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Bidders Do Not Owe Duties of Fairness and Honesty to Other Bidders in Tendering Competitions

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Case Commented On: *LaPrairie Works Inc v Ledcor Alberta Limited,* 2019 ABQB 701 (CanLII)

This case raises the interesting question of whether bidders in a tendering competition owe duties of fair play to other bidders. The plaintiffs asserted that a contract had been formed among the bidders, requiring the bidders to treat each other fairly in the bid preparation stage, and that this contract had been breached at their expense. In a judgment summarily dismissing this claim, Justice Michael Lema found that the plaintiffs had not discharged the onus of proving a contract existed (at para 57).

Decision

LaPrairie Works Inc. and Contractors Leasing Corp. ("LaPrairie") are the plaintiffs. They bid in an Alberta Government's Request for Proposals ("RFP") in relation to highway maintenance contracts. Ledcor Alberta Limited, P.T. Brown and Gary Mayhew ("Ledcor") are the defendants. Ledcor won the tendering competition. LePrairie asserted that a contract existed between the bidders, to treat each other fairly during the bid preparation phase, and that Ledcor had breached it. In separate proceedings, LaPrairie sued the Alberta Government for what it perceived to be shortcomings in the bid and selection process, and it settled those claims (at para 43). These latter proceedings had no bearing on this application (at para 43), as this application was about whether the parties had made a contract with each other before beginning to assemble their bids, not about whether Ledcor's bid was compliant (at para 6, p 4).

LePrairie argued that a contract between the bidders had been formed in one of two ways. First, that the bidders had expressly contracted with each other. Or second, that an implied contract had arisen due to the parties entering into the bidding process.

LePrairie's first argument was that the bidders had formed a contract between themselves to act fairly and honestly in the bid preparation stage.

Justice Lema laid out many portions of the affidavits and the cross-examination testimony in which LePrairie argued for the existence of a bidders' contract. He found that while there could have been an acknowledgment, understanding, or even an expectation that the bidders would act fairly and honestly while preparing their bids, that was not the same as reaching a contract, as in, "promising to behave in a certain way *in exchange for* a reciprocal promise" (at para 6, p 9, emphasis in original). The judge drew a distinction between the Alberta Government requiring fair

and honest bidding, and the bidders agreeing amongst themselves to conduct themselves fairly and honestly in the bid preparation stage. The Alberta Government did have RFP rules,
and each bidder needed to follow the rules to avoid the consequences of breaching them, such as disqualification of its bid, but that does not mean the bidders owe a duty to each other, or had a contract with each other, to follow the rules (at para 6, pp 5, 9). Nothing prevents the bidders from contracting in this way, but the judge did not find any such agreement in this case (at para 6, pp 3, 4, 10).

In its second argument, LaPrairie argued that an implied contract had arisen between the bidders by virtue of their participation in the tendering process, through a multi-party or an inter-member contract. These types of contracts require a common set of rules to which parties agree to be bound, knowing and expecting other parties will do the same. Justice Lema found that the rules and requirements in the RFP did not address bidder conduct vis-à-vis other bidders in the bid preparation stage. This is unlike multi-party contracts, whereby the entry into a contest signals an intention to enter into contracts with other members (at paras 31-32), or inter-member contracts, whereby members, by virtue of their membership, enter into contracts with each other (at para 34).

Overall, Justice Lema did not find any evidence indicating that LePrairie had entered into a contract with Leduc to prepare their bids fairly and honestly, and that LePrairie had therefore not raised a genuine issue about the existence of a contract between the bidders.

Given that finding, the court went on to find that the Supreme Court of Canada case, *Bhasin v Hrynew*, 2014 SCC 71 (CanLII), was not applicable here, as the organizing principle of good faith and honest performance arises in the performance of a contract, and not in the absence of one (para 23).

As for other arguments made by LaPrairie, the court found that there was no gap to be filled via the implication of a bidders' contract, and that there was no public policy basis for implying a contract between bidders.

Analysis (*some of this analysis relies on Jassmine Girgis, "Tercon Contractors: The Effect of Exclusion Clauses on the Tendering Process" (2010) 49 Can Bus LJ 187)*

The tendering process is governed by a dual contract model, first established in *Ron Engineering & Construction Eastern Ltd v Ontario* (1981), 119 DLR (3d) 267 ("*Ron Engineering*"), which gives rise to "Contract A" and "Contract B". Contract A does not govern the relationships between the different bidders, at least, not without explicit reference. Rather, Contract A arises between each individual bidder and the owner or issuer upon the submission of the bid; the tender call constitutes the offer of Contract A in relation to the tender process and submission of the bid constitutes acceptance. Contract B, the subject matter of the bid, arises between the owner and the winning bidder.

