Goodmans Update

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Dancing With The Subcontractor You Brought: Undercutting Will Not Be Tolerated

A. Dynasty Roofing (Windsor) Ltd. v. Marathon Construction Services (1991) Inc.

by Howard M. Wise

In the case of *A. Dynasty Roofing (Windsor) Ltd. v. Marathon Construction Services (1991) Inc.* a decision of the Ontario Superior Court released March 11, 2002, the Court was asked to determine whether the bidding process resulted in a contract which obligated the contractor to offer the subcontract to the lowest bidder at the subcontractor's bid price absent any other reasonable cause to reject the subcontractor.

The facts in the case are as follows:

1. The defendant, Marathon Construction Services ("Marathon"), a general contractor, bid on a contract for the construction of an industrial building in January 1999. The plaintiff, A. Dynasty Roofing (Windsor) Ltd. ("Dynasty"), a roofing subcontractor, in response to the defendant's request prepared and submitted a bid for the roofing component of the industrial building.

2. Marathon's bid was successful and it was awarded the contract. The approximate cost of the building contract was $16,000,000 and the lowest subcontractor bid for the roofing component was $198,500 by Dynasty. Smith Peat Roofing's ("Smith Peat") bid for the same component was $208,840.

3. In its successful bid, Marathon named both Dynasty and Smith Peat as roofing contractors it would use if its bid was successful. Marathon allocated $195,000 in its bid for the roofing work. Marathon's practice was to reduce the lowest subcontractor bid in order to attain a bidding advantage over the other general contractors.

4. After Marathon was awarded the contract, they contacted Dynasty and offered them the roofing contract at a price of $195,000. Dynasty refused to do the work for any amount less than their bid price of $198,500. Marathon then offered the roofing contract to Smith Peat at a cost of $195,000 and Smith Peat accepted.

5. Marathon argued that there was no contract with Dynasty as its solicitation to roofing contractors was a request for prices and not a bid competition.

The issue before the court was whether the bidding process resulted in a contract which obligated Marathon to offer the roofing contract to Dynasty at Dynasty's bid price absent any other reasonable cause to reject Dynasty as a subcontractor.

The construction industry is one of Canada's largest. It is one of the industries by which our economy is measured. From heavy equipment manufacturers to suppliers from subcontractors and general contractors to owners and developers changes in the industry can have a dramatic effect on day-to-day business.

The Goodmans Construction Law Update was created to keep you abreast of recent legal developments as well as industry trends. We hope you find it informative and will continue to keep you informed of future developments and trends in the construction industry.

In This Issue

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Howard is a partner at Goodmans specializing in the areas of construction law and commercial litigation. Howard is the author of the *Manual of Construction Law*, published by Carswell and co-author of *Construction, Builders and Mechanics Liens in Canada* (7th edition). He is also a contributing author to a textbook entitled "*Construction Disputes: Representing the Contractor*", published by Aspen Publications, New York and a contributing editor of *Canadian Forms and Precedents: Construction Liens* published by Butterworths. Howard is a Fellow of the Canadian College of Construction Lawyers and has been certified by the Law Society of Upper Canada as a Specialist in construction law. He is regularly retained to act in large multi-partied disputes, including acting for owners, general contractors, subcontractors, financiers and design professionals.

The court determined that the facts did not support Marathon's argument and found that the evidence pointed to the creation of a contract. Both roofing companies took steps to qualify themselves as subcontractors with the owner as required by the general contract. In addition, the owner had to approve subcontractors prior to tender and the subcontractors had to review the plans and specifications in order to submit a quote.

Further, the judge was unequivocal in his determination that Dynasty and Marathon were involved in a formal bidding process, not a request for prices by Marathon, and that a contract was entered into between Dynasty and Marathon in relation to the bidding process. Dynasty, "in submitting its bid undertook that its bid would be irrevocable for a reasonable period of time and that it would do the work for the price quoted. Marathon undertook that it would abide by the bidding process and offer the contract to the lowest bidder provided there was no reasonable cause to reject the lowest bidder."

