



EXPERIENCED PROJECT MANAGER DID NOT UNDERSTAND OBLIGATIONS
OWED TO BIDDER

Municipality Liable for Bid-Shopping

Government agencies increasingly use outside project managers for major capital works projects. The court battles in *Borcherdt Concrete Products Ltd. v. Port Hawkesbury*, [2006] N.S.J. No. 426 (Nova Scotia Supreme Court), and *Borcherdt Concrete Products Ltd. v. Port Hawkesbury*, [2008] N.S.J. No. 60 (Nova Scotia Court of Appeal) provide hard lessons for government executives.

In this case, the Town of Port Hawkesbury (the municipality) hired a highly experienced and credible project manager. During the tendering process, the project manager thought that he was legitimately acting to protect the interests of the municipality. But four judges in Nova Scotia agreed that the municipality breached Contract A and was liable for bid-shopping, and that its “conduct was an egregious attack on the integrity of the tendering system.”

Tendering for Concrete Bleachers

In 2003/2004, the municipality was building a new civic-centre complex worth about \$15 million. The plans included an arena with concrete bleachers to provide seating capacity for about 1,000 spectators. The municipality issued an Invitation to Tender for the manufacture, delivery and installation of precast concrete bleachers. The tendering documents included a privilege clause that reserved the right to refuse any and all tenders that were not in the interests of Port Hawkesbury.

When the tendering process closed, Borcherdt Concrete Products was the sole bidder, and its bid price of \$269,000 substantially exceeded the municipality’s budget estimate of \$169,292. There were no issues about compliance, ability to perform, or quality.

Process After Tender Closing

Some time after the tender closing, and represented by its outside project manager, the municipality contacted another concrete company about a supply-only contract for the bleachers. The municipality did this without notifying Borcherdt, and without refusing its bid or cancelling the original tender process. In negotiating with the other company, the municipality changed some the specifications covering the concrete bleachers.

Ultimately, the municipality awarded a supply-only contract to Borcherdt’s competitor. At the same time, the municipality took on the role of general contractor, using its own

employees to perform part of the installation work that had been included in its original tender package.

Court Judgments

The Trial Judge applied Contract A law, and held that Port Hawkesbury had breached its duty to ensure fair and equal treatment during the tender process. It also found that the municipality had bid-shopped, and that, acting as its own contractor, it was itself non-compliant.

The Court awarded damages of \$68,536, which was equivalent to Borchardt's total loss of profit, plus court costs.

The Court of Appeal (a panel of three judges) upheld the Trial Court's findings. A privilege clause is not in itself a final answer to a claim of breach of the duty of fairness.

The Court of Appeal reduced the damage award to \$44,548 plus costs.

Bid-Shopping and Non-Compliant Bidder

What was wrong with the conduct of the municipality and its project manager?
According to the Trial Judge:

“Not only was the defendant negotiating with a third party, in the end the defendant performed a portion of the work which was included in the original tender package. In that sense they were negotiating “with themselves.” It is worth noting in that regard that the town was the general contractor on this project. Because as the town came to perform part of the work which was tendered by the plaintiff, the town was in essence shopping the tender to themselves as much as they were shopping it to the third party. The town knew what the plaintiff tender amount was. The plaintiff was at a distinct disadvantage in not having the town go back to the plaintiff to renegotiate the contract or allow them to take part in the discussion as between the town and the third party.”

Lowest or Any Tender Not Necessarily Accepted

Why didn't the privilege clause protect the municipality from liability? Using well-known precedents from Canadian law, the Trial Judge said:

“The privilege clause in the tender package affords substantial discretion to the town. It does not give an unfettered discretion to simply disregard the rights and interests of the plaintiff in the tendering process ... how could the town act fairly as regards the plaintiff without rejecting his bid or going back to the plaintiff to indicate they were negotiating with a third party and considering the option of having town workers perform part of the contract. This was all done during a time when Contract A still was valid and the plaintiff tender had not been rejected.”

Breach of Contract A

In making this finding of liability, the Trial Judge used strong language:

“[T]he process as adopted by the defendant is a sufficiently egregious attack on the integrity of the bidding system that it cannot be condoned. If the actions of the defendant are condoned in a case such as this then it would invite various abuses. A general contractor might obtain bid information and then use it to negotiate a better contract either for itself or with third parties at the expense of the bid system ...

“There is nothing about the actions of the defendant which suggest they properly took into account the potential liability of the plaintiff under Contract A. They kept the plaintiff exposed to that liability while they embarked on a process that was totally separate and apart from the tendering process. That activity cannot be condoned so long as Contract A was not rejected.”

The Trial Judge described the outside project manager as credible and well-intentioned, and doing whatever he felt was in the best interest of the municipality. The Trial Judge then said:

“[O]nce the tender was let out and Contract A was formed, the plaintiff in this case was exposed to certain risks. The defendant was then not entitled to disregard the interests of the plaintiff and use that bid package to shop the bid to themselves or other non-bidding parties. In doing so, Mr. Fiander [the outside project manager] simply did not appreciate the extent of the obligation [owed] to the plaintiff.”

Lessons for Government Executives

Don't engage an outside project manager simply on technical qualifications, strong communication skills, and experience in construction management. A project manager must also be highly skilled in procurement and contract management. As this case amply illustrates, if your project manager doesn't understand tendering and Contract A obligations, your organization can be publicly embarrassed and waste time, money and resources in dealing with needless litigation.

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Training with innovation and integrity

Katherine Caughran, MBA, CPP, CPM (klc@psbdelegation.com) is a procurement and contract management consultant and author specializing in supply-chain management. She is an instructor with NECI's Procurement and Contract Management Program (PCMP).

Melissa McCabe, CRM, is a Senior Risk Management Consultant for the Province of B.C. and a subject-matter expert for the PCMP. She specializes in complex procurement and risk management issues.

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