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OVER BUDGET

A tender call invariably carries the customary privilege clause (i.e. the owner need not accept the lowest or any tender). The latter condition allows the owner to shut down the prospective project if the tenders are over budget. Regardless of that clause, are there circumstances in which the owner or its generals may still be liable for breach of the tendering contract? This question is discussed in two 2008 Ontario Superior Court of Justice cases: G & S Electric Ltd. v. Devlan Construction Ltd. and Aloia Bros Concrete Contractors Ltd. v. Richmond Hill.

Devlan

The owner called for tenders. The general was the low bidder, but its price came in \$1.3 million (30%) over budget. The owner went back to the three low generals and requested that specified portions of the work be altered, re-priced, or deleted. The general was not happy. It wrote the owner and stated that the owner should only be dealing with it as low tenderer. However, it grudgingly agreed to participate in the process.

The general then requested the low electrical sub, whose price it had carried in its tender, to sharpen its pencil and assist the general in the re-pricing process. However, unbeknownst to the sub, the general had requested a competing subcontractor to engage in the same process.

Five days before the post

tender addendum closing date, the general learned that the other two generals had decided not to engage in the cost cutting process. Accordingly, it knew that the owner would either cancel the project or select the general to complete the project.

The sub submitted a revised bid of \$498,000, \$92,000 less than its original bid. However, its competitor submitted a bid that was \$31,000 less than the sub's revised bid. The general chose to carry the competitor's bid in its re-pricing tender to the owner. The owner accepted that tender and awarded the contract to the general. The general awarded the electrical subcontract to the competitor. The sub sued the general.

Custom

The sub alleged that the general should have dealt only with it. The general agreed that, normally, it would have gone back to the sub only. However, because the owner went back to three generals, the general changed its normal procedure and went back to two electrical subs.

The sub's expert testified that the construction industry followed the informal guidelines that the Canadian Construction Association issued. These guidelines specified that, if a tender is over budget, the owner should negotiate with the low contractor; this duty would then flow to that contractor and govern its treatment of its low subcontractors. If the negotiations between the owner and the low

contractor failed to produce a contract, then the owner could enlarge its bid discussions to the three low bidders from the general contractor level and the general contractors could expand their negotiations down to the three low subcontractors. This last step is closely akin to the recalling of tenders.

The complaint in this case was that the owner and the general, in effect, skipped the first portion of the normal process and went directly to a re-tender type of situation.

Result

The judge held that the sub had an implied expectation that the contractor would ask only it, as low bidder, to make a revised submission for the electrical work. By requesting the sub's competitor to do so also, the general breached that implied term of the contract and failed to follow the accepted rules of engagement of the tender process. The judge felt that the general ought to have used the sub's price and increased its tender to the owner accordingly. Finally, the judge noted that the general had originally subcontracted the sub as its carried subcontractor and did not request or receive permission from the owner to change the sub. The judge held that the general breached its tender contract with the sub.

Damages

The sub testified that it had a profit margin of \$50,000 in its bid. It also stated that, historically, it had beaten its estimated profit margin by an average of 30%. We would take this information with a large grain of salt

because, frankly, we cannot believe it. However, we were not the judge, who did buy it – in full. The judge set the damages for loss of profit at \$65,000.

Claim Over

The general had joined the owner as a party to the action, claiming that if it were liable for damages to the sub, then the owner should pay those damages. After all, the sub changed its usual procedure because the owner had opened the tender to the three low contractors rather than dealing exclusively with the general. The general claimed that the owner had been unjustly enriched at the general's expense because the price that the owner received was lower than what it would have paid had the general not accepted the lowest electrical bid and passed on the savings to the owner.

The judge dismissed that claim, but gave no reasons for his decision. Accordingly, we will leap into the breach and give a reason. The general did not have to reduce its bid to the owner by using the competitor's price. It could have taken its chances by using the sub's price. That was a decision, really a gamble, that it made. If it chose the sub's higher price, then its bid to the owner may have been too high, causing the owner to decide to cancel the project. If it chose the lower price, improperly, it was liable to the jilted sub. The owner did not ask the general to make that decision; it simply called for a new price.

Aloia

The general bid \$1.57 million, \$321,000 more than the owner's budget. The general was the low, and the only, bidder. The owner relied on the privilege clause. It did not request the gen-

eral to negotiate a new price or to suggest design changes that would reduce costs. Rather, it simply cancelled the project.

The general was unhappy. It felt that the owner should have attempted to negotiate the construction contract to bring the contract within budget. Alternatively, the owner should have informed the tenderers of the budgeted amount before the tenders were delivered.

Short

The reasons for decision were not lengthy. They did not have to be. The judge held that the owner owed no duty to the general to accept the tender or to request a new price. Further, the owner owed no duty to reveal the amount it had budgeted for the project. We agree with both of these holdings. If an owner had to

reveal its budget before tender, it would be highly detrimental to it. If the budget amount were high, it could be an incentive for bidders to increase their bids. If it were low, the owner might not receive a sufficient number of competitive bids.

The judge stated that the general was claiming \$166,000 for damages based on lost profit. Remember, the tender price was \$321,000 over budget. The judge therefore noted that, even if there were a duty to negotiate a contract, the likelihood that the contract price would be reduced more than \$166,000 to fall within budget – such that the general would be building the project at a loss – would be just about nil. Accordingly, if the judge had not dismissed the action, he would have awarded only the costs of preparing the tender, which he set at \$7,500.00.

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