Waiving non-compliance

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EVER SINCE CANADIAN courts created the concept of bidder compliance with mandatory requirements *before* any rights or obligations in competitive bidding exist, there have been problems for both owners and bidders. While the idea that an owner owes no rights whatsoever to a non-compliant bidder, has met with owner approval, owners have not been fond of the lack of discretion to waive non-compliance when it serves their interests (i.e., on an otherwise good bid which is non-compliant in some way). Compliant bidders have also approved of the idea that non-compliant bidders cannot, by their non-compliance, create a more attractive option for the owner, thereby sneaking ahead of compliant bidders in a competition. But compliant bidders have also howled when they themselves have been disqualified for non-compliance with "technicalities."

When the Supreme Court of Canada in *MJB Enterprises Ltd. v. Defence Construction (1951) Ltd.* (1999) made it clear that even slight non-compliance (in that case, double-pricing on one unit price item when the invitation required a single price for all unit items), would disqualify a bid from the competition, owners and bidders alike felt something had changed. While most accepted that this legal reasoning might uphold the integrity of the competitive process, taken too far it could defeat the goal of competitive bidding, which – if you are an owner – is to obtain several good offers to do the work, or – if you are a bidder – to make an attractive enough bid to get a contract award.

So, owners across Canada (public and private) sought ways around the "comply or die" rule of *MJB Enterprises*.

Some (surprisingly few) owners went back to their invitations and requests and got rid of all those mandatory requirements, which were not really mandatory and rephrased the "*shalls*" and "*musts*" to "*shoulds*" and "*mays.*" For these owners, now, if the invitation says "it's mandatory," it really is, and they will not consider a bid which is non-compliant with the mandatory requirements.

Some owners ignored the issue altogether and increasingly have found themselves on the losing end of lawsuits – the price one pays for not paying attention to laws.

Most owners kept insisting on mandatory things, but sought to create some form of waiver of non-compliance power in their invitations and requests, which would allow them to consider a non-compliant bid, even though the owner had required compliance in their invitations or requests. This sort of double-speak is familiar to lawyers, trade negotiators and parents of teenagers but many purchasers found it a bit unethical.

Now, the BC Court of Appeal has recently added its opinion on waiver of non-compliance clauses, in a case called *Graham Industrial Services Ltd. v. Greater Vancouver Water District* [2004] B.C.J. No. 5 (BCCA). As a result, things do not look quite so rosy for the idea of waiving major non-compliance with a clause in the invitation or request.

In this case, the bidder had made a serious error of some $2 million, discovered after close of bidding but prior to award. The bid was also non-compliant in a material way with the invitation but was an excellent price, much lower than any other bid. The GVRD had a wide waiver of non-compliance clause and purported to exercise it and award to the good but non-compliant bid. The bidder sued arguing this was unfair, as it had revoked its bid prior to award due to the error in pricing.

The GVRD argued its waiver clause gave it the subjective right to deem any non-compliant bid acceptable and award to it. But the BC Court of Appeal disagreed, unanimously. Not only could a materially non-compliant bid not be cured by a waiver clause of the owner, the Court of Appeal went further and opined that it could not see how a waiver clause could ever be used to turn a non-compliant bid into a compliant one. While the court did seem prepared to allow "minor irregularities or non-material defects" (neither of which it went on to define), "no bidder would participate in a tendering process in which the owner had an unreviewable subjective right to deem patently non-compliant bids to be compliant bids." A bid must first be "substantially compliant" with the terms of the invitation or request *before* an owner could exercise its discretion to waive non-compliance, according to the BC Court of Appeal.

It must be pointed out that much of this speculation by the court is not germane to its decision and thus is not binding on any court … yet. However, on its way to the BCCA is a case, exactly on this issue – *Kinetic Construction Ltd. v. Comox-Strathcona (Regional District)* (2003), a decision of the BC Supreme Court. The BC Court of Appeal stated in *Graham* that it did not have to consider whether the *Kinetic* decision was correct when it found the discretion clause (i.e., the waiver of non-compliance clause) permitted the owner to accept a non-compliant bid "without breaching its duty to treat other bidders fairly and equally."

Well…it soon will have to decide exactly that issue. From what the court said in *Graham*, things do not look good for "to waive or not to waive; I alone will decide" clauses. Like *Hamlet*, those who think they can may be doomed to disappointment. Or, it may be much ado about nothing. In the meantime, for those of you with "waiver of non-compliance" clauses in your invitations or requests, use them with care. They may not be as wide or as all encompassing as their words imply.

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