

True Construction Ltd. v Kamloops (City), 2016 BCCA 173: Update on Tendering Law and analysis of "substantial compliance"

A: Introduction

On April 21, 2016, The British Columbia Court of Appeal released the decision *True Construction Ltd. v Kamloops (City), 2016 BCCA 173* ("True"), upholding the [earlier decision of the BC Supreme Court](#). The litigation dealt primarily with the effect of non-compliance with bidding instructions by a bidder, and which errors amount to a bid which is legally "incapable of acceptance" due to being substantially non-compliant with the instructions.

In its tender offer, the City had used standard form instructions which required Appendix 'A' (which was to list subcontractors) to be submitted as part of the bid package. The question was whether this Appendix had to be included with the original sealed bid form, or whether it could be omitted until later on and faxed in as part of a bid amendment. Later faxed revisions, in general, were allowed by the bid instructions. The Court of Appeal found that Appendix 'A' was a part of the Bid Form and as such had to be submitted with the original sealed bid. Furthermore, the Court held that the defect in not including it made the bid substantially non-compliant and therefore "incapable of acceptance" at law. It also created a risk of a competitive advantage for True Construction over other bidders as it provided the opportunity to negotiate subcontractor pricing for longer without the risk that others bidders faced.

This recent decision does not impact the current state of the law in a significant way, but does shed further light on the definition of substantially non-compliant bids and competitive advantage in the bidding process. The Court of Appeal also made sure to note that it is not necessary that a bidder *in fact* gained and utilized a competitive advantage created by a non-compliant bid to disqualify it. It is enough that the non-compliant bid creates an objective *opportunity* for a competitive advantage from the point of view of other bidders.

B: Factual Background

In September 2010, the City of Kamloops issued an invitation to tender for the Aberdeen Fire Hall. This invitation included instructions which required bidders to place a completed Bid Form in a

sealed envelope and deliver it to the City, and that faxed bids would not be accepted. However, bidders could revise bids by fax using an Appendix 'F', including revising the list of subcontractors and subcontractor pricing.

The bid closing was set for 2:00pm on November 3, 2010. True submitted its bid form on November 2nd at 3:18pm, but did not include the two pages of Appendix 'A' which listed subcontractors not bid through the bid depository system. Appendix 'A' had not been included on purpose as True Construction wanted to postpone selecting subcontractors until they had received all of their pricing. They then submitted the missing portion on November 3rd at 1:38pm.

True had the lowest bid at closing by approximately \$150,000, but the City chose to disqualify their bid as their opinion was that choosing their bid would damage its reputation and ability to contract quality bidders for future projects. The main reason they held this opinion was that subcontractor pricing made up a large portion of the work on the project, and by deferring the inclusion of subcontractor pricing True had a greater opportunity to gain lower prices from subcontractors to include in their bid, but if unsuccessful did not have a completed bid and so could argue that they did not have to perform the contract. While other bidders could also continue to negotiate with subcontractors and reduce their price through faxed revision, they did this at the risk of being unsuccessful in gaining lower pricing or otherwise failing to fax in their revision and would then be bound by their original bid. Alternatively, other bidders could wait until the last minute to deliver their sealed bid including negotiated subcontractor pricing, but at the risk that they would not be able to make the delivery in time and miss the deadline altogether, without any obligation on the City to even review and consider their bid.

The City chose the second lowest bidder, Tri-City, which also had an irregularity in their bid. Their faxed revision (which had increased their bid price by \$122,600) came in 11 minutes before it had hand delivered its completed sealed bid, and the City decided that they were entitled to waive this error given that their standard form documents contained a "discretion" clause allowing it to waive irregularities that were technical in nature.

C: Decision of the Court of Appeal

The unanimous decision of the Court of Appeal to dismiss True Construction's appeal rested on two questions: did Appendix 'A' form part of the Bid Form which needed to be included in the original

sealed bid, and did the failure to include it in the Bid Form create the objective opportunity to gain a competitive advantage in the bidding process.

