

Consultants and Tendering: A Cautionary Tale from the Courts

BY NORM STREU & GORD BUCK

WHO SHOULD BEAR primary responsibility for a flawed tendering process — the owner or its consultant?

The recent decision of the British Columbia Court of Appeal in *Stanco Projects Ltd. v. HMTQ and Aplin & Martin Consultants Ltd.* (Stanco) suggests that even where the client is sophisticated and has experience with the tendering process, the consultant may in some circumstances bear primary responsibility for compensating an aggrieved bidder. This case is a cautionary tale for consultants retained to assist with tenders.

The case arose when the plaintiff construction company bid on a contract tendered by the Ministry of Water, Air and Land Protection (Ministry) for the construction of water reservoirs at the Cypress Bowl ski area. The trial judge concluded the tendering process was flawed from the outset. Most significantly, the tendering documents, which were drafted by the Ministry's consultant, Aplin & Martin Consultants Ltd. (Aplin), did not clearly request specific pricing information for a major aspect of the project. The problem was compounded by subsequent actions by Aplin and the Ministry, which included obtaining post-closing quotes from some but not all of the bidders and secret requests for bids. Stanco, the original lowest bidder, was not aware of these post-closing actions and submitted a revised quote in response to a request from the Ministry, which contained the specific pricing information. The Ministry, through Aplin, then used this quote to solicit better prices from Stanco's competitors. On the recommendation of Aplin, the Ministry ultimately awarded the contract to another party which, having had the advantage of knowing Stanco's quote, submitted a lower bid.

Stanco sued the Ministry, arguing it had breached the tendering contract by engaging in unfair practices and had breached the duty of fairness it owed to the bidders. The Court agreed, finding the Ministry had engaged in what it termed the "nefarious practice" of bid manipulation by effectively giving the other bidders the opportunity to re-bid on the work with full knowledge of Stanco's lower tender price. The Court concluded this conduct was "patently unfair and in breach of the Ministry's implied duty to act fairly under Contract A," and awarded damages to Stanco.

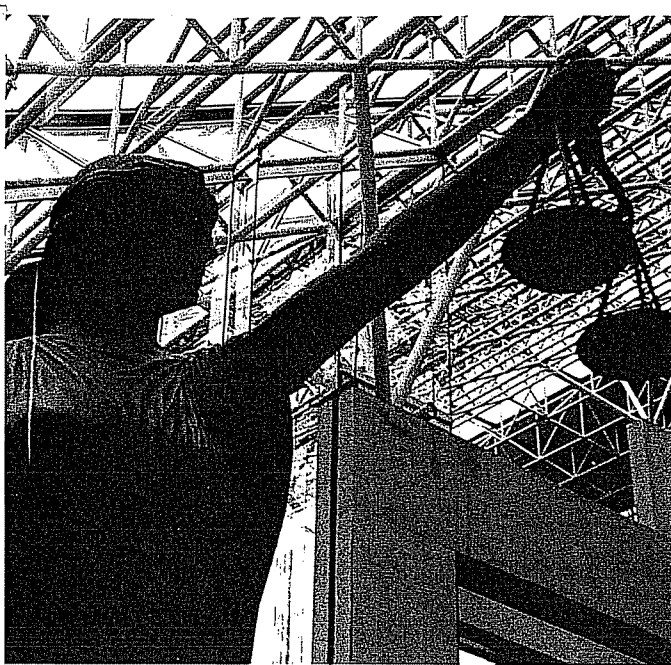
At trial, the Ministry brought a third party claim seeking indemnity from Aplin. Aplin had agreed in its contract to indemnify and save harmless the Ministry from "any losses, claims, damages, actions, causes of action, costs and expenses" incurred

by the Ministry by reason of any act or omission by Aplin in providing the consulting services.

Although the Court concluded that Aplin was negligent and had breached its contract with the Ministry, the Ministry failed to establish that Aplin's negligence and breach of contract were the cause of the loss suffered by the Ministry. The Court instead held that since the Ministry had considerable expertise in tendering, had its own experienced personnel and had sufficient knowledge to decide for itself whether to proceed with the flawed tendering process, its claim of reliance on Aplin did not "ring true." Once the Ministry was informed of the surrounding material circumstances, any reliance it might have placed on Aplin "became superseded by the Ministry's own informed and self-reliant action and decision."

The Ministry appealed both the award of damages to Stanco and the trial judge's findings on the third party issue. Madam Justice Ryan and Madam Justice Newbury, writing jointly for the

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Court of Appeal, affirmed the trial judge's award of damages to Stanco. However, the Court allowed the Ministry's appeal on the third party issue and ordered Aplin to indemnify the Ministry for the damages payable to Stanco.

The Court of Appeal held that the Ministry's obligation to pay damages to Stanco came within the very broad wording of the indemnity clause in the contract between the Ministry and Aplin. The Court then turned to consider whether an exception in the indemnity clause for "liability arising out of any independent negligent act" by the Ministry applied to its claim against Aplin. While the Court acknowledged that it was "a very fine line to draw," it nonetheless concluded the conduct of the Ministry did not amount to an independent negligent act within the meaning of the indemnity clause. The Court observed that the Ministry had acted "in response to Aplin's advice," and even though the Ministry had expertise of its own in tendering, it had hired Aplin for its professional expertise and had relied on it to run a proper tendering process.

The specific implications of this decision for professionals who are retained as consultants in the tendering process are apparent. Even in a situation where the client is sophisticated and has its own expertise in tendering, is a knowing and active participant in the tendering process and the decisions made in that process, the client may still have a claim against its consultant where there is some reliance on the consultant's advice. Depending on the professional services contract in question, that reliance may result in a successful claim for indemnity. To reduce this exposure, consultants should remind their clients in writing they are not lawyers and any questions concerning the legalities of the tendering process should be directed to the client's legal counsel.

The broader implications of this decision are also clear — contractual indemnities will be enforced by the Courts and can result in onerous outcomes for the party that provided the indemnity. The case is a reminder that you should always do whatever is in your power to delete or limit the scope of the indemnities you provide in your contracts. **CB**

Norm Streu and Gord Buck are lawyers within the Construction & Engineering Group of the Vancouver law firm Alexander Holburn Beaudin & Lang LLP. If you have any questions about this decision or any construction law related issue, please feel free to call Norm or Gord at 604.484.1700.

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www.ahbl.ca • nstreu@ahbl.ca

Suite 2700 - 700 West Georgia St. Vancouver, BC V7Y 1B8
(Tel) 604 484 1700 (Fax) 604 484 9700 www.ahbl.ca info@ahbl.ca