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Public Sector

Procurement Law Newsletter

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No duty of care owed by owner to subcontractors

In *Design Services Ltd. v. Canada*, 2008 SCC 22, the Supreme Court of Canada examined whether there is a duty of care owed in a tendering process by an owner to subcontractors. This case is an appeal from the Federal Court of Appeal.

Public Works and Government Services Canada ("PW") held a two stage tendering process for a "design-build" contract. The winning bid would design and construct a building. The first stage documents, a Request for Statement of Qualifications ("SOQ"), allowed for bidders to bid on the contract alone or as a joint venture. Design Services Limited and the other appellants ("Design Services") were subcontractors to Olympic the bidding contractor. There was no joint venture formed between Design Services and Olympic. After qualifications of bidders and team members were gathered from the SOQ stage, PW selected four bidders to continue to the next stage of the process, the Request for Proposal ("RFP") stage, including Design Services.

PW awarded the contract to a non-compliant bidder. Olympic and its subcontractors brought a claim against PW which was later settled. The subcontractors continued the negligence claim, seeking to recover for purely economic losses.

At trial, the judge found that there was no contractual duty owed by PW to Design Services. The contractual findings of the trial judge were upheld in the Federal Court of Appeal and were not contested in the appeal to the Supreme Court of Canada.

The trial judge found that there was a duty in tort owed by PW to Design Services. The trial judge did not find that there was an existing category of duty owed by the owner in a tendering process to the subcontractors. However, the trial judge did find that a new duty of care ought to be recognized. The judge found that "*it was reasonably foreseeable in the circumstances of this case that PW's issuing the contract to a non-compliant bidder would result in financial losses to the appellants*" (para. 15). As well, the trial judge found that the need for proximity in the relationship between the parties was also met, even though there was no formal joint venture entered into by Olympic and Design Services. The first stage of the tender process, involving disclosure of the qualifications of the team members and other information, was deemed to be "*analogous to a joint venture*" (para. 15) and so, was found to have met the proximity standard. Additionally, the trial judge rejected indeterminate liability concerns in this case. The judge found that because of the unique design-build approach, there was a limited class of plaintiffs and a limited scope of liability.

At the Federal Court of Appeal, it was found that the trial judge had made palpable and overriding errors, which allowed the Court of Appeal to overturn the trial judge's findings as to the existence of duty of care in this case. It was noted that there was no direct relationship between the subcontractors and the owner. There was a two-tier relationship "*the first between PW and Olympic; the second between Olympic and the appellants*" (para. 19). Because of the lack of direct relationship between the owner and the subcontractors, the Appeal Court found that the situation was not analogous to a joint venture, which might have allowed for a finding of the existence of a duty of care. The Court of Appeal then found that no new duty of care should be recognized. This was because there was not sufficient proximity in the relationship between the owner and the subcontractors. The two-tier relationship did not support sufficient proximity, nor did policy considerations, as the subcontractors were "*in an excellent position to protect themselves by forming a joint venture with Olympic*" (para. 20). No duty of care was found.

The Supreme Court of Canada considered the issue of whether a duty of care between an owner and subcontractors should be recognized in Canadian law. As the Supreme Court of Canada has previously found, "*it must first be determined whether the present situation fits within, or is analogous to, a relationship previously recognized as having a duty*

of care between the parties. If it does, a duty of care will be established" (para. 27). Design Services costs and lost opportunity for profit were pure economic losses, as they were solely financial in nature. The Supreme Court considered existing categories of relationships where a duty of care had been recognized. Only one was considered as a possibility by the Supreme Court: relational economic loss. However, this category was rejected by the Supreme Court in this case, as there was no actual property damage to Olympic, which is required to find relational economic loss. The Supreme Court found that the subcontractors' claim did not fit into a pre-existing category through which a duty of care could be recognized.

The Supreme Court then considered whether a new duty of care should be recognized between an owner and subcontractors. The *Anns* test, from the House of Lord's decision in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), was applied to determine: *"(1) is there 'a sufficiently close relationship between the parties' or 'proximity' to justify imposition of a duty and, if so, (2) are there policy considerations which ought to negate or limit the scope of the duty, the class of persons to whom it is owed or the damages to which breach may give rise?*" (para. 46). A new duty of care may be recognized if a duty of care is established under the first stage of the *Anns* test which is not negated by the second stage of the test.

