFQ, or interest in completing work by way of RFEI. A shortlist is then prepared.

(2) Tendering Phase – where potential contractors submit bids in response to a request for tenders, or proposal to complete the work.

(3) Contract between municipality/owner and contractor

Contract A / Contract B

In *Ron Engineering*, Supreme Court of Canada (SCC) set out Contract A/Contract B analysis, as follows:

- When a party submits a bid in response to a call for tenders, contractual duties and obligations (Contract A) may arise, depending on the terms and conditions of the tender documents, or as implied as a matter of law.
- Terms of Contract A include: the irrevocability of the bid, and the obligation of both parties to enter into a contract (Contract B) upon acceptance of the tender.

In *Tercon*, SCC held that Contract A arose, due to the irrevocability of bids for 60 days; a security deposit; and the fact that the RFP set out exclusive detailed evaluation criteria to evaluate proposals.

Owner's rights and obligations under Contract A

- Owner is contractually bound to only accept bids from eligible bidders. This may be implied to give effect to tendering process (*M.J.B.*)
- Owner is contractually obliged to treat all bidders fairly and not to change the terms of eligibility (*Tercon*).
- Owner has the right to investigate allegations of non-compliance of a bid by a rival bidder (*Rankin*).
- Owner does not have an implied duty to investigate allegations of non-compliance (*Double N Earthmovers)*

Best Practices to try to avoid liability

1. Have clear instructions to bidders in tender documents.

2. Include well-drafted Privilege and Discretion Clauses in tender documents, such as:

   "The Ministry reserves the right to reject any or all tenders, and to waive formalities as the interests of the Ministry may require without stating reasons, therefore, the lowest or any tender may not necessarily be accepted." (*Rankin*)

Best Practices to try to avoid liability

3. Only consider compliant bids and treat all bidders fairly and in good faith, not arbitrarily

- Once a government owner sets the rules for having a compliant bid, it must play by those rules in assessing bids (*G.J. Cahill*)
- The bidders should be confident that their initial bids will not be skewed by some underlying advantage conferred upon one bidder (*Martel*)
- In the context of public procurement, “there is a need for transparency for the public at large.” (*Tercon*)

Best Practices to try to avoid liability

4. Include a well-drafted (enforceable) exclusion clause in the tender documents.

In *Tercon*, the following exclusion clause in the RFP documents was found NOT to be enforceable, since the clause did not apply to claims resulting from the participation of ineligible bidders:

> "… Except as expressly and specifically permitted in these Instructions to Proponents [bidders], no Proponent shall have any claim for 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."

Best Practices to try to avoid liability

By contrast, in *Rankin*, the Ontario Court of Appeal found that the following exclusion clause contained in instructions to bidders was enforceable:

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

Best Practices to try to avoid liability

In *Tercon*, the SCC set out a three-step framework to be followed when considering an exclusion clause:

1. Court must first interpret the clause to determine whether it applies to the circumstances established in evidence;
2. If the exclusion clause does apply to the circumstances, then the court must determine whether the clause was unconscionable at the time it was made;
3. Finally, if the clause applies and is valid, the court must consider whether it should nonetheless refuse to enforce it because of an overriding public policy that outweighs the strong public interest in the enforcement of contracts.

Part II – Minimizing project delays to avoid costly litigation

Reasons for delays at construction projects include:

- owner fails to provide site access;
- actual conditions encountered are materially different than disclosed on drawings;
- multiple change orders from owner;
- incomplete design drawings and specifications;
- contractor fails to begin construction on time, fails to coordinate its subcontractors;
- Inclement weather; strikes; insolvencies.

Litigation that can arise from project delays

1. Delay claims – to recover time-related costs and expenses from party liable for causing delays. Typically commenced by contractor against owner.

2. Other impact claims – lost productivity claims, acceleration claims, and claims due to accidents.

Categories of Delay Claims

- Excusable & Compensable – delay event for which claimant is entitled to extension of time and additional compensation.
- Excusable non-compensable – delay event for which claimant is only entitled to an extension of time.
- Non-Excusable – events within a party's own control for which that party assumes the risk

Legal requirements for proving a delay claim

2004 decision in *Bemar Construction* set out what a contractor must prove to recover damages for delay:

1. Cause of delay must be isolated and defined;
2. Delay must be analyzed to determine whether it is excusable and compensable;
3. If delay is excusable, the extent (amount) of the delay must be determined;
4. Notice of the delay claim must be given, if required by the contract;
5. Delay event must affect critical path; and
6. Quantum of damages must be determined.

How municipal owners can minimize project delays and try to avoid litigation

1. **Avoid standard contract terms**, such as CCDC-2 Clause GC 6.5.1, which provides:

If the *Contractor* is delayed in the performance of the *Work* by an action or omission of the *Owner, Consultant*, or anyone employed or engaged by them directly or indirectly, contrary to the provisions of the *Contract Documents*, then the *Contract Time* shall be extended for such reasonable time as the *Consultant* may recommend in consultation with the *Contractor*. The *Contractor* shall be reimbursed by the *Owner* for reasonable costs incurred by the *Contractor* as a result of such delay.

