LOWEST BIDDER BEWARE

Contractors sometimes submit bids on projects where, in the tender documents it states "…lowest or any tender bid will not necessarily be accepted."

These quoted words constitute the so-called privilege clause.

These words have been relied upon by owners as justification for not accepting the lowest bid tendered, as justification for accepting non-compliant bids and as justification for not accepting the lowest compliant bid.

Rather, owners have accepted higher bids based on criteria not disclosed to all the bidders, such as a preference for local bidders over out-of-town bidders.

Contractors who go through the effort and expense of preparing and submitting bids get understandably upset when they see the contract ultimately awarded to a higher bidder. Until very recently, contractors' rights in this situation have been unclear. Did the privilege clause allow an owner to award a contract to whomever he wanted to and for whatever reason regardless of who had the lowest bid?

The Supreme Court of Canada has, now cleared up some – but not all- of the uncertainty in this situation.

It has ruled that an owner cannot accept a bid which does not comply with the tender documents, even if it is the lowest. To do this would, in most circumstances, breach its implied obligation to the other bidders to consider only compliant bids.

The Court has ruled that an owner cannot accept a compliant bid that is not the lowest compliant bid on the basis of an undisclosed criterion, such as a preference for local bidders.

Of significance however, the Court did uphold the general validity of the privilege clause. Further, they expressly ruled that the privilege clause can still be used as legal justification for accepting a compliant bid that is not the lowest compliant bid. An owner can do this in two situations.

Firstly, an owner can do this where the decision to accept a higher compliant bid rather than the lowest compliant bid is based on a reasonable, good-faith assessment by the owner to the effect that, in the end, the "cost" of accepting the higher bid might be less than the cost of accepting the lowest bid.

This assessment might involve consideration of such relevant factors as a shorter completion date if the higher bidder was chosen, or the experience and 'track record' of the higher bidder chosen versus that of the lowest bidder. (This latter factor would likely not be appropriate if the bidders had pre-qualified).

Specifically the Court said that the owner's discretion ~ this regard "is a discretion to take a more nuanced view of cost than the prices quoted in the tenders."

No doubt this highly ambiguous statement will be the focus of most future litigation relating to the privilege clause.

Secondly, an owner can accept a higher compliant bid where all bid criteria, including those which have often been previously undisclosed such as a preference for local bidders, are fully disclosed in the tender documents.

The law in this area now emphasizes openness and good faith on the part of owners soliciting bids for construction projects. So long as owners act openly, reasonably and in good faith throughout the bid process, they will continue to be able to rely on the privilege clause as justification for not accepting the' lowest compliant bid.

That can be achieved by putting all the bid criteria on the table from the outset including, I would suggest, their now-conformed discretion to "take a more nuanced view of cost." No doubt this will be to the continued chagrin of compliant low bidders.