The first stage of the *Anns* test considers, as indicators of proximity, the reasonable foreseeability of harm, and subsequent policy considerations. The Supreme Court considered the reasonable foreseeability of harm and subsequent policy considerations in the analysis. Design Services failed to satisfy the first stage of the *Anns* test and no duty of care was found between an owner and subcontractors. Although the Supreme Court found that subcontractors would be directly affected by any breach of the tendering process and subsequent losses, they found that a duty of care was not appropriate in this situation for policy reasons. The Court found that the subcontractors had an opportunity to protect themselves and were in the best position to do so. Olympic and Design Services did not choose to form a joint venture, which would have protected the subcontractors contractually, under the contract formed by the tendering process: "*The fact that the appellants had the opportunity to form a joint venture… is an overriding policy reason that tort liability should not be recognized in these circumstances*" (para. 56). Although there were factors showing a close relationship between Design Services and PW, no new duty of care is recognized under the *Anns* test.

Under the second stage of the *Anns* test, the Supreme Court considered residual policy concerns, even though it was unnecessary, as the case failed the first stage. Indeterminate liability was the concern at this stage because of the context of construction contracts: contractors will often have employees, subcontractors and suppliers, and these subcontractors and suppliers may have employees, subcontractors and suppliers of their own. The Supreme Court found that the scope of liability was not narrow enough, nor was the class of potential plaintiffs a limited enough group. Because of this, even if a duty of care had been found through the first stage of the *Anns* test, it would have been negated at the second stage.

In conclusion, the Supreme Court found that Design Service's claim did not fit into a pre-existing category of duty of care, nor was a new duty of care found to exist between an owner and subcontractors.

The Court was not prepared to expand the causes for liability in the tender process. In particular, the Court would not extend the duty of care by owners to subcontractors.

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Court confirms owner cannot waive mistake on material term and accept non-compliant tender

The case of *Jarlian Construction Inc. v. Waterloo (City)*, [2008] O.J. No. 1156 (Ont. Div. Ct.), is an appeal from a motion for

summary judgment brought by the City of Waterloo, seeking a court order dismissing the claim of Jarlian Construction Inc. ("Jarlian").

In December 2005, the City of Waterloo ("the City") issued a call for tenders for a bridge replacement project, receiving eight bids. The City accepted a bid from Xterra Construction Inc. ("Xterra"), rejecting the bids from Jarlian and the other six bidders.

Jarlian claimed that by accepting a non-compliant bid from Xterra, the City had breached the contract between the City and the bidders arising from the tender process. Jarlian argued that as it had the lowest compliant bid, its bid should have been accepted. Jarlian was seeking compensation for lost profit and expenses incurred tendering its bid.

In defence, the City denied that there was a breach of the contract arising from the tendering process, as they claimed that Xterra's bid was compliant. Alternatively, the City claimed that if Xterra's bid was non-compliant, then so was Jarlian's. The City also claimed that it was under no obligation to accept the lowest compliant bid.

The issue was the compliance of Xterra's bid with the tender terms. If Xterra's bid was found to be compliant, then the City's motion for summary judgment would be successful. If Xterra's bid was found to be non-compliant, then the action would proceed to trial.

As the Supreme Court of Canada has previously recognized, "*A submission by a contractor of a tender bid in compliance with the terms and conditions under which the call for tenders was made creates a contract between the contractor and owner*" (quoted by the motion court judge in *Jarlian Construction Inc. v. Waterloo (City)*, [2007] O.J. No. 4296 (Ont. Sup Ct.) at para. 7). The express terms and conditions of the tender documents govern the terms and conditions of the contract arising from this tender process. Additionally, the Supreme Court of Canada has recognized in previous cases that it is an implied term of the contract arising from the tendering process that only a compliant bid will be accepted and that all bids must be treated "fairly and equally" by the owner.

