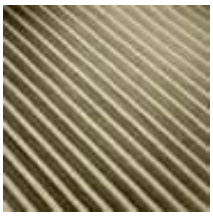

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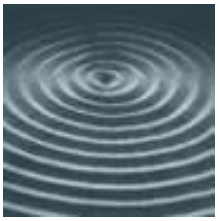

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LOST IN TRANSLATION

By William M. Pigott

March/April 2005

Justice Southin and Justice Oppal agreed. There is no question that in this case Contract A arose, added Justice Southin. If the owner gives the construction contract to someone whose bid was non-compliant, the issue is whether the owner has in any way committed a breach of Contract A. The terms of Contract A are found in the invitation to bid. There was no breach because Clause 23 construed in light of the whole of the invitation permitted the District to do what it did.

It is interesting and rather confusing to note that, in January 2004, three other judges of the same Court of Appeal (Chief Justice Finch and Justices Mackenzie and Thackray) reached a different conclusion in *Graham Industrial Services Ltd. v. Greater Vancouver Water District*.

The owner's right to rely on the discretion clause as a term of Contract A only arises if a valid Contract A is formed, wrote Chief Justice Finch in that decision. Contract A is only formed if a bid is compliant. Without Contract A, the discretion clause is not operative. An inoperative discretion clause cannot give the owner the power to decide that a bid is compliant even if, on an objective analysis, the bid is materially non-compliant.

Although the Supreme Court of Canada examined the effect of the privilege clause in *M.J.B. Enterprises*, in that case the clause related to the owner's exercise of discretion *after* Contract A had already been formed. The Court did not address the ability of the owner to dictate subjectively when Contract A would arise through a discretion clause in the bid documents.

So, we have a tie at the appellate level. The issue has nowhere to go but up — to the Supreme Court of Canada.

Court of Appeal for British Columbia

Southin, Braidwood and Oppal JJ.A.
September 16, 2004

Case Comment

LOST IN TRANSLATION

by William M. Pigott, Miller Thomson LLP, Toronto

Kinetic Construction Ltd. v. Comox-Strathcona (Regional District)

Justice Braidwood decided that Contract A between Kinetic Construction Ltd. and the Regional District of Comox-Strathcona was not breached because the "exact words" of the Instructions to Bidders permitted the District to retain the bid of a "non-conforming" bidder — D. Robinson Contracting Ltd. So, when the District awarded Robinson a contract, Kinetic had no complaint — at least no complaint on that particular term of Contract A.

Robinson and Contract A

As to Robinson's bid, the motions judge determined that Contract A had come into existence when the District decided to "retain for consideration" the Robinson bid. On the appeal, the panel did not speak to the Contract A issue, probably because the issue would not have affected its finding that Contract A — the one between Kinetic and the District — had not been breached.

Between the District and Robinson, one might conclude that this appellate panel had, implicitly, approved the notion that Contract A could be formed — at the election of the owner — where a bidder has counter-offered by submitting a non-compliant bid. But, such a reading stands in stark contrast to two things. First, the basic principle of contract law, that where an offeree responds to an offer by making a counter-offer, the original offer has been rejected. And, second, the British Columbia Court of Appeal in *Graham Industrial Services Ltd.* v. *Greater Vancouver Water District*, where the panel found that Contract A did not arise between the owner and a non-compliant bidder, under similar circumstances.

Kinetic and Contract A

One might quibble about how Article 23 of the Instructions to Bidders should be read. After all, one of the fundamental principles of contract interpretation is that ambiguities are read against the drafter.

Article 23 of the Instructions to Bidders — quoted by Paul Sandori above — could refer to a minor problem in the bid relating to "the content or form" or "the process for submission". Nowhere in Article 23 does it say whether these non-conformities are major or minor or whether the drafter intends to forgive venial sins (substantial compliance) or mortal sins (fundamental non-compliances). One could argue that the "exact words" of the discretion clause are not exact at all.

More interesting is the holding by the court that a particular term of Contract A applied (retain Robinson's bid) and so Kinetic is out of luck. While that may be so, Contract A is not one dimensional. Whither the implied duty to treat Kinetic fairly?

The implied duty of fairness in Contract A was confirmed in *Martel Building Ltd. v. Canada*. In a more complex bid setting, the Supreme Court of Canada stated "...that all bidders must be treated equally and fairly." So, what became of it?

We have a split evaluation setting. Between the District and Robinson, Robinson is not entitled to fair and equal treatment because it does not have Contract A with the District. So, if Robinson received the short end of the stick, it would also be short on remedies. And, whatever Robinson's remedy, it is not contractual.

The contract awarded to Robinson was not Contract B but something different. Nothing in the "exact words" excludes the implied duty of fairness in Contract A between Kinetic and the District or gives the District the right, when all the dust has settled, to award anything but Contract B. Which would be — you guessed it — unfair.

If your fairness barometer is twitching, consider the findings of the courts in *Best Cleaners and Contractors Ltd. v. Canada* and *Thompson Bros. (Const.) Ltd. v. Wetaskiwin (City)*. Both decisions held that, where an owner awards something other than Contract B, it has breached Contract A with the compliant bidders. Tricky thing, Contract A.

As a footnote, Contract A arises when a bidder accepts the offer for Contract A — the invitation to bid — by submitting a compliant (or substantially compliant) bid. Drafters of bid documents would greatly assist all parties — including judges — if they adopted and used post-*Ron Engineering* terms, leaving old labels such as "informal", "irregular", "qualified" and their brethren behind. Did the drafter of Article 23 intend that "non-conforming" translate to "non-compliant" — or something less lethal? Beats me.

ENGINEER LIABLE FOR NEGLIGENT BID RECOMMENDATION — TEN YEARS LATER

by Paul Sandori

Tectonic Infrastructure Inc. v. Middlesex Centre (Township)

Owner accepted bid of a numbered company thought to be lowest bidder • unsuccessful bidder discovered years later that numbered company's bid contained various irregularities • owner had engaged consulting engineer on entire project • unsuccessful bidder sued and owner brought claim against engineer • bid found to have been non-compliant • unsuccessful bidder entitled to damages • engineer was found liable due to negligence in failing to identify non-compliant bid

In April 1995, the Township of Lobo, the predecessor of the defendant Township of Middlesex Centre in Ontario, issued a bid call for infrastructure work. The contract was eventually awarded to a numbered company, 756949 Ontario Inc., which was interpreted as the lowest bidder at the time the contract was awarded.

Years later, Tectonic Infrastructure Inc., which had been one of the unsuccessful bidders, heard that there had been something unusual with respect to the bid of the numbered company. Based on freedom of information legislation, Tectonic obtained access to the bid and discovered the numbered company had inserted handwritten additions on the bid form and other irregularities which the owner failed to take into account.

Tectonic sued the Township on the basis that: (a) the bid of the numbered company was non-compliant and should have been disqualified; (b) Tectonic's bid was therefore the lowest; and (c) the court should imply a term that the contract would go to the lowest compliant bidder, *i.e.*, Tectonic.

The Township of Lobo had engaged a numbered company formerly known as Totten Sims Hubicki (TSH) to be the consulting engineer on the entire project. TSH was required to draft and prepare the bid documents, to analyze and evaluate the bids, and to make a recommendation as to which bid should be accepted.

The Township brought in TSH as third party on the basis that, if found liable, the Township should be indemnified by TSH.

Compliance

The milestone decision of the Supreme Court of Canada in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.* stands for the proposition that the owner must accept only bids compliant with the bid documents.

Justice Klowak of the Ontario Superior Court found that the bid of the numbered company as submitted to the Township contained items not called for in the bid