# Legal obligations to subcontractors

by Glenn Ackerley

OWNERS ENGAGED IN procurement often worry about their legal obligations to the subcontractors involved in the bidding process. The Federal Court of Appeal's recent decision in *Canada v. Design Services Ltd. et al., (2006 FCA 260)* should help alleviate some of that concern.

In 1998, Public Works and Government Services Canada (PWGSC) conducted a proposal call process to select a "design-builder" who would be awarded the contract to design and construct a naval reserve building in St. John's, Newfoundland.

The first step taken was a statement of qualifications process that PWGSC used to assess the experience and capability of interested proponents and their team members. Qualified proponents were then allowed to respond to the request for proposals for the project, and their design-build proposals were evaluated.

One of the qualified proponents was Olympic Construction Limited. Olympic submitted a proposal with the help of its team, which included an architect, a structural engineer, an electrical contractor, a structural contractor and a civil contractor. The proposal was submitted with Olympic as the sole proponent but everyone agreed that the other team members would get the work if Olympic won.

PWGSC decided to award the contract to another pre-qualified proponent, Westeinde Construction Limited, and Olympic and its team lost out. For reasons that are not clear in the subsequent court decisions, Olympic decided to attack Westeinde's proposal as being non-compliant. Had Westeinde been disqualified, Olympic would have been awarded the project. Olympic sued PWGSC for damages for the lost opportunity.

The rest of Olympic's team joined in the action against PWGSC, echoing Olympic's claim. If Olympic had properly been given the contract, they argued, they would each have been able to earn the expected profits on their own work.

Prior to the trial of the lawsuit, PWGSC settled Olympic's claim and Olympic discontinued its action. The other members of Olympic's team did not settle but rather chose to continue on to trial where they advanced two arguments against PWGSC. The first was based on contract law and the second in tort law.

The contract argument relied on the Contract A/Contract B theory the Supreme Court of Canada first developed in the famous *Ron Engineering* case. The team members said that PWGSC's acceptance of a non-compliant bid was a breach of Contract A and therefore PWGSC was liable to them for damages.

The trial judge dismissed that argument, deciding that Contract A had arisen only between PWGSC and Olympic. Even though all of the members considered themselves to be part of one team, it was only Olympic who had been put forward as the sole proponent. It was only Olympic who faced disqualification if the requirements of the RFP were not met and Olympic who was responsible for demonstrating a financial capability to perform the work.

The judge noted that it had been open to the team to form a "joint venture" and collectively submit a proposal as the proponent, but they had not done so. No joint venture could be implied after the fact, since there was no evidence that the members had agreed to share both profits and losses on the project.

Having lost on the Contract A issue, the team members moved to the second argument: PWGSC owed the team members a duty in tort law and PWGSC's acceptance of a non-compliant bid was a breach of that duty, entitling them to damages.

The problem the plaintiffs faced is that the law of tort generally awards compensation only when plaintiffs have been injured or property has been damaged. There are very few exceptions where the law of tort will allow compensation where only money has been lost. (Recovery of the monies spent repairing dangerous or unsafe buildings, before actual damage has occurred, is one such exception.)

No existing legal category applied to this situation, which meant that the trial judge would have to make a new law. After analyzing the relationship between the team members and PWGSC, the trial judge concluded that the relationship was close enough that, based on applicable legal principles, PWGSC should be held to owe a duty of care to the team members to not accept a non-compliant bid. The plaintiffs won.

PWGSC appealed the decision to the Federal Court of Appeal. The appellate court agreed with the trial judge on the contract issue but disagreed on the conclusion regarding tort law.

In pointing to other unsuccessful appellate decisions refusing to find liability on the part of the owner to subcontractors, the Court held that the relationship between the owner PWGSC and the team members other than Olympic was too indirect and distant to justify the imposition of a new legal obligation. PWSGC's appeal was successful.

Subject to the outcome of any further appeal to the Supreme Court of Canada, this case should provide some comfort to owners who might be concerned about facing potential claims of subcontractors in the bidding process.

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