CONSTRUCTION LAW LETTER

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CASE SUMMARY

Max Gennis
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TENDERING: THE PROPER USE OF ALTERNATE PRICE CREDITS IN EVALUATING BIDS

Finn Way General Contractor Inc. v. Red Lake (Municipality)

It is no secret that those putting a project out for tender must be cautious when evaluating competing bids. The 2015 Ontario Superior Court of Justice decision of *Finn Way General Contractor Inc. v. Red Lake (Municipality)* offers important insight into the tender process and how bids should be evaluated in the context of alternate price credits. The decision also demonstrates how tender cases can be dealt with on summary judgment, in accordance with the Supreme Court of Canada's judgment in *Hryniak v. Mauldin*.

In 2012, the Corporation of the Municipality of Red Lake was provided $5 million through a donation in order to renovate or construct a medical centre. The donation would be available to the Municipality for two years. The Municipality gained further funding of up to $250,000 through a conditional grant for a geothermal ground loop system for the centre.

The Municipality put out a call for tenders to build the medical centre. The initial deadline to submit bids was set for September 4, 2013, but was extended to October 4, 2013. The reason for the extension was to draft an addendum to the bid that would allow bidders to provide an alternate price credit if construction began in the fall of 2013 but was

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CONSTRUCTION
LAW LETTER

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delayed through the winter months and resumed in spring of 2014. The goal remained, however, to perform the majority of construction in the fall of 2013. There were two price credits: one was to delete the geothermal ground loop system, and the other was to suspend construction through the winter months and resume construction in the spring.

Section 5.2 of the Instructions to Bidders stipulated that the lowest bid or any bid would not necessarily be accepted. Furthermore, Section 5.3 of the Instructions stated that when evaluating bids, the owner reserved the right to adjust bid prices to determine the successful bidder.

Five companies submitted bids, including Tom Jones Corporation and Finn Way General Contractor Inc. They were the two lowest bids. Jones had the lowest base bid, the lowest bid if both alternate price credits were applied, and the lowest bid if only the first alternate price credit for deletion of the ground loop system were applied. However, if only the second alternate price credit for suspending construction during winter were applied, Finn Way became the lowest bidder.

Following the opening of the bids, Jones sent the Municipality a letter stating that the Consultant might award the contract to Finn Way. They sent a second letter from their lawyer threatening legal action if the Finn Way bid was accepted. Finn Way wrote to the Municipality advocating for its bid to be accepted on the basis that it was the low bidder if construction were suspended during winter. Because of these competing positions, the Municipality delayed making its decision. This prevented construction from starting during the fall. The Municipality decided to go forward with the ground loop system and without suspending construction during the winter because the project was not starting in the fall. Because neither credit was applicable, the Municipality decided to proceed by only looking at the base bids, without factoring in the alternate price credits.

The Municipality entered into contract negotiations with Jones, resulting in changes to certain specifications for the project and a reduction of the contract price. On December 23, 2013, the Municipality passed a resolution to award Jones the project, and on January 20, 2014, Council authorized the execution of a construction contract. Jones was instructed to commence immediately, and construction began

on February 11, 2014. Substantial performance was certified on January 30, 2015, and an occupancy permit was issued on the same date.

Finn Way sued the Municipality for $775,000 for breach of contract, claiming that construction started in the fall of 2013 and was suspended for the winter months, resuming in or about April of 2014. Finn Way's position, therefore, was that the credit for suspension of construction during winter should have been relied on when evaluating the bids, and therefore Finn Way should have been selected as the lowest bidder.

The Municipality challenged the notion that construction began during fall of 2013. Furthermore, the Municipality argued that sections 5.2 and 5.3 of the Instructions to Bidders gave them a large amount of discretion when evaluating bids. They brought a motion for summary judgment. Finn Way, on the other hand, submitted that the purpose of the winter suspension credit was to eliminate heating and hoarding costs and by starting the contract in the spring and avoiding those same costs, the credit should have been applied, at least in part. Finn Way argued that even if its price was not accepted, it should have been allowed to negotiate a new price. Finn Way took the position that a trial was required to adjudicate these issues.

