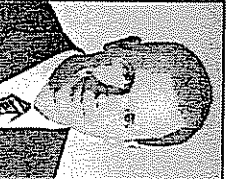




LEGAL SPECS

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Court reverses Mierau judgment

Ceneral contractors are celebrating the recent court of appeal decision in *Continental Steel vs. Mierau Contractors Ltd.*

The result is consistent with industry expectations of how general contractors select

their trades, although the case is not all good news.

That's because the law in this decision applies not only to the general contractor/trade contractor relationship, but to the owner/general contractor relationship. While the decision confirms the

general contractor's latitude to select trades in its own best interests, it also reaffirms the owner's growing latitude with respect to selecting a general contractor.

In this case, the general contractor (Mierau) was bidding on a construction

project and invited subcontractors to bid on the steel erection work. The lowest bid came from Continental Steel followed by PMC Builders.

There was a privilege clause in the tendering invitation, to the effect that the lowest bid would not necessarily be accepted. Mierau chose not to go with Continental, the lowest bidder, but instead

selected PMC to complete the steel work on the project.

When Continental learned of Mierau's decision it threatened legal action.

Mierau responded by reviewing its decision. As part of that review, Mierau obtained four references from other contractors regarding Continental, and stuck to its original decision.

Continental brought an action against Mierau, arguing that it had been treated unfairly in the bidding process and that there was no valid reason for Mierau to select PMC over Continental.

The trial judge agreed with Continental and held that the references that Mierau received from other contractors were not relevant to the issue of the plaintiff's right to be chosen as the low bidder.

In the opinion of the trial judge, Mierau's concerns about Continental were unjustified and unsubstantiated.

As such, the judge held that Mierau breached its duties of fairness and good faith in the consideration of Continental's bid and were liable for damages.

The trial judge's decision, however, was overturned by the **B.C. Court of Appeal**. While the appeal court confirmed that Mierau owed a duty of fairness to all bidders, that duty did not mean that Mierau was obliged to blindly accept the lowest bid.

The privilege clause contained in the tendering invitation allowed Mierau to act in its own best financial interest, so long as its decision was a reasonable exercise of business judgment.

The court concluded that Mierau had exercised that discretion fairly and objectively and, as such, was entitled to select PMC's bid.

In short, the court of appeal held that the trial judge wrongly second-guessed Mierau's analysis of whether there were valid reasons for not proceeding with the low bidder.

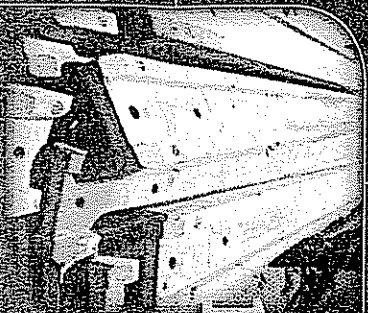
The court affirmed that Mierau could use its own business discretion in determining what was in its best interests, provided it did so fairly and objectively.

This decision continues the growing erosion of a bidder's ability to challenge a tendering authority's decision not to award the contract to the low bidder.

Accordingly, while the decision is good news for general contractors dealing with their trades, general contractors may be less happy with the decision the next time a project is awarded to their higher priced competitor. ■

Norman D. Stren and Christopher E. Hirst are partners in the Construction & Engineering Group of Alexander Holburn Beaudin & Lang LLP. Stren is a past chair of the Vancouver Regional Construction Association. This article was prepared with the assistance of article student Sihano Tadessa. If you have any questions about this decision, or any construction law related issue, call Stren or Hirst (604-484-1700).

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