The first page of the City's Bid Form provided lines for the stipulated price of the project bid, the applicable GST, and the Total Contract Sum. On page ten, the Bid Form provided an area for summary of project components and the Base Bid Total, as well as Alternative Prices for alternative work not included in the bid price. There were explicit instructions "*to separate the alternative price from the base bid. The… bid price to be entered on page 1 of the Bid Form shall not include the price for the alternative ("provisional") item*" (*Jarlian* [2007] at para. 16).

Jarlian's Total Contract Sum, as set forth on page one of the Bid Form, and as published by the City on its website, was $142,139.87. Xterra's page one Total Contract Sum was $162,516.95. Jarlian was the lowest bidder.

However, when the City reviewed the Bid Forms, they found that the page ten Base Bid Total for Xterra was $140,046.95, which was lower than the Contract Total Sum they had written on page one. Xterra's $22,470.00 total for the alternative item was listed separately on page ten. The City decided that Xterra had mistakenly included in the page one Total Contract Sum both the Base Bid Total and the total price for the alternative item. The City concluded that Xterra's Total Contract Sum was really $140,046.95 and amended its tender summary to reflect this. Xterra was now the lowest bidder and the City awarded the contract to Xterra.

The City argued that Xterra's bid was compliant and that the error it contained was not material, but an irregularity which was covered by the discretion clause (which gave the City the discretion to declare bids that contain an arithmetical error or an irregularity to be informal). The City argued that because of this, it did not prevent the City from accepting the bid. Jarlian argued that Xterra's bid was incapable of acceptance as it was non-compliant.

The trial judge found that Xterra's bid was "*clearly non-compliant and therefore not capable of*

being accepted by the city in accordance with the terms and conditions of the tender." (*Jarlian* [2007] at para. 23). By accepting the non-compliant Xterra bid, the City had breached its implied obligation to accept only a compliant bid. By accepting the Xterra bid for an amount other than the Total Contract Sum on page one, the City had also breached its implied obligation to treat all bidders fairly and equally.

To be deemed "compliant", a bid must be in substantial compliance. The Supreme Court of Canada has previously determined that this is when "*all material terms and conditions of the tender have been complied with, determined on an objective basis.*" (*Jarlian* [2007] at para. 25). The trial judge found that the instructions were clear that only the Base Bid Total was to be included in the Total Contract Sum on page one. Xterra's bid breached a material term of the contract, as the Total Contract Sum listed on page one of Xterra's bid was the sum of the Base Bid Total and the alternative item price, contrary to the instructions. "*While Xterra may have made an error in the price it set forth as its stipulated sum on page one, that was the price at which it was offering to do the work.*" (*Jarlian* [2007] at para. 31).

By accepting Xterra's non-compliant bid, the City breached its implied obligation to only accept a compliant bid. The City was also in breach of its implied obligation to treat all bidders fairly and equally, by altering the price on page one of Xterra's Bid Form. As a result, the motion court judge dismissed the summary judgment motion.

The case was appealed to the Ontario Superior Court of Justice Divisional Court. The appeal was dismissed. The Divisional Court found that there was no palpable and overriding error of law made by the motion court judge and upheld the lower court decision.

It was a material term of the contract that the bid only include the base bid, as instructed. Xterra's failure to follow the bid instructions, which were a material term of the contract, resulted in non-compliance. Ultimately, the City was in breach of its express and implied obligations by altering and accepting a non-compliant bid. The discretion clause did not allow the City to waive a mistake on a material term of the contract.

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Broad exclusion clause in tender absolves possible liability

In *Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation and Highways)*, [2007] B.C.J. No. 2558, 2007 BCCA 592, the Court of Appeal allowed an appeal from a trial judge's decision that allowed the respondent contractor's action and awarded the respondent $3,293,998.00 in damages. This trial decision was highlighted in the May 2007 Procurement Law Newsletter (see "Accepting Non-Compliant Bid Leads to Liability to Other Bidders," Procurement Law Newsletter, May 2007, Vol. 1, Issue 1).

The main issues at trial were whether or not a Request for Proposals ("RFP") was a tender call, the nature of a joint venture and the application of exclusion clauses. Ultimately, the trial judge found that the Province had breached its duty of fairness to Tercon by accepting a non-compliant bid. This decision was overturned by the Court of Appeal.

