

July 2016

No Margin for Error in Tendering Process? Recent BC Court of Appeal Decision Warns Bidders to Play by the Rules

The recent BC Court of Appeal decision in *True Construction Ltd v Kamloops (City)*¹ is an important reminder to contractors to diligently follow tender instructions when responding to a call for tenders. The decision is also a good reminder to owners that not all “irregularities” found in tender documents, even with the assistance of a broad privilege clause, can be waived by an owner when selecting a winning bid.

Background

The City of Kamloops (the “**City**”) sent a call for tenders for the construction of a new fire hall. The tender instructions required that the bid form along with a number of appendices be mailed in a sealed envelope to the City by the tender proponent before the deadline to submit bids. The City allowed certain amendments to be made after the sealed bid had been submitted by faxing an appendix form outlining the amendments (again before the deadline).

One of the bidders, True Construction Ltd. (“**True**”), delivered a sealed bid envelope by mail before the deadline. However, True did not fully complete one of the appendices and omitted appendices

¹ *True Construction Ltd v Kamloops (City)*, 2015 BCSC 1059, aff'd 2016 BCCA 173.

altogether. True later faxed the missing information and appendices to the City before the deadline.

True was the lowest bidder. However, the City rejected True's bid because it found it to be materially non-compliant. Namely, True had attempted to remedy its incomplete bid by faxing the appendices and other missing information after it had submitted its incomplete sealed bid.

True commenced an action in the BC Supreme Court seeking damages and costs. True argued that its bid was substantially compliant and that the missing appendices (remedied by the faxed update) amounted to a mere irregularity capable of acceptance by the City.

The Trial Decision

A central question at trial was whether True's bid was compliant. The bid instructions did not specifically state that the tender proponents should include the appendices with the bid form. However, the trial court found that, because the tender documents defined the appendices as part of the bid form, the appendices ought to have been included when True submitted its sealed bid.

The trial court considered if the defects in True's bid were clerical or technical in nature or whether the defects were essential to the agreement, rendering the bid *materially* non-compliant. The Court found that a discretion clause permitted the City to waive irregularities in a bid form, provided that the irregularities were of a minor and technical nature.

The trial judge held that material non-compliance is "anything that might impact the reasonable expectation of the parties or undermine the integrity of the tendering process ..." including defects that may provide a competitive advantage to a bidder. On this point, the trial judge found that True gained a competitive advantage, because it was able to continue negotiating with subcontractors while the other bidders, having submitted completed bids, could not do the same, and thus held that the City was correct in rejecting True's bid.

On Appeal

The Court of Appeal accepted much of the trial judge's findings. The Court found that, considering the entirety of the bid documents

together, the appendices formed part of the bid form. Having submitted an incomplete bid, True's bid was not compliant.

The Court of Appeal came to the same conclusion as the trial judge on the issue of whether True's bid contained simply clerical irregularities or material irregularities rendering it substantially non-compliant, but for different reasons. The Court found that one of the missing appendices, which required a list of selected subcontractors, was clearly a material component of the tender because it had a bearing on the price and schedule of the contract. An irregularity in a material component of the tender renders the bid unacceptable.

The Court of Appeal also found that the faxed submissions did not rectify the irregularity. The Court reasoned that the submission of an incomplete bid followed by a later attempt to complete it by faxing further documents is different from the submission of a complete bid that is subsequently revised. The latter would have been in compliance with the bidding rules. True's competitive advantage arose from its submission of an incomplete bid and its subsequent attempt to use revision procedures to complete its bid. Thus, True should not be allowed a competitive advantage by submitting a bid that was not capable of acceptance by the City and then later attempting to remedy the defect once it was able to negotiate more favourable terms with its proposed subcontractors.

Conclusion

True Construction does not purport to change tendering law. Rather, this case shows the tendency of our courts to favour the integrity of the bidding process by not allowing any of the bidders to gain a competitive advantage by not correctly following the tender instructions. This tendency reflects the traditional importance the courts have given to upholding contracts between parties in order to maintain stability and predictability in commercial relationships.

Ultimately, contractors need to follow tendering instructions carefully. If any questions arise with respect to the bidding process, contractors should contact the owner to seek clarification. The case is also a helpful reminder to owners that missing information in a bid

will not necessarily mean that the bid is incomplete. The owner should consider the nature of the information that is missing and the potential effect the information may have on the bidding process in determining whether the bid should be rejected. Missing information that increases the potential likelihood of placing the bidder at a competitive advantage may be considered “material” and could render the bid unacceptable. Whether information is considered “material” is necessarily fact-specific, and it may be worth seeking legal advice when such tendering questions arise.

by [Jamieson Virgin](#), [Paula Krawus](#) and [Emily Csiszar](#), Temporary Articled Student

For more information on this topic, please contact:

Vancouver [Jamieson Virgin](#) 604.691.7455 jamieson.virgin@mcmillan.ca

[a cautionary note](#)

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2016