Integral to the tendering process is the implied duty of fairness found in Contract A, which allows bidders to submit bids while knowing that the issuer is subject to certain obligations. These obligations, as noted in this case, require the issuer to "play by the rules", in the sense of evaluating the bids fairly and acting honestly in selecting the winning bid (at para 6, p 10). The Supreme

Court has articulated these obligations in several different cases, starting with *MJB Enterprises Ltd v Defence Construction (1951) Ltd* (1999), 170 DLR (4th) 577 ("*MJB Enterprises*"), a case that confirmed and expanded the analysis in *Ron Engineering*. There, the Court recognized an implied obligation by issuers only to accept compliant bids (*MJB Enterprises*, at paras 40-41). In a later case, *Martel Building Ltd v Canada* (2000), 193 DLR (4th) 1 ("*Martel Building*"), the Supreme Court maintained that this duty to reject non-compliant tenders falls under a broader umbrella of fairness, which includes "an obligation to treat all bidders fairly and equally" (*Martel Building* at para 88). This, said the court, is "consistent with the goal of protecting and promoting the integrity of the bidding process…" (at para 88).

However, the duty of fairness is not guaranteed in tendering competitions; it can be excluded by the parties. After all, tendering is nothing more than a series of contracts to which contract law principles apply. Due to the "special commercial context" (*Tercon Contractors Ltd v British Columbia (Ministry of Transportation and Highways)* (2010), 315 DLR (4th) 385 ("*Tercon Contractors*") at para 67) in which it exists, it does import certain rights and duties for the parties, but these rights and duties are nothing more than implied terms, meaning they can be varied if the parties do so expressly by an exclusion of liability clause (oftentimes referred to as a "discretion clause" in the tendering context). *Tercon Contractors* is the most recent decision to conclude that the duty of fairness can be excluded (see also *MJB Enterprises* at para 40-41; *Kinetic Construction Ltd v Comox-Strathcona (Regional District)* (2003), 29 CLR (2d) 127, 2003 BCSC 1673, affd 245 DLR (4th) 262, 2004 BCCA 485 at para 31). The majority in *Tercon Contractors* stated, "[i]t seems to me that clear language is necessary to exclude liability for breach of [the duty of fairness in] the tendering process, particularly in the case of public procurement" (at para 71).

There has been plenty of concern about parties' ability to exclude the duty of fairness from the tendering process, the foundation of which is the fair and equal treatment of bidders (see, for example, S.M. Waddams, "Tenders for Construction Contracts" (1999), 32 CBLJ 308 at 309), as these obligations sustain the integrity of the dual-contract model. If an owner can judge tenders on non-disclosed standards, the dual-contract model, which protects owners and bidders and injects commercial certainty into the process, would cease to be utilized. As the court in *Double N Earthmovers Ltd v Edmonton (City)* (2007), 275 DLR (4th) 577 said (at para 70),

> The reciprocal obligations of owners implied in MJB Enterprises and Martel arose out [of] the expectation of bidders that if they undertook the significant time and expense involved in preparing a bid, their bids would each receive fair and equal consideration by owners during the evaluation of bids and the award of Contract B.

And yet, after *Tercon Contractors*, it became clear that the obligations of fairness could be excluded with a carefully drafted discretion clause.

This concern has most likely been alleviated with the Supreme Court's decision in *Bhasin*, where the court recognized "an organizing principle of good faith that underlies and manifests itself in various more doctrines governing contractual performance" (at para 63). The *Bhasin* Court did not define good faith and noted that what it means "depends on the context", but it did broadly say that "good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid,

forthright or reasonable contractual performance" (at para 66). The court also recognized a general duty of honesty in contract performance flowing directly from the organizing principle of good faith. The Court said it meant simply that parties "must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of a contract" (at para 73). This duty of honesty is not an implied term and therefore cannot be excluded; "it operates irrespective of the intentions of the intentions of the parties" (at para 74) and in that way, limits freedom of contract, much like the doctrine of unconscionability.

Exactly what the principle of good faith looks like in the context of tendering has not been considered since *Bhasin*, but *Bhasin* did mention the cases that first articulated the content of the duty of fairness in tendering processes. I predict it will look exactly the way it has always looked – bidders must be treated equally and fairly, and in particular, non-compliant bids must be disqualified. The basic requirements of "honest, candid, forthright or reasonable contract performance" from *Bhasin* would make it difficult to exclude the fair treatment of parties or award a contract based on undisclosed criteria.

Since this duty of fairness, or the organizing principle of good faith, is not free-standing, it cannot apply absent an underlying contract or responsibility. As Justice Lema noted, *Bhasin's* "animating principle focuses on good-faith performance of contracts, not the creation of a generalized duty of good faith behaviour" (*LaPrairie*, at para 23). Without an underlying contract, the bidders do not owe duties of fairness to each other.

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