The Province of British Columbia issued a Request for Expressions of Interest for the construction of a highway in northern British Columbia, receiving multiple submissions. Because of changes to the structure of the project, the Province then issued an RFP (which was found to be a tender call in this case) and invited the original bidders to submit bids, which they did. The documents included a clause that addressed material changes to the bidder's circumstances after the submission of a bid. Included in the bid documentation was an exclusion clause precluding any claim for compensation arising from this process: "*Except as expressly and specifically permitted in these Instructions to Proponents, 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"(para. 10).

The Province rejected a bid from Tercon and accepted a bid from another contractor. At trial, Tercon's bid was found to be compliant, while the other contractor's bid was found to be non-compliant because of the restrictions in the RFP dealing with changes in legal structure. The trial judge concluded that the acceptance of a non-compliant bid by the Province was a fundamental breach and that enforcement of the exclusion clause would not be fair or reasonable in the circumstances (as there was a fundamental breach and the trial judge had found the exclusion clause to be ambiguous), as this would disregard the duty of fairness between the owner and bidder.

There were two matters at issue in this appeal: 1) whether the successful bid was non-compliant; and 2) whether the claim was barred by the exclusion clause. The Court of Appeal did not resolve the issues associated with whether or not the successful bid was non-compliant, as the Court dismissed the appeal on the basis of the claim being barred by the exclusion clause.

The Court of Appeal found that the trial judge erred in interpreting the exclusion clause and in refusing to give effect to it. The wording of the exclusion clause was found to be "*so clear and unambiguous that it is inescapable that the parties intended it to cover all defaults, including fundamental breaches*"(para. 14). The Court of Appeal found that excluded breaches do not have to be particularized or expressly stated for the exclusion clause to be effective, as the "*broad words of the clause cover the full range*"(para. 15) The Court also found that the word "participating" is not ambiguous, as it communicates Tercon's involvement in the bidding process: "*A sophisticated contractor like the respondent… would have had in contemplation at the time of the RFP all potential breaches by the appellant, including the most likely source of a grievance, the acceptance of a non-compliant bid*"(para. 15).

The Court of Appeal found that Tercon's claim was barred by the exclusion clause.

This case confirms the importance of clear and unambiguous exclusion clauses which cover all contingencies. It also confirms that bidders are expected to understand the terms and conditions of the bid.

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Court confirms due diligence obligation of bidders

In *EBC Inc. v. New Brunswick*, [2007] N.B.J. No. 435 (N.B. C.A.), the New Brunswick Court of Appeal allowed the appeal, concluding that the Province of New Brunswick ("the Province") did not breach its duty of care to act fairly and in good faith when preparing the tender specifications in the circumstances of this case.

The Province invited bids for the construction of a new ferry terminal and wharf. For construction, the tender contract required four reinforced concrete caissons to dock the structure. The tender documents specified that LASF cement must be used to construct the caissons. It was silent as to the need to use an admixture to accelerate the curing of the slip-formed concrete if LASF cement was to be used in winter months. EBC Inc. ("EBC") was awarded the contract. EBC realized during construction that an accelerant admixture was necessary. EBC incurred extra costs obtaining this accelerant admixture.

EBC sued for the extra expenses of the accelerant, and costs of concrete mix testing to figure out the rate at which the concrete could be extruded from the slip-forms. EBC claimed: (i) that the Province had negligently misrepresented the concrete mix required for the project by failing to specify that an admixture was necessary; (ii) that EBC had relied upon the specifications (and absence of) to their detriment; and, (iii) also claimed increased expenses for concrete curing, as EBC was not permitted to use a curing compound, as well as for production losses.

The Province denied liability, claiming that EBC should have assessed relevant associated costs and included these costs in its original bid. The Province also claimed that EBC was negligent in failing to foresee the issues it encountered, which could have been avoided by including the costs in its bid.

At trial, EBC was successful with the claim for the expense of the accelerant admixture and for half of the concrete mix testing costs, totalling $147,604.41. The additional expenses for production losses and curing were not allowed.

