

CLIENT UPDATE!



RIGHT TO NEGOTIATE WITH BIDDERS IN THE PROCUREMENT PROCESS

It is written in stone that during the procurement process for construction projects an owner must not negotiate with bidders from the time tenders have closed until the expiry of the procurement process. To do so would amount to a breach of “Contract A”, that is the bid contract between the Owner and each bidder, and expose the owner to a claim for damages by each of the unsuccessful bidders in such a process. That does not mean the owner can never negotiate with bidders: the right to negotiate can arise in one of two situations.

First, an express term or condition of Contract A can provide for the owner’s right to negotiate. Indeed, such a clause is not unusual, particularly in the process of procuring by means of a Request for Proposals, commonly used in the public sector. But without such a clause the right to negotiate is non-existent, at least during the life of the Bid Contract.

The second way in which the right to negotiate might arise is when for either substantial reasons, or owners exercising their right pursuant to the “Privilege Clause” commonly found in Contract A, all bids received to the procurement process are rejected. Upon that occurrence, a recent case from the B.C. Supreme Court has reaffirmed the owner’s right to freely negotiate with one or more of the unsuccessful bidders.

In *Cambridge Plumbing Systems Ltd. v. The Owners of Strata Plan VR 1632.*, 2009 BCSC 605, Cambridge had alleged the owners were guilty of “bid shopping”, relying on some evidence that some of the Strata Plan owners became unhappy with the prices submitted during the procurement process and explicitly expressed their wish, if not intention, to enter into negotiations with the bidders to see if a better price could be obtained. Following the advice given to them by their consultant and other strata owners that no such negotiations were to be held during the procurement process, Cambridge’s bid was submitted to a special general meeting of the owners where, upon a duly constituted vote, the bid was rejected as being more than the owners were willing to commit to. One of the owners shortly thereafter proceeded to negotiate with both Cambridge and one of two other unsuccessful bidders, whose bids had been earlier rejected, and subsequently awarded a contract to one of those unsuccessful bidders.

Cambridge, being unhappy with the result and the process, alleged in an action they commenced against the owners that the subsequent negotiations constituted bid shopping.

Madam Justice Dorgan of the B.C. Supreme Court disagreed with Cambridge and found that upon rejection of Cambridge’s bid at the Special General Meeting the bidding process came to an end and that the owners then became entitled to negotiate with any one or more of the bidders to see if a better price could be obtained. Neither the stated desire of one of the owners during the procurement process, nor the negotiations conducted after the Special General Meeting constituted bid shopping. In the result, Cambridge’s action for its loss of profits on the project failed.

John Singleton and Aaron Sherriff acted as counsel for the Strata Owners.

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