



John D. Stefaniuk, Partner, Thompson Dorfman Sweatman LLP

LOVE ME, TENDERER

– municipalities, tendering and the law

Municipalities and other public bodies are often involved in projects or purchasing in which the contract is put out for tender. The tendering process helps to ensure that contracts are awarded to qualified suppliers, on the most advantageous terms (financial and otherwise) for the municipality and without improper political or personal preference. From the bidder's perspective, it offers a fair opportunity to secure a contract by submitting the best qualified bid.

The courts get involved when the process goes awry. Sometimes low bidders believe that their bids are rejected for improper reasons. Sometimes higher bidders believe that the low bid that was accepted should have been rejected as ineligible. Contractors can, and often do, sue municipalities. Their claims are for the lost profits that they would have earned from the job had it been properly awarded. Those can be big numbers, and municipal liability insurance may not cover the loss.

The courts have been very active in supporting the integrity of the tendering process. Courts have held that a call for tenders creates a legal, contractual obligation on the municipality, in favour of all of the bidders, to award the contract only in accordance with the terms of the tender. (The courts call this "Contract A." The contract that is then awarded to the successful bidder is "Contract B.") After all, bidders may spend thousands of dollars in time and resources in preparing a bid, and they deserve to be treated fairly. If bidders lose faith in the tendering system, what alternatives will a municipality have to make sure that it is getting the best contract?

Public bodies have a duty to act in good faith in the tendering process. Courts have held this duty to include:

- Making the bid evaluation criteria available to all bidders;

- Giving each bidder a fair opportunity to bid;
- Evaluating the bids using only the criteria set out in the invitation to tender; and
- Rejecting all non-compliant bids.

Courts have rejected "bid shopping." Bid shopping occurs when a municipality opens the bids and then uses them to "negotiate" by approaching bidders with the information and trying to get them to lower their bids. This violates Contract A and the duty of good faith.

The tendering process helps to ensure that contracts are awarded to qualified suppliers, on the most advantageous terms for the municipality and without improper political or personal preference.

Tendering lawsuits can be very expensive and complicated.

The 2007 Supreme Court case of *Double N Earthmovers Ltd. v. Edmonton*, the City of Edmonton dealt with a contract to provide earthmoving equipment and operators. Double N and Sureway were two bidders. The call for tenders required that all equipment was to be 1980 model year or newer and was to be fully described, with serial numbers listed. Before the contract

was awarded, Double N told Edmonton that one Cat listed by Sureway as a 1980 model was actually a 1979 model. For another piece, Sureway listed a 1977 unit "or 1980 Rental Unit," without a serial number for the rental unit.

After its bid was identified as low bid the City approached Sureway and said that Sureway would "probably" get the contract if it could lower its price on one piece of equipment, which it agreed to do. Double N was also approached to reduce its price on the same type of equipment. Edmonton awarded the contract to Sureway. By the time the contract was performed, Sureway had acquired use of 1980 equipment, but over the 30-month contract it also used other, older equipment on the job.

Double N, as next lowest bidder, sued Edmonton. Double N said that Sureway's bid should have been rejected because Edmonton was told that Sureway did not have the equipment and because Sureway did not include all equipment serial numbers. Double N also said that by agreeing to changes to the contract with Sureway, Edmonton was bid shopping.

In a split decision, the Court dismissed Double N's claim. It held that Sureway submitted a bid that complied with the call for tenders. In the bid Sureway promised to supply 1980 model or newer equipment. Once Edmonton accepted the bid, Sureway was legally bound to comply with the terms of the bid if Edmonton insisted. Edmonton was not under any duty to investigate the accuracy of the bid.

The tender package (in what is usually referred to as the "privilege clause") allowed the City to "waive any informality." The Court said that the failure to include the equipment serial number was just the type of bid defect that could be waived by the City. The lack of a serial number was not something that was material to

the performance of the contract or to the price.

It also held that the Edmonton was not bid shopping when it approached Sureway to lower its price. The tender package included a condition that "Changes in Tenders will not be permitted after the Tenders have been opened unless negotiated with the lowest evaluated Tenderer." Under that term, Edmonton was permitted to negotiate with the low bidder, which was Sureway. (I suspect that had Edmonton selected another bid after these "negotiations," the court's view might have been very different.)

WHAT ARE SOME OF THE LESSONS?

1. Be very careful when preparing the call for tenders. Consider developing a standard document (but make sure that it fits the job before using it). Extra time up front avoids costly headaches later.
2. Pay special attention to the privilege clause. If the municipality intends to exercise discretion in selecting a bidder other than the lowest bidder, then set out the criteria that will be used. Do not rely on just "the lowest or any bid may not necessarily be accepted."
3. Reject all non-compliant bids unless

the call for tenders allows you to do otherwise. This may be hard to swallow when it means disqualifying the lowest bidder(s), but everyone needs to play by the same rules and it may save you a law suit.

4. Be very careful when considering waiving informality or non-compliance, even when you are allowed to do so.
5. Don't bid shop.
6. Get advice from your municipal solicitor or another lawyer with tendering or construction law experience.

Remember, every project starts with a good foundation. ■



Nelson River Construction Inc.

FOR ALL YOUR CONSTRUCTION NEEDS

Municipal, Residential,
Commercial and Industrial Works
Asphalt & Concrete Paving
Sewer & Water

101 Dawson Road North
Winnipeg, Manitoba R2J 0S6
Telephone: (204) 949-8700
Fax: (204) 237-8337



www.nelsonriver.com