The trial judge referred to Mr. Justice Estey's statement in *Ron Engineering & Construction (Eastern) Ltd.* to bolster his conclusion about the existence of a contract: "the significance of bid law is that it once becomes irrevocable if filed in conformity with the terms and conditions under which the call for tenders was made and if such terms provide." Further he cited Madam Justice Charron in *Scott Steel (Ottawa) Ltd. v. R.J. Nicol Construction (1975) Ltd.*, who ruled that the binding contract referred to by Justice Estey between the owner and general contractor also applied to general contractor and subcontractor.

Dynasty's conduct supported the finding that the parties entered into a binding contract with implied terms that the bid would be irrevocable; Dynasty would perform the work at the bid price and the lowest bidder, would be offered the contract. The court criticized Marathon's conduct stating that their actions "created a sham of the bidding process" and that Marathon had "no intention of maintaining the integrity of the bidding system".

As there was no reason presented to reject Dynasty as a subcontractor, the court found that Marathon was in breach of contract. On the question of damages, the court concluded that Dynasty's damages included both the loss of profits and the overhead from the roofing contract.

On October 24, 2003, the Ontario Court of Appeal confirmed the decision of the trial judge when it concluded, "the bidding process resulted in a contract which obliged the defendent to award the roofing subcontract to the plaintiff, the lowest bidder".

Public-Private Partnerships: Demystifying the Process

by Donald G. Pierce, Q.C.

Introduction

The use of public-private partnerships (known as P3s) is now well established in Canada at the federal level and in several provinces, notably Ontario, British Columbia, New Brunswick, and Nova Scotia. Currently, P3s are playing a bigger role in building and capital projects across all areas of government, including power generation, energy delivery, water and wastewater facilities, waste disposal, transportation, communications, education and health facilities, and public service buildings. Recently, its popularity has led to P3s being used more frequently in smaller-scale developments across Canada, such as schools, courthouses, and hospitals.

A. Process Issues

A great deal of thought and planning must go into developing the process that will govern

the public-private partnership project. First of all, it is crucial to recognize that there are two distinct worlds that must be addressed when dealing with projects such as these: the business world and the political world.

Creation of a Government Team

The first step and probably the most important is for the government to create a team of experts to run the government side of the project (the "Government Team"). The Government Team's task is to set up, monitor, and implement the various steps of the process throughout the entire project. The Government Team's job is to create a process that once established, facilitates the development of a **fair business deal** while at the same time is, and appears to be, beyond reproach to public scrutiny. It is essential that not only must the business deal be fair, it must *appear fair* to the skeptical public. Fairness and the appearance of fairness are crucial for the ultimate long-term success of the project, and can only be achieved by the establishment of a fair process.

Who are the players on the Government Team? The team of experts will likely consist of four main groups of consultants: (1) process consultants; (2) legal consultants; (3) technical consultants; and (4) financial consultants.

Process Consultants

This role is generally filled by a large accounting/consulting firm whose job is to co-ordinate and steer the Government Team so that all the issues are addressed in a comprehensive and efficient manner. The process consultants are essentially the quarterbacks of the process. They assist in setting the rules, the evaluation criteria, the review process, and the selection process.

Legal Consultants

The lawyers on the team are responsible for providing legal advice both on the business transaction and on the process. As such, the lawyers must be experienced in all aspects of the business deal, fully understand the process, and ensure that the process can withstand the most intense public scrutiny. In developing a full understanding of the process, it is then the lawyers' job to communicate this process to ensure that all members fully understand the potential pitfalls of certain actions. The lawyers want to be constantly anticipating future events and encouraging the other members to do so as well. Importantly, the lawyers must also endeavour to draft the documents in an even-handed manner to ensure lender participation, and an easy, quick closing.

Technical Consultants

The technical consultants are generally comprised of engineers or other technically trained people whose job it is to review the technical proposals and technical issues that arise in the planning stages, and throughout the process.

Financial Consultants

The financial consultants' specific job is to determine the real costs of the various project proposals, breaking them down into net present values, so that proper analyses can take place.

These four team members must start working together immediately and each member must fully understand the whole process. One of the most consistent themes across projects is that the better the consultants work as a team from the outset and throughout the project, the greater the chance that the project will operate smoothly.

A Well-Defined Process Framework

A properly prepared **Process Framework** is key to ensuring that all the players proceed with the same view to a defined result. The process framework is the internal government document that defines the procurement and evaluation process for a particular project. It provides detailed evaluation methodologies and criteria, as well as the forms to be used by evaluation teams in the conduct of their evaluations. It incorporates the RFQ (if any), the RFP, and the project agreement(s) by reference. It is

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designed to document to unsuccessful prospective proponents and third parties that the process followed was fair and rationally related to its objectives.