Justice D.C. Shaw's decision begins by outlining the principles established in *Hryniak v. Mauldin* for determining whether a summary judgment motion should succeed. It was decided that there was no genuine issue requiring a trial, and summary judgment dismissing Finn Way's claim was granted. On a factual level, Finn Way's assertion that construction commenced in the fall of 2013 was found to be incorrect, as site preparation only started on February 11, 2014. Finn Way's witness, who submitted affidavit evidence, admitted that he misunderstood the timeline of events, and conceded that construction had started in February.

In further support of the motion for summary judgment, it was found that the affidavit evidence of the Municipality's witness was clear, detailed and uncontradicted. The Municipality determined that it was wrong to decide the lowest compliant bid solely based on the second price credit, and determined that if they were going to consider one price credit, they had to consider both. In that case, Finn Way's bid would still not have been accepted. On the basis of the Canadian Construction Documents Committee (CCDC23-2005), considering only base bids to determine the lowest bid is seen as the fairer approach. Furthermore, because the Municipality decided to use the geothermal ground loop, and because construction was not suspended during the winter months, neither price credit was applicable. The Municipality did not want to unduly delay the start of construction, so as not to lose their donation. The evidence further demonstrated that none of the price reductions negotiated between the Municipality and Jones related to heating and hoarding costs, and whether Jones incurred such costs was irrelevant.

Finn Way also submitted that although section 5.2 of the Instructions to Bidders indicated that the lowest bid or any bid need not be accepted, this had to be limited to bids that were based on criteria known to bidders. Its position was that the price must be determined in relation to the winter suspension credit, based on heating and hoarding costs actually incurred. Justice Shaw rejected this argument, stating that section 5.3 did not require the Municipality to adjust for winter suspension costs. Based on the possibility of losing their donation, the Municipality was reasonable in deciding to begin construction during the winter months. Whether heating and hoarding costs were incurred has no relevance.

The court found the Municipality acted in good faith by assessing the bids fairly and equally on the basis of objectively reasonable criteria. There was no obligation to apply the winter suspension credit or ascertain what heating and hoarding costs Jones may have incurred. There was no obligation to include Finn Way in negotiations for a reduced base bid price. The fairest approach, given the particular facts of the case, was to just consider the base bids.

No party had an unfair advantage. Accordingly, summary judgment was granted, and Finn Way's action was dismissed.

This decision provides an important example of how summary judgment can effectively be used in the context of tendering. It also provides support for those administering tender bids, not only by upholding their discretion under the provided instructions, but also by finding that when the circumstances of a tender change, a clear and logical decision will have the support of the courts.

Ontario Superior Court of Justice
Shaw J.
December 10, 2015

CASE SUMMARY

Jay Nathwani
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DO NOT SKIMP ON THE DETAILS: COURT OF APPEAL THROWS OUT CONTRACTOR'S CLAIM DUE TO INSUFFICIENT BACKUP

Ross-Clair v. Canada (Attorney General)

In the recent case of *Ross-Clair v. Canada (Attorney General)*, the Ontario Court of Appeal affirmed the enforceability of contractual clauses requiring submission of details to support a claim for extras. The court also emphasized that in interpreting contractual notice requirements, the provisions must be read in harmony with the rest of the contract in order to effect the commercial purposes of the contracting party. The effect of the court's decision was to deny the contractor's claim for approximately $1.4 million in extras.

Background

The contractor, Ross-Clair, a division of R.O.M. Contractors Inc., entered into a contact with Public Works and Government Services Canada ("PWGSC") for the construction of management offices at Millhaven Institution. The project engineer was NORR Limited. The contract provided for a detailed procedure governing claims for extras, including claims for delay. The procedure, in brief, was as follows:

1. Within 10 days of the occurrence of an act or discovery giving rise to an extra, the contractor must provide notice in writing to the Engineer;
2. Where a notice has been given, the contractor must provide a written claim to the Engineer within 30 days of the issuance of a certificate of completion. The written claim must contain "a sufficient description of the facts and circumstances of the occurrence that is the subject of the claim to enable the Engineer to determine whether or not the claim is justified…."

