

problem for the non-defaulting party if the stipulated amount is less than the actual damages sustained. Therefore, it may be desirable to include language which expressly indicates that liquidated damages are in addition to and without prejudice to any other remedy that may be available.

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### **3. Two Court of Appeal Decisions Clarify Law of Tendering in Ontario**

*Brendan D. Bowles and Markus Rotterdam\**

#### **Unreasonable Objections to Prequalified Bidder**

##### *Schaible Electric Ltd. v. Melloul-Blamey Construction Inc.*

On July 29, 2005, the Court of Appeal released its decision in *Schaible Electric Ltd. v. Melloul-Blamey Construction Inc.* The decision confirms that courts will tend to hold a party to its obligations once a bid is submitted by a pre-qualified bidder, even when new facts are subsequently discovered. The general contractor has a heavy onus to prove a reasonable objection to awarding the subcontract to the carried bidder.

The Hamilton-Wentworth School Board required general contractors submitting tenders for a school project to carry electrical and mechanical bids from pre-qualified subcontractors. Schaible Electric, one of the pre-qualified electrical subcontractors, submitted the lowest bid for the electrical work for the project. Melloul-Blamey carried Schaible Electric's bid in its tender, but later developed serious concerns about the subcontractor's ability to complete the electrical work competently and expeditiously.

The general contractor's concerns arose largely as a result of Schaible Electric's alleged failure to respond to a request for references, and various subsequent conversations that Melloul-Blamey had with parties who had previously worked with Schaible Electric, and who commented unfavourably on the electrical contractor. The trial judge, Mr. Justice Cavarzan, was not impressed with this evidence. He found as a fact that Melloul-Blamey had not contacted Schaible Electric before demanding the bonds. The trial judge was also skeptical of some of the alleged negative verbal opinions of Schaible. In sum, Justice Cavarzan found that the general contractor had not "conducted appropriate due diligence into Schaible Electric's ability to perform the subcontract, and instead,

relied on rumour in coming to its conclusions about the subcontractor."

The general contractor then demanded performance and labour and materials bonds in the amount of 100% of the subcontract price, which the subcontractor was unable to obtain. The president of Schaible Electric offered to provide a personal guarantee backed by certain properties, in lieu of the bonds. The general contractor nonetheless awarded the electrical subcontract to the second lowest bidder.

Mr. Justice Cavarzan held that Melloul-Blamey did not have a reasonable objection to contracting with Schaible Electric and that it was not entitled to demand performance and labour and material bonds from Schaible Electric in the full amount of the subcontract price. The trial judge found that the general contractor did not give serious consideration to any alternative form of guarantee. In Mr. Justice Cavarzan's view, all of this amounted to a failure to act fairly and in good faith with the subcontractor. However, he did not go so far as to find that a fiduciary relationship existed, and confined Schaible Electric's damages to the \$45,000 in profit that it would have made on the project. No punitive or aggravate damages were awarded.

Interestingly, however, the trial judge did find that Melloul-Blamey would have been within its rights to demand bonds in the amount of 50% of the subcontract price, because bonds in the amount of 50% of the prime contract price were required by the prime contract, the terms and conditions of which were incorporated by reference into the sub-contract. Melloul-Blamey, however, did not ask for 50% bonds, they asked for bonds in the full amount of the electrical subcontract. The general contractor attempted to justify this position by arguing that 50% of the value of the prime contract was greater than the total amount of the electrical subcontract, meaning that bonds in the amount of 100% of the subcontract price could be required from the subcontractor. The trial judge rejected this argument, finding that it contradicted the terms of Melloul-Blamey's prime contract with the owner which required 50% bonds, and that was incorporated by reference into the subcontract. Further, Melloul-Blamey's position also contradicted its own form of subcontract, which did not require bonds at all.

