Thomas G. Heintzman, O.C., Q.C.

McCarthy Tétrault

Toronto, Ontario

www.mccarthy.ca

416-362-1812

theintzm@mccarthy.ca

www.constructionlawcanada.com

Thomas Heintzman specializes in commercial litigation and is counsel at McCarthy Tétrault in Toronto. His practice focuses on litigation, arbitration and mediation relating to corporate disputes, shareholder's rights, securities law, broadcasting/telecommunications and class actions.

He has been counsel in many important actions, arbitrations, and appeals before all levels of courts in many Canadian provinces as well as the Supreme Court of Canada.

Thomas Heintzman is the author of Goldsmith & Heintzman on Building Contracts, 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Goldsmith & Heintzman on Building Contracts has been cited in 183 judicial decisions including the two leading Supreme Court of Canada decisions on the law of tendering:

M.J.B. Enterprises Ltd. v. Defence Construction (1951), [1999] 1 S.C.R. 619 and
Double N Earthmovers Ltd. v. Edmonton (City), 2007 SCC3, [2007] 1 S.C.R. 116-2007-01-25 Supreme Court of Canada

Is a Site Visit a Material Condition to a Tender?

Construction Law – Tenders - Site Visit - Materiality

An invitation to tender may contain many conditions, some of which are more or less material to the ultimate submitted tender. Is a requirement that the contractor attend a site visit a material condition of the tender? In *Admiral Roofing v. School District 57 (Board of Education)*, the British Columbia Supreme Court said Yes, and held that a missed site visit eliminated the contractor from the bidding process.

The District School Board issued an invitation to tender for re-roofing of two buildings. The invitation contained a term stating that a "mandatory" site visit was being held at 8 am on a certain date, that registration at the site visit was required and that "failure to attend and register will lead to the non-acceptance of the tender by the owner."

The President of Admiral Roofing arrived 15 minutes late at the first site. After the representatives of the School District had moved to the second site, he joined the group making the site visit. He was asked by the School District representatives whether he wished them to go back with him to the first site, and he declined stating that he would visit that site himself later. He was told later that day that Admiral Roofing's bid would not be accepted. Nevertheless, he went back to the first site and then submitted the tender. The School Board did not open that tender.

The contractor and the School Board brought an application to determine whether Admiral Roofing's tender was non-compliant so that the School District was unable to accept it. The British Columbia Supreme Court held that it was.

The contractor argued that it substantially complied with the site visit requirement by attending part of the site tour, signing its name and returning later to the first site. The court held that the word "attend" required the attendance at the two locations and at the mandatory site tour starting at 8 am. The Court held that the words "failure to attend and register will lead to the non-acceptance of the tender by the owner" made this mandatory requirement sufficiently clear.

The Court also held that this failure by the contractor could not be waived by the owner under the tender condition entitling the owner to waive "irregularities … of a minor or technical nature." While arriving late by five minutes might have been technical if the School District's site team had still been there, there was no discretion to waive the actual first site visit itself.

The Court quoted from another case in which it was held that a defect is material if it "undermines fairness of the competition or the process of tendering …impacts the cost of the bid or the performance of contract B …or creates a risk of action by other (complaint) bidders."

The Court applied a "restrictive interpretation" to the discretion clause, which approach has been held necessary "in order to respect the mandatory requirements of the instructions to tenderers and to protect the tendering process." Applying that approach, the Court held that there was no discretion to accept the bid.

This approach places a very narrow limit on the owner's discretion to accept non-compliant bids, from two aspects.

First, it treats procedural irregularities in the same way as substantive irregularities. It may be argued that the procedural necessity to attend a site meeting is of a different order or nature than the actual contents of the bid or timing of its delivery. The former cannot impact the content of the bid itself or the constructed project. Nor does a missed site visit appear to unfairly impact other bidders who are required to deliver their bids on time. A site meeting seems to be very much for the benefit of the bidder, and to the extent that it has any value to the owner, that value would seem to be one that the owner should be entitled to waive.

Second, the Court's interpretation appears to place an inordinate importance on the threat of a claim by another contractor. The late attendance at the site meeting does not seem to materially interfere with the other ingredients referred to by the Court: the fairness of the competition, the process of tendering, the cost of the bid, or the performance of Contract B. Rather, reading between the lines, the threat of an action by another bidder that makes the "defect" material. That approach may be inappropriate for two reasons.

First, in this case, the parties apparently made the application to the court immediately, and before the tender were completed. So the court was in a position to deal with the legality of the bid before claims were made by other contractors.

Second, the threat of litigation should not, by itself, be relevant to the materiality of the defect of default. Otherwise, the other contractor will always "hold the hammer" and the owner's discretion to accept a bid with a non-material defect will virtually disappear.

See Goldsmith and Heintzman, *Canadian Building Contracts* ((4th ed.), Chapter 1, Part 1(f).

Construction Law - Tenders-Site Visit - Materiality:

Admiral Roofing v. School District 57 (Board of Education), 2010 BCSC 1394

Thomas G. Heintzman May 29, 2011
www.constructionlawcanada.com