The contract explicitly provided that failure to provide written notice or a claim would forfeit the contractor's right to compensation for an extra. The contract also provided for an arbitration in the event of a disagreement as to the Engineer's determination of a claim for extras.

In the course of the project, Ross-Clair advanced two claims for extras. The principal claim, in the amount of $1,437,976, was first advanced in a letter dated December 5, 2008 from Ross-Clair to the Engineer. The letter alleged that a planned start date of December 15, 2008, for a phase of the construction, had been delayed by Millhaven Institution, and stated that there would be delays and extra costs.

The Engineer responded on December 16, 2008, requesting additional details to support the claim. This request was repeated by PWGSC at a meeting held December 22, 2008. Ross-Clair agreed to provide the details by January 10, 2009, but failed to do so.

The project was scheduled for completion on January 25, 2009, but the schedule was not met. On February 27, 2009, PWGSC wrote to Ross-Clair to express concern about the delay, and to remind Ross-Clair of its promise to submit a request for a time extension.

On March 2, 2009, Ross-Clair responded. In its letter, Ross-Clair cited "delays due to site conditions, weather conditions, alterations to the contract and disruptions to the original sequence of construction" as the reason for the delay. The letter attached an "Additional Costs Summary" that listed various subcontractors and the costs attributed to their work, totalling $1,437,976. The letter contained no other supporting documentation.

In April 2009, PWGSC wrote twice to Ross-Clair requesting further documentation in support of Ross-Clair's request for an extension of time. The Engineer wrote to Ross-Clair in May 2009.

On October 6, 2009, PWGSC responded to Ross-Clair's request for an extension to time by approving an extension to September 14, 2009, but without prejudice to its right to contest Ross-Clair's entitlement to compensation for the extension of time.

On March 31, 2011, Ross-Clair submitted a further claim for extras as a result of delays and change orders, in the amount of $766,700. The letter contained no breakdown of the costs being claimed.

On April 20, 2011, PWGSC responded that the claim contained insufficient details to determine if the claim was justified, and asked Ross-Clair to provide documentation to support both the original and the revised claim, which together totalled $2,204,676.

The project was certified complete on February 10, 2012.

On May 28, 2013, Ross-Clair provided PWGSC with a report called "Analysis of Delays and Additional Costs". No further communication took place related to the claims being advanced.

The claims remained outstanding. PWGSC took the position that Ross-Clair had not provided a description of the facts and circumstances giving rise to the claim sufficient to allow the Engineer to make a determination of the merits. The Engineer appears to have taken a similar position and refused to decide the claim on its merits; accordingly, the parties were at an impasse. They could not even have recourse to the dispute resolution provisions of their contract, because a decision by the Engineer was a prerequisite to proceeding with an arbitration.

In order to advance its claim in the face of the Engineer's refusal to take a position, Ross-Clair brought an application before the Superior Court for an order compelling PWGSC to consider the claim.

Decision of the Lower Court

The application was heard by Justice Lederer. Justice Lederer noted that PWGSC acknowledged that initial notice of the claim had been provided in accordance with the contract. At issue was whether Ross-Clair had provided "a sufficient description of the facts and circumstances of the occurrence that is the subject of the claim to enable the Engineer to determine whether or not the claim is justified," in accordance with the terms of the contract.

Justice Lederer saw the question before him as "whether what is required is notice of the claim or proof of it?" He saw the answer lying between the two positions. In his view, "There has to be more than notice but less than the proof an arbitrator would require. … [T]here has to be enough information for the Engineer to be able to decide if the claim is justified. This need not be proof of the claim".

Justice Lederer relied on the Court of Appeal's decision in *Technicore Underground Inc. v. Toronto (City)* for the proposition that providing proper notice of claim for extras in accordance with the contract is a condition precedent to the consideration of such a claim. The court observed that, unlike in *Technicore*, the contract did not use the language of a "detailed claim".

