

Private vs. Public Rights - What is the Law?

We all know that tendering in Canada is based on the strength of many legal precedents. Very few of us in this industry have not heard about Ron Engineering, Martell, MJB and the numerous cases that followed which have provided us with a set of rules on how tenders should be handled.

We have been lectured and lectured on the rules of bid closings, of Contract A and Contract B. Yet despite this, we still find owners ignoring these precedents, contractors who forget their responsibilities and subtrades who rarely even bother to read the documents, ignoring the fact that the rules of the “bid” and the subsequent contract clauses apply to them. That’s usually when I hear cries of anguish from subtrades accusing the contractors of being unfair.

Currently we are awaiting the fallout from the Supreme Court appeal of the Tercon case, the result of which could seriously jeopardize the tendering process across Canada or reinforce what we all believe is the right way to conduct a Tender. There has been much written on this already by myself and many lawyers as we wait for the other shoe to drop.

In the meantime, the laws governing bidding and tendering are in place and those who choose to ignore them do so at their own peril. One need only to look at the updates to the Goldsmith on Canadian Building Contracts or issues of the Construction Law letter to see the folly of trying to get around the principle of “fairness”.

The most often quoted clause is the Privilege Clause which can be as simple as the usual “the lowest or any price may not be accepted”, to clauses that run to three or more pages. All are designed to allow an owner to ignore their “Duty of Fairness”. Anyone who does read the above-mentioned documents knows that such clauses are not absolute and the courts have set certain parameters around their use. This issue is worth a column on its own but that is for a later time.

The question that has shown up recently concerns the rights of private owners vs. public owners. Do the laws of Bidding and Tendering and their precedents which are applicable to the Public sector also apply to the Private sector?

Can private owners do what they want and ignore the rules? In researching this, I went to the excellent book on the topic of Bidding and Tendering written by Bill Pigott and Paul Sandori. Chapter 3 lists and discusses a large number of cases that reinforce the law of bidding and tendering. What is interesting, as the authors relate, is that the list of contractor / owner bid litigation is almost entirely between Public organizations and contractors. This begs the question - what is going wrong that so much litigation is happening in the Public sector and not the private? Again, this is a subject for a future column.

After some research, I was able to locate a case between a private owner and a contractor. In 2005, a case was decided that reinforces the answer to the question being asked. The case *Southside Construction (London) Ltd. V. 734133 Ontario Limited* (Shoppers Drug Mart) reinforced that there is one law for everyone when it comes to bidding and tendering and the use of a privilege clause. The owner breached the obligation to act in good faith and the court found for Southside.

The difficulties in holding private sector owners responsible are several. As we know, owners may have a duty to treat all contractors fairly but they do not have a duty to make their contracts fair! Many open bids in private making the access to information difficult. We all know in this industry there are no secrets. With so many suppliers and subtrades involved, news of an owner try to shop or alter a bid spreads very quickly.

So the answer to the question is - the law is the same for both Public and Private Owners who conduct tenders, which raises another question.

Why do so many owners, either Public or Private, feel it is necessary to try and circumvent their duty through convoluted Privilege clauses and clauses that eliminate any responsibility for an owner to be held accountable if they break the rules? Clauses like these are detrimental to everyone in an industry that needs to rely on a solid working relationship between Owner, Contractor and Consultant with a strong element of trust.

So far the courts have seen through these attempts and the OGCA has had successes in convincing many owners to be reasonable. But the problem continues and as long as it does, then the list of reference cases will continue to grow. One would think that someone would notice that trying to gain an unfair advantage is more costly than working with the industry.

Till then, remember the golden rule ... **READ THE DOCUMENTS!**