How municipal owners can minimize project delays and try to avoid litigation

2. Ensure your contract contains **properly drafted notice provisions for delays**.

In 2012 decision in *Technicore v. Toronto (City),* Ontario Court of Appeal upheld a motion Judge's dismissal of a contractor's claim against the owner due to contractor's failure to provide notice of its claim "***no later than 30 Days after completion of the work affected by the situation***"

A properly drafted notice provision may result in delay claims being made expeditiously; and, if contract also contains an expedited arbitration clause, delay claims may also be resolved without protracted litigation.

How municipal owners can minimize project delays and try to avoid litigation

3. **Ensure your contract contains a properly drafted (enforceable), exclusion clause**.

- Not all exclusion clauses are enforceable.
- "Contractor shall have no claim … for damages, costs, expenses, loss of profits or otherwise howsoever because or by reason of any delay in the fulfillment of the contract within the time limited therefor occasioned by any cause or event within or without the contractors control, and whether or not such delay may have resulted from anything done or not done by [the owner] under this contract."

enforceable – *Perini Pacific* (*SCC*)

How municipal owners can minimize project delays and try to avoid litigation

By contrast, the Nova Scotia Supreme Court found that the following “no damages for delay” clause was not enforceable:

> “… the contractor shall not have, nor make any claim or demand, nor bring any action, suit or petition against the Minister for any damage which he may sustain by reason of any delay or delays, from whatever cause arising in the progress of the work.” - *Westcounty Construction* (*NCSC*)

In other words, unless there are clear words in the exclusion clause applicable to delays caused by the owner itself, the owner may still be liable for damages cause by it, notwithstanding the exclusion clause.

How municipal owners can minimize project delays and try to avoid litigation

4. Ensure your **consultant administers the contract between the owner and contractor fairly**, and in good faith.

- Typically, an owner retains an architect/engineering firm to prepare design drawings, included in tender documents.
- Architect/engineer can also be the consultant under the contract, tasked with issuing change orders, interpreting contract, issuing payment certificates, CSP, etc.
- Ensure that the consultant responds to requests for information promptly, and impartially interprets the contract documents.

How municipal owners can minimize project delays and try to avoid litigation

In *Bhasin*, SCC held that there is a general organizing principle of good faith that underlies the common law of contract, and a duty to act honestly in the performance of contractual obligations.

- Duty of honesty does not impose fiduciary duties; it is a requirement not to lie or mislead the other party;
- Duty of honesty is not an implied term, but a general doctrine of contract law that operates irrespective of the intentions of the parties; and
- The precise content and scope of honest performance will vary with context; any modification of the duty must be in express terms.

How municipal owners can minimize project delays and try to avoid litigation

5. Obtain and retain contemporaneous project documents.

In 2011 decision in *Dean Construction*, lien master held that:

> "… generally documentary evidence, created contemporaneously with the events in issue, is more reliable than *viva voce* [oral] testimony based solely on memory."

It is important to obtain accurate look-ahead schedules, minutes from site meetings, weekly reports, etc. and to deliver letters confirming events that occur (or do not occur on time) at a project.

Part III – Conducting the finishing touches – completing a thorough safety inspection to effect prompt sign-off

The Ontario Building Code establishes standards for public health & safety, fire protection, structural integrity, accessibility, conservation and environmental integrity with respect to buildings.

For large buildings in City of Toronto, the following inspections are required, among others:

1. Fire separations and closures – at completion of framing for wall, floor and shaft fire separations, before applying interior finishes;
2. Insulation and vapour/air barrier – at completion of insulation and vapour/air barrier, before installation of interior services;
3. Fireplaces, gas appliances, and chimneys – at commencement of installation;
4. Life safety systems – at completion of rough-in of the safety systems – refer to Toronto Fire Prevention; and
5. Occupancy – consult applicable inspector.

Part III – Conducting the finishing touches – completing a thorough safety inspection to effect prompt sign-off

- From owner's perspective, it is important to work with the project consultant during the closeout of a project, since the submission of reports from engineers and other professionals will assist the Chief Building Official to determine readiness for occupancy.
- The following is a non-exhaustive list of reports that may be required for occupancy:
  - As-built drawings;
  - Architects' general review reports;
  - Structural, electrical and mechanical engineers' review reports;
  - Site servicing reports; geotechnical/soil reports;
  - Fire safety reports and fire alarm certificate;
  - Balancing reports for HVAC and mechanical units; and
  - Testing certificates.

Part III – Conducting the finishing touches – completing a thorough safety inspection to effect prompt sign-off

- Depending on the municipality, an owner may obtain authorization to occupy a building prior to deemed completion (i.e. during time between Substantial Performance and completion).
- Obtaining an occupancy authorization during this period typically involves:
  1. Submitting a Request to Occupy an Unfinished Building;
  2. Having a building inspector conduct site inspections;
  3. Follow-up inspection regarding deficiencies; and
  4. Issuance of a Certificate of Occupancy

Occupying a building prior to completion requires careful planning regarding incomplete/deficient work, and insurance and bonding.

Questions ?