Justice Lederer concluded that the initial notice, combined with the Additional Cost Summary delivered on March 2, 2009, was sufficient to comply with the contract's requirement of a "sufficient description of the facts and circumstances … to enable the Engineer to determine whether or not the claim is justified". The court commented, in making this finding, that "the Engineer … is not a stranger to the project but an active participant in reviewing its progress".

Accordingly, Justice Lederer held that the $1,437,976 claim complied with the contract.

With respect to the further claim of $766,700, Justice Lederer found that the letter of March 31, 2011 did nothing more than increase the amount of the earlier claim by $766,700. The letter contained no description of the facts or circumstances explaining the increase. There was nothing on which the Engineer could base a decision. Applying *Technicore*'s central *ratio* that contractual notice requirements are enforceable, the court held that the report delivered May 28, 2013 could not be considered as it was delivered later than 30 days after the issuance of the Final Certificate of Completion.

In the result, Justice Lederer held that the Engineer was bound to consider the $1,437,976, but not the $766,700 claim.

PWGSC appealed in respect of the $1,437,976 claim; Ross-Clair did not cross-appeal.

Court of Appeal

The Court of Appeal found that Justice Lederer looked too narrowly at the words requiring a "sufficient description" of the claim, without having regard to how the requirement fit into the overall contractual scheme for the determination of claims for extras. After reviewing the applicable contractual provisions, the court concluded that the contract "contemplates a process for dealing with a contractor's claim for extras in which the Engineer has control sufficient that it can fulfill its obligation to determine whether a claim is justified. …The Engineer fulfills this important role in the context of a [contractual procedure] that, in my view, depends on a highly specific informational component".

The Court of Appeal concluded that Justice Lederer, when interpreting the information required by the contract, had looked at the contractual provision in isolation, without taking into account the contractual context. This, the court held, constituted an error of law.

The Court of Appeal went on to find that even though the word "detailed" was not included in the contract, the contract nonetheless required that a claim "must be supported by detailed information. Without detailed information, it is difficult to see how the Engineer would be able to make a decision as to the validity of a claim". The court is of the view that "such a decision requires 'proof' that the claim is justified".

On the facts of the case, the court found that the letters sent by Ross-Clair provided "little if any support" for the $1,437,976 claim. Among other deficiencies that the court identified, the letters, "failed to include information relating to the nature and extent of [PWGSC's] responsibility for the delay, to address whether compensation had already been paid on account of the extra expense or to explain whether the extra expense" fell within the compensable classes under the contract. Moreover, the letters were inconsistent and therefore confusing on key points.

The court summarized its conclusions by finding that "the information contained in the letters was lacking in specificity, confusing in terms of identifying the parts of the Project affected by the delay and accompanied by virtually no information in support of the extra work done and the costs associated with any such work".

The court allowed the appeal, set aside the order of Lederer, dismissed the application and declared that Ross-Clair's claim for extra payment was barred by operation of the contract.

Conclusion

Ross-Clair builds on the important precedent of the *Technicore* case. It firmly entrenches, in Ontario law, the principle that contractual notice requirements, including requirements to give detailed accounts of claims, are enforceable, and ought to be taken seriously. If required to provide details of a claim sufficient to allow an initial adjudication by the project consultant, it will not be sufficient for parties to a construction contract to deliver incomplete or skeletal information. Parties to construction contracts would be well-advised to ensure their staff are equipped to comply with notice requirements by delivering submissions that are both timely and of sufficient quality.

Ontario Court of Appeal
Gillese J.A., Gloria Epstein J.A., Roberts J.A.
March 14, 2016

CASE SUMMARY

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TENDERING: WAIVER OF COMPENSATION CLAUSE COMPLETE ANSWER TO CLAIM

Todd Brothers Contracting Ltd. v. Algonquin Highlands (Township)

The Township of Algonquin Highlands intended to expand its Haliburton-Stanhope airport by adding a new runway and rehabilitating an existing one. The project was controversial and politically charged.

