



BID-MANIPULATION AND LACK OF DUE DILIGENCE LEAD TO DAMAGE AWARD

Clandestine Practices in Tendering

Bid-manipulation and bid-shopping are growing problems for both public- and private-sector tendering authorities. This article looks at those clandestine practices and explores certain costly mistakes made by a group of municipal employees.

What is Bid-Shopping?

Every person engaged in public- or private-sector tendering should understand that bid manipulation or bid-shopping is conduct:

*“[In which] a tendering authority uses the bids submitted to it as a negotiating tool, whether expressly or in a more clandestine way, before the construction contract has been awarded, with a view to obtain a better price or other contractual advantage from that particular tenderer or any of the others. What I am speaking of here is bid manipulation which can potentially encompass as vast a spectrum of objectionable practices as particular circumstances may make available to a motivated and inventive owner, intent on advancing its own financial or contractual betterment outside the boundaries of the established tendering protocol [emphasis added]... ” Gruchy J. in **Western Plumbing and Heating Limited v. Industrial Boiler Tech-Inc.**, (2000) 180 N.S.R. (2d) 41 (S.C.), referenced in **Dolyn Developments Inc. v. Paradigm Properties Inc.**, [2007] O.J. No., 63 (Ontario Court of Justice), and in **Amber Contracting Ltd. v. Halifax (Regional Municipality)**, [2008] N.S.J. No. 282.*

The Amber Contracting Case

In *Amber Contracting Ltd.*, Amber was the lowest bidder in the first round of tendering for a storm-sewer contract. The Halifax Regional Municipality (HRM) cancelled and reissued the tender, ostensibly because of funding concerns. After a second round of tendering, a lower bid was accepted from a contractor who had not participated in the first round of tendering.

The Court found that the HRM had engaged in bid-shopping, in breach of its duty of fairness to Amber, and it awarded Amber damages of \$147,560.

Conduct of the Municipal Staff

Justice Robertson stated that “*Whether HRM staff understood or not, the implication of their conduct, amounted to classic ‘bid shopping’ to the detriment of the plaintiff and the integrity of the construction industry, who go to considerable expense in submitting tenders and expect fairness in their dealings with entities such as HRM.*”

Mistake #1

Disclosure of Bid Prices and No Change of Scope

In response to the first round of tendering, the HRM got three bids, ranging from a low price of \$570,612 (Amber) to a high price of \$773,950. In accordance with established practice, the HRM opened these bids in public, and posted the bid prices on the HRM website. The HRM cancelled the first tender. But then, without any significant changes to the tender requirements, the HRM re-bid the same tender package. During the litigation, the HRM claimed that the disclosure of first-round prices created no unfairness to the first three bidders. Yet, the eventual winner was allowed to bid the same job, with full knowledge of the earlier bids.

Mistake #2

No Due Diligence by Project Engineer

The HRM’s internal project estimate, based on work done by an outside consulting engineering firm, was \$159,000. Yet the bid prices received in the first round of tendering ranged from \$570,612 to \$773,950. In reference to the large discrepancy between the budget and the actual tendered amounts, the HRM employee (a professional civil engineer), testified that “the consultants have done a poor job for us.” However, the Court concluded that the same HRM employee “did not perform any *due diligence* with respect to the report received ... ” and “did not return to the consultant to receive new estimates of the value of the work in light of the bids that were almost three times higher. Rather, he used the value of the bids received in the first round of tendering for budgetary purposes in re-tendering the project.”

Mistake #3

Ignoring Procurement Policy and Practices

In this situation, the HRM staff ignored its own policies and past practices. The HRM policy provided that “The award is normally to the lowest total cost bid received from a responsible bidder meeting the requirements of the tender.” Further, the HRM policy provided that, “Negotiations with one or more suppliers for the supply of goods and/or services would take place when ... all bids received are not acceptable or exceed the amount budgeted for the purchase.” The tendering administrator testified that, “in [her] experience tenders are not cancelled when they come in over budget.” Another senior employee testified that he had no previous experience with a project being re-tendered under these circumstances.

Mistake #4

All E-mails, Memos, Internal Documents and Employees Go to Court

In this situation, the Court heard direct testimony from six senior employees and former employees of the HRM. As well, Amber’s lawyer and the Court had access to all HRM e-mails, memos and documents relevant to this dispute. The defendant’s written evidence

generally supported the plaintiff's allegations of bid-manipulation.

Mistake #5

Don't Hedge Your Testimony

After hearing the direct testimony of the HRM employees, the Judge doubted their credibility. In summary, the Judge said:

"[T]here is in fact an issue of credibility with all of the HRM witnesses except for Ms. Andrews. I sensed throughout that the HRM witnesses wanted to emphasize the funding issue to explain away their most obvious intention to price shop by re-tendering. Their ostensible reliance on budget constraints belies their true conduct which in my view was classic bid-shopping 'If we retender we'll get a better price'."

Conclusion

These court battles soak up huge resources for a private or a public body. In this situation, the HRM paid the damage award of \$147,560, plus fees for any outside lawyers, as well as court costs to the winning plaintiff. The Court hearing took three days and involved testimony by six senior employees.

No less important, a high-profile court judgment of this nature can badly damage the reputation of a tendering authority and discourage other bidders from participating in future tendering calls.

Editor's Note: For related articles, see "Tendering Disputes in the Private Sector" in *The Legal Edge* Issue 71, and "Municipality Liable for Bid-Shopping" in Issue 79.

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