It is important to understand that the framework developed from the outset can either serve to guide the project to fruition with minimal conflict, or through lack of forward thinking and communication, bog down the process at every turn.

Development and Application of Evaluation Methodology and Criteria

The development and application of evaluation methodologies and criteria help to ensure that the selection of the successful proponent is unbiased and rational. It is generally recommended that government develop detailed evaluation methodologies and criteria in parallel with the development of the Request for Qualifications (if any) and the Request for Proposals for the project.

1. The RFQ - The Request for Qualifications/Expression of Interest

An RFQ is used in a two-stage evaluation process to solicit statements of qualifications from prospective proponents in order to generate a short list of eligible proponents. Typical contents of an RFQ include:

- A detailed description of the opportunity, couched in commercial, rather than legalistic language, as the opportunity should be marketed to prospective proponents in order to generate greater interest and thereby enhance project value;

- A summary disclosure of information related to the opportunity, with references to sources of more detailed information not contained directly within the RFQ, to allow prospective proponents to decide whether the opportunity is suitable to pursue, and if so, with whom they should partner;

- The procurement schedule, including submission deadlines, especially with respect to the RFQ stage if not also with respect to the RFP stage; and

- Evaluation criteria and submission requirements in enough detail to provide prospective proponents a reasonable opportunity to prepare a formally and substantially viable and compliant statement of qualifications.

A purpose of RFQs in large projects is to control the number and quality of companies entitled to bid on the project. From the Government Team's perspective, they have to determine from the outset exactly what type of private companies they are looking for and, within that type, which ones might be most qualified for the particular jobs. From the private sector's point of view, the issue is: how does your company get on this qualifying list?

Generally, there are two dominant criteria that the government uses to determine who is qualified: (1) experience; and (2) financial capability and stability. There are also ancillary criteria that vary in weight depending on the type of project and the political/economic climate.

Experience: The government is looking to the private sector to provide a certain expertise in developing the project. They want to be assured that only highly qualified, highly experienced companies apply for the jobs. These types of projects are not a great opportunity for a local company with little experience to gain experience at the expense of the government. The government wants to be comfortable that the companies bidding are capable of doing the jobs correctly, and the best assurance is to require experience.

Financial Capability and Stability: The financial capability of the private corporations is also very significant due to the relatively large size of the proposed projects. Obviously, the government wants to retain companies whose balance sheets are proportionate to their responsibilities under the project, including the provision of performance bonds. Once again, this is not a place for start-up companies to hope

How does your company get on the government's qualifying list to bid on a project?

Two dominant criteria are used:

1. Experience. Highly qualified, highly experienced companies that can provide a certain expertise in developing the project.

2. Financial capability and stability.

to make their mark with a huge contract that is disproportionate to their past dealings. Thus, the government, in striving to minimize problems from the outset, wants assurance that all the potential bidders are experienced and have financial capability to carry out the job.

2. RFP - Request for Proposals

An RFP is used to solicit proposals from pre-qualified bidders in an RFQ process, or if there is no RFQ process, it will also include the requirement to provide a statement of qualifications. The RFP is the key document in the process, and outlines what the government wants the private sector to bid on. Typical contents of an RFP include:

- A detailed description of the opportunity, couched in commercial, rather than legalistic language, as the opportunity should still be marketed to interested bidders/proponents in order to generate greater interest and thereby enhance project value, and (for two-stage evaluations) in order to ensure continued interest among prospective proponents so that they do in fact proceed to become proponents;

- A summary disclosure of information related to the opportunity, with references to more detailed sources of information not contained directly within the RFP. The disclosure of information, both within and outside the RFP, is ordinarily more detailed than in an RFQ;

- The procurement schedule, including submission deadlines;

- Evaluation criteria and submission requirements in enough detail to provide proponents a reasonable opportunity to prepare a formally and substantively viable and compliant proposal; and

- Legal disclaimers with respect to the government's liability for any inaccuracies in information provided to proponents, with respect to government's right to amend the RFP and with respect to government's right to reject the proposal of any or all proponents.

There are numerous other considerations that factor into process decisions.