Todd Brothers Contracting Limited was the low bidder. The request for tenders provided that tenders would be open for acceptance by the Township for 45 days following the tender closing date. However, after the Canadian Environmental Assessment Agency (CEAA) unexpectedly announced that it would conduct a review of the project, at the request of the Township, Todd Brothers agreed to extend the time for acceptance of its tender to July 15, 2009.

When in late June 2009, the CEAA review had still not been completed, the Township decided to seek approval from the Ministry of Agriculture, Food and Municipal Affairs to complete the project in three phases. The first phase, Part D of the RFT, did not require CEAA approval, and could therefore be completed without waiting for the results of the CEAA review. The remaining phases would have to await completion of the CEAA review. Todd Brothers agreed to this phasing of the project and to a further extension of the time for acceptance of its tender.

In September of 2009, council passed a resolution accepting Todd Brothers' tender "in accordance with the tender documents, subject to the Canadian Environmental Assessment Act".

Even though CEAA completed its review in December of 2010 and approved the airport project subject to certain conditions, the composition of the Township council had changed in the meantime. Many of the new council members had campaigned on an anti-airport platform, and the new council passed a resolution to defer the execution of the CEAA report until a further review of the project. In the end, after only one of the four parts (Part D) was completed, the Township decided not to proceed with the project. Instead, the Township proceeded with a different project pursuant to a January 2011 plan by the Ministry of Natural Resources, as part of which the Ministry would relocate its northeastern fire management headquarters, and consolidate its regional operations, at the Haliburton-Stanhope airport.

Todd Brothers sued for damages for breach of contract. The Township moved for summary judgment dismissing the action. To begin with, the Township argued that although council passed

a resolution accepting Todd Brothers' tender, it was not binding because: (a) the RFT provided that an award of the contract required the Township's "written confirmation mailed to the successful bidder", and no such confirmation was mailed; and (b) because acceptance of the tender was never communicated to Todd Brothers. The court dismissed both arguments.

With respect to the first argument, the court held that the provision of the RFT relied upon by the Township which provided that "the party to whom the Contract is awarded will be required to execute the agreement contained herein ... within seven (7) days ... after mailing of written notice by the [Township] ... advising of the award of the Contract to him" did not, as argued by the Township, make an award of the contract conditional upon the Township's written confirmation, but rather provided an obligation on the part of the contractor to sign the contract contained in the RFT. Having failed to mail written notice of the award to Todd Brothers, the Township could not rely upon that failure to argue that acceptance of the tender did not create a binding agreement.

The second argument could not succeed in light of the Supreme Court of Canada decision in *R. v. Ron Engineering & Construction (Eastern) Ltd.*, which clearly established that Contract A is formed when a contractor submits a compliant bid in response to an invitation to tender and not upon communication of the acceptance from the owner to the contractor.

The Township's argument based on waiver was successful, however. Before the Township accepted its tender, Todd Brothers had signed a "Compensation Waiver Acknowledgment" which provided that Todd Brothers would "not seek any compensation for ... work identified but not completed ... in the event that the Township cannot proceed to any of the phases as a result of matters beyond the control of the Township of Algonquin Highlands, or delays resulting from the review being completed by the CEAA ... or any other public issues/concerns or the withdrawal of funding from applicable sources".

Todd Brothers argued that the Township should not be able to rely on the waiver clause because it should have signed off on the CEAA report in December of 2010, and that its failure to do so was a purely political decision.

The trial judge disagreed, holding that while the decision was political, it was based upon public concerns, and the proposal made by Ministry of Natural Resources in January 2011 would have intervened in any event. In those circumstances, the Township was entitled to rely upon the written waiver in full defence to Todd Brothers' claim.

Todd Brothers appealed, arguing that: (a) there was no evidence to support reliance on the "other public issues/concerns" provision in the waiver, and (b) there was no evidence that a withdrawal of funding might occur, so as to trigger that clause in the waiver. The Township countered that the public outcry about the project, which was an issue in the 2010 municipal election, which returned a majority of councillors opposed to it, was clearly a public issue, and led evidence to show that it was, in fact, obliged to consider the Ministry's alternative project or risk withdrawal of funding.