The Court of Appeal agreed with the trial judge's findings and dismissed the appeal. Both parties agreed that the Supreme Court of Canada decision in *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, [2001] 2 S.C.R. 943 was the governing authority. The general contractor's objection therefore has to be "reasonable", a standard

which depends on the facts of each case. To interfere with a judge's findings on this fact sensitive issue, an appellate court must find that the trial judge made a "palpable and overriding error", an onerous standard for Melloul-Blamey to meet.

The Court of Appeal found no palpable and overriding error. The Court of Appeal held that the defendant did not have a reasonable objection to contracting with the plaintiff. Although the defendant had obtained some negative information about Schaible, the latter had been pre-qualified and had successfully completed other projects for the owner.

#### **Formation of "Contract A"**

##### *Toronto Transit Commission v. Gottardo Construction Ltd.*

On September 7, 2005, the Ontario Court of Appeal released its decision in *Toronto Transit Commission v. Gottardo Construction Ltd.*

When the TTC opened tenders it had received for a major project, Gottardo was the lowest bidder. Shortly after the tenders were made public, Gottardo advised the TTC that it had made a \$557,000 error in the tender amount. Gottardo maintained that, because of the error it was not obligated to honour the tender price of \$4,811,000. The TTC took the position that Gottardo was bound. When Gottardo refused to sign the contract, the TTC awarded the contract to the next lowest bidder and sued Gottardo claiming, among other alternative relief, damages of \$434,000, being the difference between Gottardo's tender price and the price at which the work was ultimately carried out. CGU Insurance Company of Canada (CGU) was also sued by TTC, as it was the company that had issued Gottardo's bid bond.

The trial judge found that the TTC's tender instructions were such that a first contract, referred to in the case law as "Contract A", had not come into existence upon the opening of the sealed tenders, arguing that additional documents had to be provided by Gottardo before Contract A came into existence. These additional documents were required by the tender instructions. Once the documents were provided to the TTC, it was apparent that an error had been made in the tender amount. The trial judge found that Gottardo's mistake was discernable on the face of the documents before the formation of Contract A, and therefore that the TTC could not compel Gottardo to honour the price and could not recover against CGU on the bid bond. Consequently, she dismissed TTC's claim against Gottardo and CGU.

The Court of Appeal allowed the appeal, holding that Contract A had been formed and that Gottardo had breached this contract. The Court awarded damages in the amount of \$434,000 against both defendants together with pre and post judgment interest.

The Court clarified that acceptance or rejection of the bid is not what leads to the creation of Contract A. Acceptance or rejection is the end point of the tender process. Once the tender is accepted, the parties enter into the construction contract referred to as Contract B. The fact that certain steps are taken and certain documents are to be produced by the tenderer after the submission and opening of tenders will not delay the formation of Contract A when the clear intent of the parties is to be bound as of the opening of the tenders. In this case, it was clear from the tender documents that the parties intended to initiate contractual relations the moment that the tenders were opened.

The Court did not give effect to Gottardo's alternative argument for equitable rescission either. In *obiter*, Madam Justice Kitley found that even if she were wrong in her finding that no Contract A had come into existence, that she would have granted Gottardo rescission in these circumstances, largely because of financial hardship. However, the Court ruled that this was an error. Rescission is only available where one party knowingly takes advantage of another's mistake, or where there is fraud or unconscionable conduct. Nobody knew that Gottardo had made a mistake when the bid was submitted and Contract A was formed. Further, any financial hardship caused to Gottardo was not so grossly disproportionate so as to make enforcement of the contract unconscionable.

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#### **4. What the Court of Appeal Did During the Summer Holidays: Recent Decisions of Note**

*Michael MacKay\**

In addition to the above, the Ontario Court of Appeal has released decisions in the following appeals that will be of interest (and/or concern) to the construction law bar.

- (a) *AC Metal Fabricating Ltd. v. Comerica Bank*  
2005 CanLII 26707 (ON C.A.) Date: July 29, 2005

In this case, the Court of Appeal upheld Justice Farley's decision that the proceeds of a court-approved asset sale undertaken by Veltri Metal Products, a company involved