Risk Allocation

Risks are generally allocated (item by item) according to the specific circumstances of each project, taking into account the following important considerations:

- It should be allocated to the party best able to manage risk, either through insurance or self-insurance, or through financial or operational risk mitigation strategies;

- It should be clearly allocated prior to the submission of proposals, since vagueness will force proponents to build sizable contingencies into their bid amounts that would not otherwise be incorporated given clear allocation; and

- It should be drafted by a team with cross-functional representation. Members of the team should expressly take on the advocacy of the various project stakeholders - one government, another the private partner, and another the private partner's lenders (if applicable). Other stakeholders, such as affected local governments or affected labour groups, where of sufficient importance to the project, may also have an advocate, but even if not, should be taken into account.

Changes to Consortia Membership and to Contractors and Sub-contractors

Government might require restrictions to ensure that capability requirements are not by-passed through making changes to consortia membership after the capability of the original membership has been assessed to be satisfactory. For example, restrictions may be imposed on changes to individual people within project organizations holding certain key positions. This

An RFP — Request for Proposal — is used to solicit proposals from pre-qualified bidders and outlines what the government wants the private sector to bid on.

helps ensure that highly qualified personnel put forward initially in order to attract selection are not later substituted with less qualified personnel that the government would deem unsatisfactory.

Confidentiality of Information

Confidentiality of information in the procurement process deals with who is to keep what confidential from whom, and in what manner. While there are important reasons to maintain the confidentiality of certain information related to public policy and the protection of proprietary information and intellectual property, these reasons must be counter-balanced against the reasons for disclosing material information related to the infrastructure being procured.

Fairness in the procurement process is served by timely disclosure of identical information to all proponents.

In order to keep information that it receives from proponents confidential from the public at large, the Government Team may find it necessary to destroy or return that information at the conclusion of the procurement process so that it cannot at some later date be required to be made available by the government.

Disclosure of Information

Disclosure of information related to the infrastructure being procured, prior to submission of statements of qualifications and proposals, has a bearing on fairness in the procurement process and on project value. However, it must be weighed against competing requirements for confidentiality:

- Fairness in the procurement process, both as between government and proponents, and as between proponents themselves, is served by timely disclosure of identical information to all proponents. By disclosing as much information material to the proposed project as possible, information disparities cannot be exploited either by government or by proponents who may have special access to information (perhaps through extensive experience in the region). Moreover, failure to disclose material information may open government to legal liability; and
- Project value can be enhanced by detailed disclosure of information, as such disclosure of the structure of the deal renders more definite the assignment of risk and responsibility between government and the private partner, and helps to better quantify the exposure and cost that the allocated risk and responsibility bring. Contingencies incorporated into bid amounts, due to unclear allocation of risk and responsibility and due to sub-optimal information for the quantification of exposure and cost, can be reduced through increased disclosure.

The Procurement Process

Two key objectives which can be influenced by the method by which the legal agreements are integrated into the procurement process are value (in particular, the maximization of bid amounts), and fairness (in particular, the establishment of a level playing field across proponents). Value and fairness are achieved by issuing all relevant information to all prospective proponents (at the RFQ stage) and to all proponents (at the RFP stage) in a timely manner, and in a way that does not discriminate between proponents.

Selection of proponents is usually the first step in what could potentially be a very difficult process. If the government first selects a winner in the process, and then attempts to negotiate the legal agreements, the government has lost its advantage and must work at negotiation in order to ensure that the winner agrees to comply with important legal conditions and requirements. At this point, all other bidders are long gone, and the process has surely been prolonged. The key to attaching all the documents at this early stage is that there is little room for future negotiation. The most that the government may choose to offer in terms of compromise is to put out a draft, invite comments from the proponents, reissue a revised draft incorporating such comments as the government decides in its discretion should form part of the document, and then reissue the document

as amended. Once a proponent bids, it is bound to sign those amended forms of agreement.

Economic Benefits Requirements

Economic benefits requirements, motivated by an intention to promote economic development, are often sought to be, and often are, incorporated into the Request for Qualifications (if any) and Request for Proposals for a project.

Economic benefits requirements may include: local employment requirements and employee training requirements; local procurement requirements and supplier development requirements; local management requirements, such as the maintenance of local design and construction management offices and of local operations management offices; domestic ownership requirements; technology transfer requirements, in order to develop export capability; and requirements not directly related to the project, as for example, funding of capital or social projects not related to the subject of the project.