Both the Province and EBC appealed. The Court of Appeal overturned the trial decision, allowing the Province's appeal and dismissing EBC's cross-appeal. All of EBC's claims for extra expenses incurred failed.

The Province's knowledge of certain project specifications (the necessary properties of the concrete mix, slip-forming issues with concrete containing LASF cement, testing necessity and costs) did not create a contractual arrangement concerning these issues: *"[A]n owner is under no disclosure obligation to protect an inexperienced tenderer from its own lack of inquiry or lack of knowledge*" (para. 66). The Court of Appeal found that EBC had a due diligence obligation. EBC chose to enter into the contract to construct the project at a specific price without making any pre-tender inquiries about required aspects of the project with which it was less familiar. The Court of Appeal found that relevant information about these issues was "*readily available from cement suppliers*" (para. 76). The due diligence obligation of the contractor was not absolved by the Province's knowledge of certain project specifications. There was enough specification of requirements in the tender documents for EBC to make necessary inquiries and readily obtain the relevant and readily available information.

As a result of the circumstances in this case, the Court of Appeal found that the Province did not fail in "*its disclosure duty of care to act 'fairly and in good faith' when preparing the tender specifications*" (para. 76). The Province was found not to have negligently misrepresented the concrete mix required for the construction project. Nor did the Province fail in any contractual obligation. The specification of LASF cement in the tender documents was enough, as the Province could rely on the due diligence obligations of tenderers to "*readily discover that an accelerant admixture and testing of its concrete mix would be necessary*" (para. 76).

The decision in this case may have turned on the expected expertise of a tenderer. Certainly, the obligation of due diligence on the part of bidders is confirmed. An owner can further minimize potential liability with appropriate disclaimer clauses in the tender documents with respect to the obligation of bidders to satisfy themselves as to the technical requirements of the tender.

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Court finds liability for breach of duty of good faith and negligent misrepresentation

In *Hub Excavating Ltd. v. Orca Estates Ltd.*, [2007] B.C.J. No. 2209 (B.C. S.C.), the Court dealt with the good faith requirement and negligent misrepresentations made in the tendering process.

The developer defendants formed a joint venture, Rocky Point Joint Venture ("the Joint Venture Defendants"). The other defendants, Leslie Allan Morris and Morris Engineering Ltd. were the engineer and engineering company working for the Joint Venture Defendants, who made the estimated budget for the project and initially examined the bids for compliance. Mr. Morris was acting as an agent for the Joint Venture Defendants and for Morris Engineering Ltd.

The Joint Venture Defendants invited six contractors to bid on work for a proposed phase of development in a subdivision. Three companies submitted bids, including Hub Excavating Ltd. ("Hub"). Through Mr. Morris, the engineer, Hub was informed that it had submitted the lowest bid, that its budget

was consistent with the engineer's estimate and that they would be contacted as soon as they got the "go ahead" (para. 106). None of the bids were accepted and the project did not proceed. The Joint Venture Defendants stated that it did not proceed for economic reasons, which the judge found to be true.

Hub brought an action against the Joint Venture Defendants for breach of contract and negligent misrepresentation. Hub claimed that the contract formed by the tendering process had been breached concerning the duty to treat all bidders fairly. Hub claimed that the Joint Venture Defendants called for tenders on the project without any real intention of proceeding. Additionally, Hub claimed that statements made by Mr. Morris and the Joint Venture Defendants were negligent misrepresentations. Hub claimed that they reasonably relied upon the statements made, to their detriment. They claimed that in reliance on the negligent misrepresentations made, they did not submit a bid on another specific project (on which they had done work successfully in the past), that they would have been the lowest bidder, would have received the work and would have made a profit.

The Joint Venture Defendants denied that they breached their duty to treat bidders fairly. Additionally, the Joint Venture Defendants claimed that Hub's bid was non-compliant, as well as relying on the privilege clause to allow them not to accept any of the bids. All of the defendants denied that any negligent misrepresentations were made.

