

By Matthew Swanson and Alexander Bjornson



Tender with care: The importance of bid compliance

Tendering is often a complex and hurried process, and sometimes mistakes are made. In the recent case of *True Construction Ltd. vs. Kamloops (City)*, the British Columbia Supreme Court and the Court of Appeal considered a number of issues relating to tendering and the need to comply with the rules set out in a call for tenders. In both instances, the Courts emphasized the importance of bid compliance.

True Construction Ltd. vs. Kamloops (City) involved the construction of a fire hall for the City of Kamloops. The City's tender instructions required the submission of certain bid documents, including a bid form and five appendices ("A"-"E") by way of sealed envelope. Bidders were permitted to revise the proposed contract price prior to the tender deadline by faxing in a specified form (appendix "F").

The tender documents also included a "discretion clause", which permitted the City to accept bids that did not conform strictly to the requirements, so long as the irregularities were minor or technical and did not give the bidder a competitive advantage. However, where a bid failed to conform to the instructions to bidders, the clause gave the City discretion to disqualify that bid.

True Construction submitted a sealed bid to the City the day before bidding closed. However, one of the required appendices (appendix "A") was incomplete and another (appendix "B") was not included. The following day, True Construction sent a fax including completed appendices "A" and "B", all under cover of appendix "F". After reviewing the bid documents, the City determined that True Construction's bid was non-compliant and awarded the contract to

another contractor.

True Construction initiated court proceedings, arguing that its bid was compliant because, in its view, the tender instructions did not require all appendices to be included in a sealed envelope and, in the alternative, that the alleged non-compliance was immaterial and should be overlooked.

Canadian courts have repeatedly indicated that bids, which simply omit inconsequential details or are submitted in a different format than requested are generally capable of acceptance (so long as the tender contains all relevant information). However, bids that fail to include requested material information cannot be accepted unless there is a "discretion clause" contained within the bid documents, in which case the measure for a bid's validity is "substantial compliance." In such instances, courts consider whether the bid failed to address an important requirement, and if so, whether there is a substantial likelihood that the defect would have been significant or material to the owner's decision-making process.

Here, the Court found that True Construction's bid did not strictly comply with the tender requirements. While appendix "F" could be used to alter the bid's contract price, it could not be used to complete a bid and provide information that should have been included in the sealed envelope. By submitting follow-up documents by fax, the Court found that True Construction ignored the required sealed bid format, making True Construction's bid not strictly compliant.

Nevertheless, because the tender documents contained a "discretion clause", the key issue was not strict compliance

but whether there had been substantial compliance. However, even under that framework, the Court was unable to find in favour of True Construction. The Court found that True Construction gained a competitive advantage because it was able to negotiate with subcontractors while other bidders could not. This irregularity went beyond a minor or technical nature and, in the circumstances, the Court found that True Construction's bid was incapable of acceptance. True Construction's subsequent submission subverted the tendering process and provided an unfair advantage to True Construction.

True Construction disagreed with this outcome and appealed the case to the Court of Appeal, arguing that, even if the completed appendices were absent, its original bid was capable of acceptance. The Court of Appeal dismissed the appeal and upheld the City's decision to award the work to another (compliant) bidder.

The decision in *True Construction Ltd. vs. Kamloops (City)* highlights the importance of adhering strictly to bidding requirements. While courts may overlook trivial errors, it is unlikely that non-compliant bids resulting in any perceived competitive advantage will be considered capable of acceptance. Contractors need to take great care in preparing bids and closely follow tendering rules to minimize risk. Contractors should review the tendering process, the required elements of a bid, and tender with care. □

This article is provided for general information only. It may not be relied upon as legal advice. Matthew Swanson is a partner at Borden Ladner Gervais LLP (BLG). Alexander Bjornson is an associate at BLG. Send comments to editor@on-sitemag.com.