Criminal Liability for Workplace Accidents

by Joseph K. Morrison

Recently enacted changes to the *Criminal Code* impose criminal liability on businesses and individuals in the event of workplace accidents. These changes, which were included in Bill C-45, *An Act to Amend the Criminal Code (Criminal Liability of Organizations)* received Royal Assent on November 7, 2003 and are expected to take effect January 1, 2004. The Act is the long awaited response to the Westray Mine disaster where twenty-six miners were tragically killed following a mine explosion in Nova Scotia in May 1992. The public inquiry that investigated the disaster uncovered a serious disregard for workplace safety by the corporation and its managers. Although several members of Westray's management were initially charged, they were never prosecuted amidst much controversy and political wrangling.

Significant Penalties

The Act provides significant penalties in the event of a conviction. This includes imprisonment to a maximum of 25 years for individuals and fines of up to $100,000.00 for corporations. It is important to note that these penalties would be in addition to any existing penalties provided by provincial occupational health and safety legislation or other regulatory statutes. The Act's provisions will not supersede the existing penalties provided by these statutes but will add additional criminal liability.

Upon conviction, the Act also provides a number of new factors that will be considered in any sentencing. These factors include whether the organization realized any advantage as a result of the offence, the level of planning involved, the cost of the investigation, and any regulatory penalties imposed and any actions taken by the organization to reduce the likelihood of future occurrences.

Expanded Scope for Corporate and Individual Liability

The Act expands the scope of corporate liability and individual liability.

Instead of just "corporations" being covered, the Act provides that "organizations" be covered. This would likely include trade unions, partnerships and other forms of association.

The Act also expands the scope of individuals that may be held liable. It broadly defines those that are involved in directing the work of others within an organization. It places a positive burden on such individuals to take reasonable steps to prevent bodily harm to employees. This provision could result in personal liability for individuals such as floor supervisors, managers and anyone else directing the work of others.

The Act also applies to "representatives", which is defined as a person who plays an important role or is responsible for managing an

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important aspect of the organization's activities. It includes directors, partners, employees, members, agents and contractors. The terms "important role" and "important aspect" are not defined and will likely be the focus of much litigation in the future.

Liability for Both Intentional and Negligent Actions

The Act imposes liability for not only intentional actions of representatives and senior officers, but also for their negligent actions. For example, if a representative of an organization, acting within his/her scope and authority, is party to the offence, and the organization's senior officer fails to take reasonable steps to prevent a representative of the organization from committing the offence, the organization will be held liable. The Act thus arguably imposes a duty on senior officers and representatives to ensure that they take reasonable steps to prevent other employees from committing an offence.

Employers should consider the impact of the Act and take steps to ensure that they are prepared.

Advice for Employers

Employers should consider the impact of the Act on their workplace and take steps to ensure that they are prepared when the Act takes effect. Such steps would include the following:

- undertake a thorough review and audit of the internal safety policies, procedures and practices including enforcement and discipline mechanisms;

- educate employees about the importance of workplace safety, their legal obligations under this Act and existing provincial statutes, as well as the costs of non-compliance both financially and in human terms; and

- ensure that there are good lines of communication within the company that encourage the free flow of information and concerns regarding safety.

These measures, once implemented and enforced, may assist in not running afoul of the provisions of the new Act.

For more information on this Act (including training seminars) and other Occupational Health and Safety and Workers' Compensation issues, please contact Joe Morrison at jmorrison@goodmans.ca or at 416.597.4203.

Case Comment:

Sherway Contracting (Windsor) Ltd. v. Kingsville (Town)

by Jerry P.K. Topolski

Contractors who enter into contracts with municipalities and other incorporated government bodies need to be mindful of this recent decision of the Ontario Superior Court of Justice. The facts in this case are as follows:

1. The Plaintiff, Sherway Contracting (Windsor) Ltd. ("Sherway"), is a contractor specializing in the construction of roads, sewers, watermains and subdivisions for private developers and municipal corporations.

2. The Defendant, The Town of Kingsville ("Kingsville"), is the successor municipality to Gosfield North ("Gosfield"), the municipality which allegedly entered into the contract at issue with Sherway.