The first question was important as that would decide whether there was a completed bid “capable of acceptance at law.” If there is no completed bid, there is no legal relationship established between the parties. As the invitation to tender included a “discretion clause” entitling the City to take into account more factors than just price in deciding to award a tender contract, the threshold of whether a bid is capable of acceptance is “material non-compliance.”

True Construction argued that its bid in the sealed envelope was capable of acceptance without Appendix ‘A’ as the Instructions to Bidders did not clearly stipulate that it had to be included. Alternatively, they argued that all that mattered was that all the necessary information was included as of the time of closing and that the total price was in the sealed bid.

The Court of Appeal held that when all the tender documents were read in their entirety, Appendix A formed part of the Bid Form. There was a clause in the tender documents dealing with subcontractors which referenced applicable British Columbia Construction Association Bid Depository Rules of Procedure and how they applied to certain sub-trades “As per Appendix A of the Bid Form.” This was found to be a clear and unambiguous identification of Appendix A as being part of the Bid Form, and the fact that bidders were required to “...list the name of a Subcontractor on the Bid Form” (of which there was only a place to do so on Appendix ‘A’) further strengthened this conclusion. This interpretation was found to be consistent with expectations of tendering, which generally is a stringent and formal process.

As Appendix ‘A’ was a part of the Bid Form, the question then became whether the bid was “substantially compliant” notwithstanding the failure to include it. Given that a discretion clause was included in the tender documents, whether the bid was substantially non-compliant depended on whether True gained a competitive advantage from its non-compliant method of completing its bid. In the circumstances, the requirement that a bidder lists its proposed subcontractors fulfilled a material purpose as it formed one of the bases upon which the City could choose to accept or reject a bid. The City could and would consider which subcontractors were listed as the Invitation to Bid said that the City could reject a bid based on the bidder’s “bid price, qualifications, previous experience on similar work, and ability to meet schedule.” Given that much of the work on the project was to be completed by subcontractors, the choice of subcontractors was clearly relevant to these factors and the evaluation of whether a bid contract would be awarded.

The Court of Appeal held that when tender documents require certain information which is omitted or erroneous, it is the party seeking to establish that the required information is merely minor or technical in nature that must provide evidence demonstrating its why the information is immaterial. Put in another way, there is no presumption that a failure to comply with tender instructions represents only a minor or technical error. There was no such evidence of immateriality put forward in this case.

The last question the Court of Appeal dealt with was whether the substantially non-compliant bid could be later “cured” by faxing Appendix ‘A’ before the deadline. This was held to not be possible due to the objective competitive advantage derived from the manner in which True submitted its bid. It gained an opportunity to potentially walk away from its bid if it did not negotiate favourable subcontractor pricing which was not an option available to other bidders.

E: Implications for Local Governments

In many projects which go out for tender, work to be completed by subcontractors forms a major component. It is logical then that a Local Government should be able to take the selection of subcontractors into account when awarding a bid contract. The Court of Appeal explicitly held this to be a valid consideration when subcontractor pricing is an important aspect of the project and a “privilege clause” is present in the tender documents which allows the Local Government to consider more factors than just price.

The case also highlights the importance of the words found in the Invitation to Tender. Ultimately, the Court of Appeal relied heavily on the words found in the contract to determine whether True’s irregularity was minor or substantial in nature, and whether Appendix ‘A’ was part of the bid form. Although there are many considerations at play in lawsuits dealing with the tendering process, at the heart of the issues is often contractual interpretation. It is advisable that Local Governments take due care and attention in preparing tender documents to ensure that the instructions are as clear as possible to minimize the risk of litigation.

There is a lesson to be learned by proponents submitting bids as well. If a requirement in the tender instructions appears to be unclear, then the safest course of action is to seek clarification prior to submitting a bid. Addenda are often issued by the owner for this very purpose. This way, the manner in which a submitted bid will be evaluated is more predictable and proponents can focus their resources on submitting a bid which will be evaluated on its merits without any complicating factors.

Please contact us should you wish to discuss the implications of this decision in more detail.