In such circumstances, the Court of Appeal held, there was ample support for the motions judge's finding that the Township's actions fell squarely within the ambit of the waiver. The appeal was dismissed.

An application for leave to appeal to the Supreme Court of Canada was dismissed on April 7, 2016.

Bidders should therefore be aware that a properly worded waiver might become a complete bar to subsequent claims for damages against the owner.

Ontario Court of Appeal

Feldman, Lauwers and Benotto JJ.A.
November 3, 2015

GUEST ARTICLE

David Fraser
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DOING BUSINESS WITH THE PUBLIC SECTOR — KEY CONFIDENTIALITY RISKS & THREE RISK MANAGEMENT STRATEGIES

Privacy

When a business responds to a public sector Request for Proposal or Expression of Interest (both of which we will refer to as an RFP for these purposes) or seeks government financing, it is typically providing a significant amount of business information, some or even much of it highly confidential, to the public body. Most are rightly focused on the benefits of a successful proposal, but few consider the risk that their confidential information will end up in the hands of a direct competitor. And that is a very real — and potentially severe — risk of doing business with the public sector.

Here are the key confidentiality risks of doing business with the public sector and three strategies to help manage them.

Confidentiality Risks

Access to information (a.k.a. freedom of information) laws are intended to ensure transparency of, and access to, the public sector's activities. These same laws are the source of the confidentiality risks to parties doing business with the public sector.

Access to Information Laws

Virtually every public sector body is subject to access to information laws. Here are some examples from the Maritime provinces:

Newfoundland & Labrador: *Access to Information and Protection of Privacy Act, 2015*

Nova Scotia: *Freedom of Information and Protection of Privacy Act*

New Brunswick: *Right to Information and Protection of Privacy Act*

Prince Edward Island: *Freedom of Information and Protection of Privacy Act*

Federal: *Personal Information and Protection of Electronic Documents Act* ("*PIPEDA*")

The specific wording and scope of each access to information law varies, but there are substantial similarities in their scope and interpretation:

Public Body: Generally speaking, access to information laws apply to any government department, Crown corporation, government agency or business or company of which any of these is a majority shareholder. And this includes the "MUSH" sector: municipalities, universities, schools and hospitals.

Information: Access to information laws apply to all records and information in the public body's custody or control. This goes well beyond the RFP proposal, financing application, resulting contracts or term sheets; it includes related information, like presentation materials and e-mails, too. And the "information" is not limited to RFP proposals or financing asks that succeed; information related to unsuccessful ones is still accessible "information".

Exceptions: Most access to information laws carve out several exceptions to the public's right to access, including for third party business information disclosed in confidence when disclosure could reasonably be expected to harm the economic interests of the public body or the third party.

The first two prongs of the test are usually easy to meet. They are: (a) business information, and (b) was it provided in confidence? The third prong, is there a reasonable expectation of harm related to the disclosure, is generally much harder to overcome. Generally speaking, the party resisting disclosure must prove a "reasonable expectation of probable harm or prejudice to [its] competitive position". This requires the party resisting disclosure to show a cause and effect relationship between disclosure and the harm it asserts, and to prove more than a mere speculation of such harm occurring.

Parties resisting disclosure have run up against two key hurdles meeting this requirement. First, since the Supreme Court of Canada established this test, some access to information laws have changed, leaving some courts questioning whether the test for the exception has also changed. Second, it is the relevant access to information commissioner who applies the test and makes the decision in the first instance, and they seem to be leaning toward public disclosure.

Business and Financial Information: A proposal for a public sector RFP or financing typically includes business and financial (and possibly pricing) information. If this information were disclosed to a competitor, the competitor would gain several advantages ultimately leading to undue financial loss to the information owner. A competitor with access to a proposal could use the information in it to approach the very same public sector contractor and specifically undercut or undermine the original proponent. Similarly, the proposal could include significant information about the proponent's business approaches, methodologies and strategies — often the result of significant investment to create a proprietary competitive advantage. Disclosure can reveal how the proponent designs strategic approaches and enable others to easily and more quickly duplicate them, unfairly disadvantaging the proponent by giving others access to its research and development investment. Another risk is the ability of a competitor to reverse engineer the proponent's products or methodologies, to present a competing or identical offer to the same or a different public sector contractor without the investment to develop them.