3. Sherway submitted to Gosfield a proposal to build a watermain line along the border of its town line. Gosfield did not pass a council resolution authorizing the contract, but its Chief Administrative Officer, Brian Weaver ("Weaver"), and its Mayor, Lyle Miller ("Miller"), signed the contract and impressed upon it Gosfield's corporate seal. The contract was returned to Sherway without a by-law or resolution from Gosfield's council approving the agreement.

4. Unbeknownst to Miller and the other Gosfield councillors, prior to Weaver and Miller executing the contract Weaver had, without council approval, signed an acceptance of a proposal submitted by Sherway instructing Sherway to draft the contract, and had authorized the spending of $50,000 to conduct a pre-design survey.

5. Sherway had considerable experience in dealing with municipal corporations and knew that a contract with a municipality could have no force and effect unless its council passed a resolution or by-law.

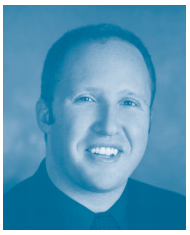
6. Miller did not know he was signing the contract when Weaver presented it to him for execution.

Following the amalgamation, Kingsville learned of the contract and informed Sherway that it was not prepared to proceed with the agreement. Sherway brought an action against Kingsville for damages for breach of contract and negligence, and against Miller and Weaver for damages for breach of warranty of authority and negligent misrepresentation in an attempt to find Kingsville vicariously liable for their conduct.

The Court ultimately dismissed the action against Kingsville. At trial, Sherway's counsel conceded that that contract could not be valid as neither Gosfield nor Kingsville had passed a by-law or resolution approving the agreement. The Court then turned its attention to the remaining claims against Weaver and Miller with a regard to determining whether their execution of the contract created a binding agreement on Kingsville.

With regard to the issue of Weaver and Miller's apparent authority to sign the Contract, Sherway argued that Gosfield, through its past conduct in permitting its Mayor and other town officials to sign contracts without former council approval, created apparent authority in Weaver and Miller to consent on Gosfield's behalf. Sherway took the position that when it received the contract, it was entitled to rely upon its apparent validity without making further inquiries.

The Court rejected this assertion and held that Sherway knew that the contract required formal council resolution prior to it being enforceable. In reaching its decision, the Court noted in particular that Sherway had extensive previous dealings with municipalities and ought to have known that a council resolution was required, notwithstanding Sherway's past informal contractual dealings with Gosfield.



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Accordingly, as the Court held that Sherway was not misled by Weaver and Miller, it could not rely solely on their execution of the contract.

In its reasoning the Court distinguished this case from a decision of the Court of Appeal in *Moin v. Blue Mountains (Town)* ("Moin") which, at first glance, appeared to suggest that a contractor entering into a contract with a municipality would be entitled to rely upon representations from the municipality's high ranking officers even absent requisite council approval.

A contractor, upon entering into a contract with municipal corporations should ensure that the municipality has passed the requisite and necessary by-law authorizing entry into the contract.

The Court in *Moin* held that the municipality was liable for the statements of the Reeve (i.e. mayor) on the basis, in part, that the statements made by the Reeve were made in the municipality's operational or business capacity rather than its legislative or quasi-judicial capacity.

The Court in the Sherway case distinguished *Moin* by noting that in that case a legislative decision to improve the road allowance had been made previously, and accordingly it was an operational decision for the Reeve to comment on the timing of the building. The Court further pointed out that, in the present case no legislative decision had been reached by Gosfield to build the watermain line, and hence an operational decision could not be made by a City official. The Court noted that in *Moin*, the Reeve had made the statements relied upon by the contractor in a council meeting where here council was entirely uninformed of the potential agreement.

Finally, with regard to the claim of negligent misrepresentation against Weaver and Miller, the Court held that one of the key requirements for negligent misrepresentation, namely that the representee (Sherway in this case), must have relied on the negligent misrepresentation, was not met. While the Court was willing to find that a negligent misrepresentation had been made by Weaver and Miller, it stated that Sherway could not have reasonably relied on the representation as it knew or ought to have known, that the municipality could not be bound without a by-law or resolution. Accordingly, for all of the reasons outlined above, the Court held that it would be unfair to find Kingsville vicariously liable for Weaver and Miller's actions and declined to uphold the contract.

