



PRE-CONTRACTUAL TENDERING DAMAGES

In the recent case of *Bre-Ex Limited v. The Corporation of the City of Hamilton* the Court was asked to decide whether pre-contractual delay damages could be awarded to a contractor.

In that case, Justice Rady found that the City of Hamilton was liable to Bre-Ex, an excavation contractor, for delay damages, even though no formal contract had been signed at the time when the claims arose. She found that the City had acted unreasonably in not promptly notifying Bre-Ex of the award of contract where time was of the essence; and in delaying the execution of the construction contract where the terms and conditions to be included were explicit.

On November 6, 2001, Bre-Ex responded to a tender, called by the City of Hamilton, wherein the City was seeking bids for the construction of a new leachate collection system at the Glanbrook Landfill Site. Included in the specifications contained in the bid package, was a requirement that each bidder submit with its tender form, both proposed investigation and construction methodologies. Further it was stated that no work could proceed until the investigation and construction methodologies proposed had been approved by the Owner. The City's Instructions to Bidders declared that time was of the essence and that the work was to proceed immediately following the award. Bre-Ex submitted its bid on a unit price basis in the amount of \$3,228,225.30 excluding GST. Included with the tender were Bre-Ex's proposed investigation and construction methodologies responsive to the requirements set out in the tender package.

Bre-Ex was the lowest of the seven bids received. The bid irrevocability period was 60 days, ending January 6, 2002. On December 11, 2001, City Council accepted Bre-Ex's tender and authorized the award of the construction contract to Bre-Ex.

Prior to Trial, all parties agreed that a binding contract had come into force as of that date; however the City's failure to communicate the award in timely fashion; and its disagreement over what constituted the terms and conditions of the contract created the controversy that forced a trial to ensue. Ultimately, the Court found that the City had unreasonably delayed the commencement of the work in two ways. First, the City did not notify Bre-Ex of the award of the contract by Council until January 24, 2002, some 18 days after the tender irrevocability period had expired. This delay was found to be unreasonable in light of the fact that: time was of essence; and, the contractor had stood ready to mobilize to site to commence work by January 6, 2002 when the irrevocability period would have expired. A second delay in executing the construction



contract and commencing work had been caused by the City's refusal to include the contractor's investigation and construction methodologies as terms of the construction contract.

The Court found that, unusually, in this particular case a declaration of the contractor's methodologies was a required component of the bid submission; and that no work could proceed until the methodologies had been accepted by the owner, so the methodologies had to be incorporated into the contract as part of the "fundamental offer and acceptance analysis that informs the law of contract". For these reasons the court found that Bre-Ex was correct to have insisted that the methodologies form part of the contract. The conduct of the City initially refusing to include the provisions was groundless.

The Court found that the two delay periods, although overlapping gave rise to damages. During the period of delay Bre-Ex had remained ready to start work, and so was unable to tender for other jobs. For the purposes of calculating the damages the delay commenced on January 6, 2002 and ran until April 12, 2002 when Bre-Ex executed the construction contract. At the end of the day Bre-Ex was awarded \$850,866 in compensation for lost revenue, fuel and labour escalation costs, refinancing, and equipment rental caused by the delay; plus interest and its legal costs.

The case, in my opinion demonstrates clearly that in certain circumstances, the relationship between parties on a construction project may be governed as strictly as if the parties had executed a formal contract, even where one is not yet signed. Contractors should thus be alive to the possibility of claims arising prior to the execution of the formal contract, and owners should not assume that delaying the execution of a formal contract necessarily prevents a contractor from advancing claims that accrue prior to the execution of the formal agreement.

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