



by Glenn Ackerley

A fine line

RFP or tender – a judge decides

A RECENT DECISION OF THE British Columbia Supreme Court demonstrates that the line between a tender process and a request for proposal can be a very fine one, particular in “hybrid” processes, which have characteristics of both.

Tercon Contractors Ltd. (“Tercon”) was a respondent in a proposal call process run by BC’s Ministry of Transportation and Highways (MOTH) for the construction of a 25 km. stretch of highway. The MOTH had first run a Request for Expressions of Interest (RFEI) process to screen candidates and Tercon had ranked first.

After deciding to change the method of project delivery, the MOTH issued the Request for Proposal (RFP) to the six respondents involved in the RFEI. The RFP provided that only those six were eligible to submit responses and any proposals received by any other proponent would not be considered. The RFP also required each proponent to advise the MOTH of any material changes to its composition or financial capability after the RFEI, and the MOTH could consider whether to allow that proponent to continue with the process.

One of the original proponents was Brentwood Enterprises Ltd. (“Brentwood”). As it prepared its proposal, Brentwood found it difficult to meet the bonding requirements of the RFP on its own, and recognized it lacked certain expertise in drilling and blasting work needed for the project. To overcome these challenges, Brentwood joined forces with Emil Anderson Construction (EAC) in a 50-50 joint venture, since EAC had the required expertise and could share the burden of bonding. Brentwood wrote to the MOTH prior to the closing of the RFP to advise of the change and the MOTH did not respond.

Tercon had also made some changes to its team – letting go a number of designers, since the MOTH had taken over the task of designing the project. Tercon did not provide advance notice to the MOTH of the personnel changes.

The total proposal price from Brentwood was \$23,935,166.00. Tercon’s price was \$26,083,623.00. Through the evaluation process, both Brentwood and Tercon scored significantly better than any of the other proponents. Although the MOTH was aware of the proposed joint venture between Brentwood and EAC, they proceeded on the basis that the joint venture would only be entered into if Brentwood was awarded the contract. In fact, EAC had been significantly involved in the preparation of the proposal and was an integral part of the team. At the conclusion of the evaluation process the MOTH selected Brentwood as the preferred proponent.

To avoid violating the rule restricting who could be awarded the contract, the MOTH was careful to enter into the contract to Brentwood alone, and let Brentwood and EAC then work out a separate agreement between them. The final agreements were structured so that EAC was described as a subcontractor but one who shared in the profits and risks on a 50-50 basis with Brentwood. Brentwood/EAC proceeded to carry out the work.

In the ensuing lawsuit, Tercon took the position that the MOTH should not have awarded the contract to Brentwood because, in

reality, the actual proponent was a joint venture between Brentwood and EAC. Such an entity – which is legally different than Brentwood alone – should not have been considered because the RFP precluded the participation of proponents who had not pre-qualified. Tercon sued for almost \$3.3 million, representing the difference between the proposed revenues for the project and the estimated cost for performing the work. In its defence, MOTH raised a number of issues, which the court addressed in turn.

Did Contract A arise?

The MOTH argued that no Contract A had arisen between Tercon and the MOTH, so no liability could flow. Even though the document was described as an RFP and the respondents as “proponents” the court concluded that the process really was a tender and Contract A had arisen. In reaching this conclusion, the court surveyed a number of authorities that described the indicia of a tender versus an RFP. The kind of process determines whether or not Contract A comes into existence.

In this case, the court concluded that – despite the label given to the process – the RFP here consisted of a formal process with explicit, prescribed documentation. The bids were irrevocable for 60 days and a security deposit was required. Although negotiation was contemplated, which is often a distinguishing feature of an RFP, the court found that the extent of the negotiation in this case was very limited and did not, therefore, mean that the process was an RFP process but rather was a tender.