As noted, the Court ruled that Sherway knew, or ought to have known, about Gosfield's municipal requirement to pass a by-law or resolution authorizing the contract. This is potentially problematic as it imposes upon a contractor an obligation to understand (and follow) corporate obligations of a party that it may not have had previous dealings with. Finally, the Court's refusal to consider as a significant factor that Gosfield had previously entered into contracts with Sherway on an informal basis suggests that contractors cannot rely on past practice with municipalities in entering into formal agreements.

When entering into contracts with municipal corporations, a contractor should ensure that the municipality has, at a minimum, followed its internal procedures in approving the contract, that the municipality has passed the requisite and necessary by-law authorizing the entering into of the contract, and that the municipality's corporate seal is affixed to the contract when returned to the contractor.

In Focus

Construction Law Group News and Upcoming Events

Carla Salzman and Joe Cosentino presented at the 13th Annual Construction Superconference on November 24th and 25th at the Hotel Inter-Continental in Toronto. Carla's presentation entitled "Catching the P3 Wave: What You Need to Know Now" focused on a number of topics including:

- is a P3 the right approach? A comparison of P3s with other delivery methods
- understanding the procurement process
- structuring the deal to achieve balance, including: appropriate risk allocation and negotiation tips
- protecting the public interest and avoiding common pitfalls
- financial criteria: is the project financially viable? risk factors; rate-setting approaches; monitoring partner performance
- setting appropriate operating standards
- mechanisms to encourage performance accountability
- managing the long term relationship.

Joe's presentation entitled "Practical Considerations and Emerging Issues in Bidding and Tendering" dealt with the following:

- the pre-qualification process, the obligations and the impact on the requirement to accept the lowest bid
- what can be done and what should be done in the tendering process, including the ramifications of re-tendering
- online bidding: what you need to know
- dealing with unfair practices and non-compliance
- key considerations in the revised "Guide to Calling Bids and Awarding Contracts" (CCDC 23).

Ken Crofoot spoke at the November 25th Ontario Bar Association Construction Section Meeting on the new *Limitations Act, 2002* and its impact on construction claims. The new *Limitations Act* comes into force on January 1st, 2004, and will have a significant impact on construction claims. Ken provided an overview of the "basic" and "ultimate" limitation periods under the new Act, and examined areas of particular interest to our construction industry clients.

Don Pierce is making a number of appearances at various conferences at the end of 2003 and in early 2004. Don gave a presentation entitled "The Role of Public-Private Partnerships in Transportation Projects" at the Alberta Roadbuilders and Heavy Construction Association's AGM, Convention and Trade Show in Banff, Alberta held November 21-22, 2003.

At the 11th Annual Canadian Council for Public-Private Partnership Conference "Building Momentum" held November 24-25 at the Toronto Hilton Hotel, Don moderated a panel on "The Evolution of the P3 Healthcare Market". The panel gave an overview of Canada's P3 healthcare sector, what lies ahead in the domestic market and what it will take for our companies to compete abroad.

Lastly, Don will be presenting a paper entitled "After the Deadline for Submitting Proposals: Issues to Consider and Decisions to Make" at the Canadian Institute Conference on Public Procurement "The Legal & Business Guide to Public Procurement for Purchasers, Vendors and Their Legal Advisors". The conference will take place on January 28 and 29, 2004 at the Toronto Hilton Hotel.

Joe Cosentino and Jennifer Leitch will be speaking at an upcoming Lorman Education Services seminar on construction claims to be held on February 25, 2004 in Toronto. Joe's topic of discussion will be alternative dispute resolution and Jennifer will focus on construction liens.

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CONSTRUCTION LAW UPDATE

If you have any comments about Goodmans Construction Law Update or wish to discuss industry-related issues or recent developments and trends, please contact a member of our Construction Law Group.

The group handles all types of construction matters, including contractual disputes, construction liens, disputes between design professionals and contractors, and between subcontractors and general contractors. As well, we regularly advise clients on complex construction contracts including design build agreements and public/private partnerships.

We advise a wide variety of clients including owners, contractors, subcontractors, material suppliers, receivers and lending institutions in construction litigation matters.

To get a downloadable file of this Update, or for more information on Construction Law, other Updates in additional practice areas, or for backgrounds on Goodmans lawyers, offices and practice areas, please visit our website at www.goodmans.ca.

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