Hub's bid was found to be compliant by the Court. The Court found the Joint Venture Defendants to be liable for breach of the duty of fairness arising from the tendering process. The Court held that the Joint Venture Defendants had based the call for tenders on an "*oral estimate which it knew, or ought to have known, was inaccurate, in the 'hope' that a contractor would make a similar mistake, and submit a low bid*" (para. 117). The Joint Venture Defendants were given a second, revised, higher written estimate during the tender process, at which point it was unfair to proceed. In addition, the Court held it was unfair for Mr. Morris to tell Hub that its bid was close to the engineer's estimate (when it was significantly higher) and that he would contact the Joint Venture Defendants and respond to Hub as soon as he got the "go ahead". Further, the Court found that it was unfair of the Joint Venture Defendants not to get back to Mr. Morris, and through him, to Hub, that none of the bids were to be accepted and the project would not proceed. The Court found that the privilege clause would not apply with regard to the duty of fairness. In conclusion, the Judge found that "*the Joint Venture Defendants treated the bidders, and in particular, Hub, with callous indifference throughout the process, in breach of their duty of fairness to the bidders*" (para. 119).

Mr. Morris was held to be liable for two negligent misrepresentations, even though the Court found that he may have made them inadvertently due to the Joint Venture Defendants communications and non-communications with him, as "*the Joint Venture Defendants failed to keep Mr. Morris properly informed*" (para. 125). This liability was based on Mr. Morris' statements that Hub's bid was "*close to the engineer's estimate*" (para. 103) and that he would let the Joint Venture Defendants know and get back to Hub as soon as he got the "go ahead" (para. 106). The Judge found that Hub had reasonably relied on these statements, taken together, to their detriment.

The Joint Venture Defendants, Mr. Morris and Morris Engineering Ltd. were found liable for damages in the amount of $300,000 for lost profits from the bid that Hub did not make in reliance on the statements of the defendants. The Joint Venture Defendants were held to be 80% responsible, while Mr. Morris and Morris Engineering Ltd. were found to be 20% responsible.

The decision reinforces the integrity principles of tendering: the duty of fairness and good faith; and, the requirement for accurate information.

Court confirms liability for failure of owner to follow appropriate process

In *Port Hawkesbury (Town) v. Borcherdt Concrete Products Ltd.*, [2008] N.S.J. No. 60 (C.A.), the Nova Scotia Court of Appeal dismissed the appeal, in part, of the Town of Port Hawkesbury for breach of its obligations of fair and equal treatment during the tendering process.

The Town of Port Hawkesbury ("Town") decided to build a $15,000,000 civic centre and arena for approximately one thousand spectators. Invitations to tender for the manufacture, delivery and installation of pre-cast concrete bleachers were issued to two companies specializing in pre-cast products, including the Defendant, Borcherdt Concrete Products Ltd. ("Borcherdt"). A privilege clause included in the Town's tendering documents provided: "*The Owner reserves the right to reject any and all tenders that, in its sole discretion, are not in the interest of the Town of Port Hawkesbury."*(para. 4)

When the invitation to tender closed on the extended date of August 27, 2003, Borcherdt was the only bid received. Borcherdt's bid complied with the terms of the Town's tender call, and maintained the requisite quality standards, but was well in excess of the Town's budgetary estimate. The Town considered the bid, as well as other alternative methods of installing the bleachers within its budget. Without notifying Borcherdt, and prior to refusing its bid, the Town entered into negotiations with a third party for a supply-only contract for pre-cast bleachers. The Town ultimately accepted the other company's quote, and used its own employees to perform part of the work included in its initial tender package. Borcherdt successfully brought an action against the Town for breach of contractual obligations and breach of an implied term of good faith and fairness in the tendering process; and was awarded damages equivalent to the total loss of profit in the amount of $68,536 plus costs. The Town, relying on the privilege clause, appealed the decision as well as the quantum of damages.

In its appeal, the Town alleged that the trial judge erred in law by failing to consider how excessively over budget Borcherdt's bid was, as well as determining that the Town had a duty to reject Borcherdt's bid prior to entering into "negotiations" with other suppliers. The Town submitted that its privilege clause included in the tender documents authorized the Town to reject any and all bids not in its best interests.