A careful review of the cases considered by the court and the evidence regarding the scope of negotiation leading to Contract B suggests that this situation falls about as close to the demarcation point between the two processes as one could imagine. Many of the criteria discussed in the decision would suggest that it was equally open to the court to have reached the opposite conclusion.

Was the Tercon submission compliant?

The MOTH pointed to issues with the Tercon proposal that meant that proposal itself was non-compliant and, accordingly, Tercon could not assert that Contract A arose between it and the MOTH. The court reviewed the allegations made about the proposal, which principally involved equipment rates, and concluded that they were minor enough in nature to pass the “substantial compliance” test developed in recent cases including the 2004 decision of the BC Court of Appeal in *Graham Industrial Services Ltd. v. Greater Vancouver Water District*.

By contrast, the court concluded that the Brentwood proposal was materially non-compliant. The court held that the proposal had in fact been submitted by a joint venture, which was an ineligible proponent. Brentwood’s proposal was not capable of acceptance by the MOTH.

The court went on to find that the MOTH’s sanctioning of this arrangement between Brentwood and EAC constituted a breach of the duty of fairness owed to Tercon particularly because it gave

Brentwood/EAC an unfair advantage. The court's view on this point appeared to be influenced by the evidence showing how the MOTH sought to cover up the joint venture problem through the contract structure entered among the parties.

The exclusion of liability clause

Having failed to avoid Contract A and having selected an ineligible bidder, the MOTH had one last argument up its sleeve. The RFP provided:

"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".

The MOTH argued that this exclusion clause was a complete defence to Tercon's claim.

However, unlike other clauses where owners have successfully limited liability for damages in tender cases such as *Elite Bailiff Services v. B.C.*, this clause sought to exclude liability altogether. The courts have a very strong reluctance to allow wrongdoers who have committed blatant wrongs to escape liability by such a clause and this case was no exception.

By relying on the principles of fundamental breach, the court held that the wrong committed by the MOTH was so egregious that it was neither fair nor reasonable to enforce the exclusion clause. The MOTH was left to argue damages.

Damages and mitigation

The MOTH asserted that Tercon's claim for lost opportunity was grossly overstated. The court carefully reviewed the evidence of Tercon's anticipated costs and compared it to the adjusted revenues and partly upon certain costs overruns actually experienced when Brentwood/EAC performed the project. The difference between the two figures was \$3,293,998.00.

The MOTH argued that this figure should be reduced by mitigation. The court disagreed. After hearing the evidence about what other work Tercon was able to perform in lieu of the MOTH project, the court concluded that Tercon could have also undertaken this project and no discount was made to the damage figure.

In the end, the MOTH not only had to pay Brentwood/EAC for the work itself, they are also left having to pay Tercon substantial profits and overhead for a project Tercon did not have to lift a shovel to earn.

Free standing duty of fairness

On a final note, the court made passing comment on the notion that there is a duty of fairness that exists outside of Contract A. Citing various appellate authorities, the court stated that no such duty exists. It is interesting to note, however, that the RFP cases referred to by the court have held that a duty of fairness may indeed arise even though no Contract A exists between the parties.

This case (Tercon) illustrates the serious consequences facing the owner who sets out clear rules about how a procurement process is to be run, and then does not to follow them. What can other owners do to try and avoid this liability? The following are some suggestions:

- The decision was based on contractual liability arising from the tender-like nature of the process; if you intend to run a true (non-contractual) RFP and not a tender, make sure that the documents clearly say so.
- Be wary of including exclusion clauses allowing you to escape liability for all wrongdoing since courts are reluctant to enforce them; instead, include limitation of liability clauses reducing potential liability, e.g. to proposal preparation costs.
- The owner here failed to follow its own strict rules; if flexibility is likely to be needed, consider adding a broad waiver of compliance clause which may provide a legal defence to a claim for accepting a non-compliant submission.

Above all, whether or not it legally stands on its own, the concept of "fairness" is still the yardstick the owner's actions are measured against. If you are not being fair, you can bet you'll find yourself in trouble. ☹

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