

THE TENDER PROCESS: PROTECTING YOURSELF FROM CLAIM RISK

Stephen J. Berezowskyj

The tendering process typically engages a number of parties, each of whom invests considerable time and money in the competition for a construction contract. Most of the rules of the competition are set out in the tender package. But the process also involves implied obligations and duties of fairness which do not appear in the documents and are not easily defined. For these reasons, the tendering process is one of the most contentious and highly-litigated aspects of the construction process. Equally, it represents a high-risk area for the consultants who are retained to guide owners through this complicated process.

A consultant may be involved in some or all of the following aspects of the tendering process:

- **Preparing the design.** Every project will involve an underlying design with drawings, specifications and other important information prepared by a design professional.
- **Preparing the tender package.** Consultants may be asked to prepare the tender package, which will typically include Instructions to Bidders, a Tender Form or Schedules a Form of Construction Contract and other materials.
- **Administering the tendering process.** This involves coordinating the presentation of information to the bidders, responding to questions, evaluating the tenders and making a recommendation to the owner.

As a professional performing these various roles, an engineer will be bound by the terms of the contract to provide the services in a manner that meets reasonable professional standards. In addition to this contractual obligation to the owner-client, a consultant can owe a legal duty to contractors and sub-contractors who will rely on the consultant to provide accurate information on which to bid the job, to ensure that the tender rules are followed and that all bidders are treated fairly.

Historically, most tender-related claims against consultants involved alleged errors in the underlying design for the project. But in a series of recent cases, consultants have been sued and found liable to pay damages for errors made in the course of issuing tender documents and administering the process as the owner's agent.

In *Tectonic Infrastructure Inc. v. Middlesex Centre*, the Township of Middlesex Centre was required to pay damages to an unsuccessful bidder after it improperly awarded a water mains and road construction contract to a bidder who had altered the Tender Form provided in the package. The Township sought compensation from the consulting engineer it retained to prepare the tender documents and to make recommendations on the award. The Court in that case determined that the consultant was negligent for failing to identify the non-compliant bid and, therefore, was liable to compensate the Owner for the amount of the full amount of damages it was required to pay to the unsuccessful bidder.

In *Stanco Projects Ltd. v British Columbia*, an unsuccessful bidder sued the Province following the award of a contract to upgrade a water system at Cypress Bowl Provincial Park. The Court concluded that the Province breached the bid contract by conducting pre-award negotiations or bid shopping and, therefore, was required to pay damages to the unsuccessful bidder in the amount of its projected profit on the project. Even though the Province was found to be a sophisticated party with experience in tendering, the Court of Appeal found its consulting engineer liable to pay all costs awarded against the Province because the tender documents prepared by the consultant did not clearly set out the bid requirements and because the consultant conducted the post-tender negotiations on behalf of the Province.

In *Hub Excavating Ltd. v. Orca Estates Ltd.*, the low bidder sued a developer who issued a tender call to clear and service land for a subdivision in Nanaimo, but then cancelled the project instead of awarding the contract. The Plaintiff alleged that the developer improperly used the bidding process to obtain market information on building costs. The Court held that the developer, through its engineer, misled the bidders about the budget and the future of the project. The Court awarded damages to the low bidder for its loss of profit on other projects passed up to bid on this one. The Court found that the developer treated the bidders with “callous indifference” throughout the process and assessed its liability at 80%. The consultant was found to have “inadvertently” misled bidders while acting as the developer’s agent, and its liability was assessed at 20% of the low bidder’s damages. (Because the engineer was found “jointly and severally liable” for the damages, he is legally obligated to pay 100% of the claim if the developer does not meet its obligation to pay its share). This decision is currently under appeal.

It is clear from these cases that consulting engineers can be liable to both their clients and to bidders for mistakes made in the tender process. Recognizing this risk, engineers who are involved in this area may wish to consider the following:

- **Insurance.** Most professional liability policies will cover architects or engineers who are acting as consultants in the tendering process, but you should speak to your insurance broker to make sure that you have coverage for that type of work. You should also

consider your limits of insurance because a claim for loss of profit on a large project can be substantial.

- **The Tender Package.** Consider whether it is appropriate to include a privilege clause which can increase the owner's discretion when awarding contracts. You may also consider a clause that limits the owner's liability for mistakes in the documents or incorrect decisions in the tender process and one that requires bidders to verify certain measurements or site conditions.
- **Project Documentation** It can be difficult for consultants to recall the detailed information required to fully explain their actions or defend their recommendations if an objection is not raised until well after the award of the contract. For that reason, consultants should prepare and maintain a written record of all recommendations made to their client, all instructions received and all information provided to bidders.
- **Legal Advice** If issues arise during the tender process, consider whether it is appropriate to seek legal advice. An assessment of whether or not a bid is capable of acceptance, whether pre-award negotiations are permitted and other important decisions will likely involve a legal conclusion. In such cases, consultants should strongly encourage the owner to obtain a legal opinion and to do so prior to making a decision on the award of the contract.

While the vast majority of construction projects will not result in claims or litigation, these recent cases demonstrate that consultants are exposed to liability when mistakes are made in the tender process. As in all areas of professional practice, the standard by which the engineer's performance will be measured is that of the reasonable level of performance of an appropriately qualified and experienced engineer in similar circumstances.