

Bidding and Tendering – Hold your applause for sharp practice

By: Misty Alexandre, Robertson Stromberg LLP

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The world of bidding and tendering is risky business. It's a competitive arena, and this atmosphere often leads to creativity from bidders. This creativity is not always on the positive side. Often, it makes for nervous consultants, who are acutely aware of the pitfalls awaiting when there is an irregularity in the submission of bids.

A recent decision by the British Columbia Court of Appeal serves as a good example of the minefield that can be encountered when bids are not submitted perfectly in accordance with requirements of the bid documents. It also serves as a reminder for 'creative' contractors that courts are on the lookout for any behaviour that might jeopardize the integrity of the bid process, and they will not applaud anything that resembles sharp practice.

In *True Construction Ltd. v. City of Kamloops* (2016 BCCA 173), the Court dealt with a bidding and tendering issue involving the construction of a new fire hall in the City of Kamloops. At the heart of the issue was whether the contractor, True Construction Ltd ("True"), submitted a bid that was "substantially compliant" with the Instructions to Bidders.

The facts were relatively straight forward (as much as they can ever be in a legal battle):

- In September, 2010, the City issued an invitation to bid for a local fire hall. The bid documents included a Bid Form along with Appendices A-F;
- Appendix A was a list of subcontractors not bid through the bid depository, and Appendix F was the form required to revise the base bid (Appendix B was not ultimately relevant to the court's discussion);
- The Instructions to Bidders required the completed Bid Form to be provided in a sealed envelope and delivered to the City, though bidders were permitted to later revise their bids in person or by fax using Appendix F;
- True submitted its sealed bid on the day prior to closing, but deliberately did not include pages 2 and 3 of Appendix A as well as Appendix B (essentially leaving out the names of the subcontractors not bid through the depository);
- On the following day just prior to closing time, True submitted the remainder of Appendix A as well as Appendix B, in addition to a price revision using Appendix F;
- During the trial, True openly acknowledged that it deliberately did not include the full Appendix A or B, as they wanted to postpone selecting their subcontractors until they had received all their pricing up to the last minute, when subcontractor prices were typically at their best; they referred to subcontractor bidding practices as "the bane of our existence";
- True's strategy was to withhold the information required in Appendix A and B, and simply complete their bid prior to closing time using Appendix F;
- When the bids were opened, and taking into account the faxed revisions to base price, it was determined that True was the low bidder on the project. However, the City was in a real

pickle at that point. While their consultant, Stantec Architecture Ltd., recommended waiving True's failure to include completed Appendices A and B in the sealed bid as an irregularity under the discretion clause, the City was concerned that allowing a bidder to gain a competitive advantage in this manner would damage the City's reputation and ability to contract quality bidders down the road;

- Despite Stantec's caution that rejecting True's bid would likely lead to litigation, the City stood firm and rejected True's bid as incomplete;
- Stantec was correct – the rejection of True's bid did, in fact, lead to a lawsuit.

At trial, the judge held that:

- The Invitation to Bidders clearly required the appendices to be submitted with the sealed bid (with the exception of Appendix F);
- Appendix F could only be used to revise price, and could not be relied upon to complete an incomplete bid;
- True had gained a competitive advantage by failing to initially submit the list of subcontractors in Appendix A, in that True could continue to negotiate with subcontractors when other bidders had already submitted their bids;
- By submitting portions of the appendices by fax, True had breached the secrecy that affected the integrity of the bidding process;
- True's bid was incomplete and incapable of acceptance even if the required information was later provided prior to the closing time;
- By submitting its bid in this manner, True gave itself the option of later arguing that the bid was incapable of acceptance should it decide that the contract would ultimately be unprofitable.

The Court of Appeal did not agree with the trial judge's reasoning on the competitive advantage gained by negotiating with subcontractors after submission of the sealed bid. Rather, this opportunity was available to all bidders, who could revise their price prior to closing using Appendix F. Similarly, the Court of Appeal could not find any evidence to support the 'breach of secrecy' argument.

However, the real issue from their perspective was whether True's bid was substantially non-compliant.

In their examination of the law and related facts, the Court of Appeal noted:

- When the tender documents were read in their entirety, Appendix A formed part of the Bid Form, and it was required to be submitted in full in the sealed bid;
- There is a difference between revising an entry that is already complete (ie using Appendix F) and completing a bid that was initially incomplete. Specifically, the Court held that "the manner in which the tender documents contemplate that revisions can be made to the bid reinforces the conclusion that a complete bid must be in the sealed envelope and that bid must include a completed Appendix A as part of the bid form";

- While a plain reading of the discretion clause allowed the City to waive irregularities of a minor or technical nature, True had gained a competitive advantage by submitting its bid in this manner. They agreed with the trial judge’s reasoning that submitting an incomplete bid, which is later completed by fax submissions, allowed True the ability to back out of the contract if it proved to be unprofitable. In essence, True had set itself up for the best of both worlds;
- The tendering documents required a complete list of subcontractors, and that fact alone was enough to support the view that the information was, in fact, material and not of a ‘minor or technical nature’. They further held that “where the tendering documents on their face require the information in question and there is some indication in the documents that the information is material, *prima facie*, the information is an important or essential requirement of the Tender. No further evidence is needed to support that result.”
- The Court of Appeal summed up True’s competitive advantage in this scenario with the following quote:

Allowing bidders to submit sealed bids that are incapable of acceptance and then complete them under a mechanism intended to permit revisions to a bid that can be accepted subverts the scheme. Treating that course of conduct as a mere irregularity does, in my opinion, provide a potential competitive advantage. To illustrate this point, it is useful to compare the position of two bidders. Each submits its sealed bid at the same time 24 hours before closing. Bidder A’s bid is complete and clearly capable of acceptance. If it is accepted, it is bound to perform the contract. Bidder A can continue to negotiate with subcontractors, at least those who have not bid through the bid depository system. If those negotiations are successful, it can revise its price and fax in its revisions. Bidder B’s bid is incomplete because it has not filled in Appendix A. It can continue to negotiate too, but if it is unsatisfied with the result of those negotiations, it can avoid the risk of being bound to perform by arguing that its sealed bid is not capable of acceptance. While it may be that Bidder A can continue to negotiate, it has lost the advantage of potentially being able to walk away from its bid. It can avoid only being at a comparative disadvantage either by putting in a similarly incomplete bid or waiting to the very last moment to put in a complete sealed bid. The former option is surely not what is contemplated by the scheme. The latter imposes a risk on Bidder A that it can get its sealed bid in on time or at least as late as Bidder B could fax in its completed Bid. I do not think that this is what is contemplated by the scheme.

- Finally, the Court of Appeal held that it was immaterial whether, in fact, True did or intended to secure a competitive advantage over other bidders in this manner. What matters is whether this practice objectively created a potential competitive advantage which undermined the integrity of the bidding process – clearly, the Court felt that it did.

Consultants are already abundantly aware that their bid documents must be drafted airtight, as any ambiguities, discrepancies or errors can result in significant headaches during the bidding process. As you’ll see from this case, the examination of whether a bid is substantially compliant is highly technical, and heavily dependent on the specific wording of the bid documents themselves. The requirement for the names of subcontractors here

was clearly material to the owners' decision, especially since much of the project would be completed by subcontractors.

But, the primary lesson to take away from this case is the court's focus on the impact to the bid process as a whole. For those bidders who wish to gain an edge, know this – the Courts are forever guided by the need to uphold the integrity of the bid process, and they do not applaud when contractors 'get cute' with their bids.