The Appeal Court gave high deference to the trial judge's factual determinations and concluded that the Town breached its duty of fair and equal treatment in the tendering process. The Court of Appeal agreed with the trial judge's decision that although the privilege clause gave the Town substantial discretion, it did not excuse the Town from it's obligation to notify Borcherdt that its bid had been rejected, or that it was negotiating with a third party. Additionally, the Appeal Court concluded that there were no express or implied terms in the tender documents that would permit the Town to renegotiate the scope of the work with a third party, and award it a contract.

The Court of Appeal disagreed, however, with the trial judge's assessment of damages concluding that the trial judge did not determine that Borcherdt would have been awarded the contract but for the Town's breach. Lacking the requisite link between the Town's breach and Borcherdt's anticipated profit, the Court reduced the damage award to $44,548, plus costs and disbursements.

This decision reaffirms the importance of following the required process. The Town could have avoided liability by following required process.

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Court confirms termination of tender process

The proper termination of the bidding process on an invitation to tender was recently considered in an appeal heard by the Ontario

Superior Court of Justice in *Dolyn Developments Inc. v. Paradigm Properties Inc.*, [2007] O.J. No. 63.

In the lower court judgment, Dolyn Developments Inc. ("Dolyn") sought damages for lost profits in relation to an invitation to tender made by the defendant, Paradigm Properties Inc. ("Paradigm"), on an office construction project. Dolyn alleged that Paradigm granted preferential treatment to other bidders, effectively "bid shopping", in breach of an implied duty to act fairly, honestly and in good faith.

Dolyn was one of only four pre-qualified bidders approved by Paradigm in an invitation to tender in mid-October 2003. Before the close of tender, Paradigm amended the terms requiring the tender package to include "Site Instruction" and "Addendum No. 1". Paradigm informed Dolyn that they were the lowest bid, and requested a cost breakdown which was provided that same day. After the close of tender, Paradigm advised all four bidders that all of the bids received were in excess of Paradigm's budget and were rejected on that basis. Paradigm asked Dolyn, the lowest bidder closest to their budget, whether it could complete the project with two cost-saving changes to meet Paradigm's budget of $130,000. Dolyn advised that its profit margins were too thin, and it could not meet Paradigm's request. Paradigm made the same request with the second lowest bidder, who also declined Paradigm's offer to award the project for its stated budget. A week later, Paradigm contacted the third bidder, Absolute Restoration and Construction Inc. ("Absolute"), who agreed to amend its previous tender package to complete the contract for a total price of $136,000, an amount only marginally less than Dolyn's bid, but still above Paradigm's stated budget. Although Absolute's contract did not specifically refer to "Site Instruction" or "Addendum No. 1", two specifications required by Paradigm in the amended terms of its initial invitation to tender; and its contract price was above Paradigm's budget; it was awarded the contract by Paradigm.

Paradigm denied that they were involved in any form of "bid shopping", but rather submitted that the contract was awarded to Absolute because their price was the lowest, and they had worked with them before. Also, Paradigm claimed that they were under time constraints, and Absolute would be ready to mobilize their workers immediately.

In dismissing Dolyn's claim for damages, the lower court concluded that when Paradigm rejected all of the bids, the tender was terminated. Dolyn was given an opportunity to re-set its price, which it declined and no agreement was reached.

No evidence was presented to support the allegation of "bid shopping", and thus there was no basis to conclude that Paradigm used Dolyn's bid to obtain a lower bid from Absolute. Moreover, the lower court found that although Absolute failed to include "Site Instruction" and "Addendum No. 1", as specifically referred to in its initial tender package, it was substantially compliant having regard to industry custom and practice, regardless of whether or not the tendering process had come to an end.

Finding the decision reviewable on a standard of palpable and overriding error, the Court dismissed the appeal deferring to the findings of fact of the lower court. The Court concluded that there was ample evidence confirming that the formal bidding process had ended when Paradigm rejected all bids; and thus Paradigm was entitled to request adjusted prices on a reduced scope from all bidders.

Nevertheless, owners should be very careful in following appropriate process in terminating any bid process, particularly before proceeding with any negotiations.

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