Customer and Client Information: Proposals often include references from past customers and information about previous engagements to demonstrate specific expertise. For obvious reasons, most businesses would balk at the thought of handing over their customer list — generally considered highly sensitive and valuable commercial information to their competition — yet this information is at risk of disclosure.

Employee Information: An RFP or financing proposal often details the business' personnel, including their education, training, experience and respective role and contribution to the proposed deliverables or organization. The degree of information varies depending on the nature of the proposal but, for example, an RFP response for supply of a service might be rife with information about personnel. And even if the proposal does not expressly provide much information on an individual proponent employee, its components could reveal a significant amount of information. Some personnel may choose to disclose publicly some of this information, but not necessarily all personnel would; the information could be incomplete, and some can only be disclosed with client/customer permission. Further, revealing information about the original proponent's personnel could allow competitors to easily identify, even poach, the proponent's personnel for their expertise. Finally, the manner in which a proponent expects to staff the particular engagement is commercially valuable information to both the proponent and its competitors.

THREE RISK MANAGEMENT STRATEGIES

The public sector is a significant consumer and investor. Completely eliminating the confidentiality risks inherent in doing business with the public sector means eliminating the public sector as a customer or an investor altogether, and that is not a

viable or even a desirable strategy for most businesses. But the risk management strategy for such businesses must include consideration of the risk of disclosure of their confidential business information to the public or to competitors. No single risk mitigation strategy will be determinative, but used together, they will strengthen an argument to resist public disclosure, minimize the related confidentiality risks.

1. **Think hard about what information to give (or not to give) the public body.** Obviously, it is important to include sufficient information in the relevant proposal to achieve the desired outcome. But there is a tension between giving the public body enough information to do so and the risk that the information could be publicly disclosed. We are not saying not to disclose the information at all; we are, however, saying that a business should give careful consideration to what to include or exclude, weigh the risks of potential disclosure and of exclusion against the benefits of inclusion, and do so before submitting the proposal. Once it is submitted, it is too late.

2. **Separate the "secret sauce".** If a business weighs the risks and decides to include highly sensitive and confidential information in its public sector proposal, it should do so in a manner that makes that particular information easily identifiable, and easily severable. For example, the information could be included in a properly labelled appendix or exhibit.

3. **Use a confidentiality disclaimer and stamps.** Include a clear general statement indicating the information is confidential and proprietary business information that is not subject to disclosure, and mark particularly sensitive information as "confidential". However, do so carefully: stamping everything "confidential" makes it seem like none of it actually is confidential, and would not help an argument that at least some of the information should be excepted from public disclosure.

CITATIONS

Finn Way General Contractor Inc. v. Red Lake (Municipality), [2015] O.J. No. 6719, 2015 ONSC 7747

Freedom of Information and Protection of Privacy Act, S.N.S. 1993, c. 5

Freedom of Information and Protection of Privacy Act, R.S.P.E.I. 1988, c. F-15.01

Hryniak v. Mauldin, [2014] S.C.J. No. 7, 2014 SCC 7

Personal Information and Protection of Electronic Documents Act, S.C. 2010, c. 23

R. v. Ron Engineering & Construction (Eastern) Ltd., [1981] S.C.J. No. 13, [1981] 1 S.C.R. 111

Right to Information and Protection of Privacy Act, S.N.B. 2009, c. R-10.6

Ross-Clair v. Canada (Attorney General), [2016] O.J. No. 1328, 2016 ONCA 205

Technicore Underground Inc. v. Toronto (City), [2012] O.J. No. 4235, 2012 ONCA 597

Todd Brothers Contracting Ltd. v. Algonquin Highlands (Township), [2015] O.J. No. 5712, 2015 ONCA 737

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Do you have an article that you think would be appropriate for *Construction Law Letter* and that you would like to submit?

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