



# Draw the line

## Engineering firm breaches tendering laws

by Denis Chamberland

**T**HE ENGINEERING PROFESSION plays an important role in the delivery of public sector services. Take, for example, the outsourcing by a municipality of its water and wastewater facilities. The municipality normally selects an engineering firm to lead the tendering process that will ultimately result in the execution of a contract between the municipality and the operator chosen to provide the services. The tendering process is typically a long one in an outsourcing, often lasting from 12-18 months, sometimes longer. But whether the tendering process is long or short, or involves the delivery of outsourced or other services, a recent court case makes it clear that an engineering firm mandated by a public-sector authority to lead a tendering process would be well advised to have significant expertise in procurement.

In the 2004 decision of the Supreme Court of British Columbia in *Stanco Projects Ltd. v. British Columbia (Ministry of Land, Water and Air Protection) and Aplin & Martin Consultants Ltd.*, the plaintiff, Stanco, bid on a construction project to build water reservoirs for the ministry, which retained Aplin & Martin Consultants Ltd, an engineering consultancy, to lead the tendering process. The process was flawed from the beginning. The tendering documents failed to request pricing information regarding an important aspect of the project.

In trying to make things right, the engineering firm sought clandestine bids from bidders, which it used to pressure Stanco into reducing its price. As the lowest bidder, Stanco assumed that it was about to be awarded the contract, but the tender was ultimately awarded to a bidder that submitted a lower price in the second round of bidding. The court found the ministry in breach of its duty to treat all bidders fairly, and Stanco was awarded damages amounting to the profit the company would have earned had it been awarded the contract. In turn, the ministry argued that Aplin & Martin had been negligent in discharging its obligations to the ministry under a services contract.

The contract between Aplin & Martin and the ministry showed that Aplin & Martin was hired to provide "detailed design, tendering, construction management and inspection services for a water system upgrade...in accordance with a standard of care, skill and diligence maintained by persons providing..." similar services. Madame Justice Ballance found the engineering consultancy in breach of its duty of care to the ministry. The engineering firm, and by extension the ministry, was guilty of bid shopping, a practice which the court labeled "repugnant."

While the engineering firm was guilty of negligence in providing poor procurement advice, it was spared from having to pay Stanco's damages. Because the ministry was a highly sophisticated party in tendering matters – having in place a detailed

contract administration manual and having relied on internal procurement legal expertise – the court found that the ministry had not relied on the firm's opinion in making its final decision.

A number of lessons can be drawn from the *Stanco* decision. First, consulting organizations – whether engineering or otherwise – rarely, if ever, internally house the expertise that is required to lead a procurement process. This deficiency may be explained by the lack of appreciation of recent developments in the area. The rapid transformation of procurement in Canada in the last two decades has turned this sector into something akin to a regulated area, not unlike the complex web of laws that surround and support the financial services sector. Much of this transformation has been linked to the movement to liberalize trade and promote transparency in government spending, a trend that has led to the introduction of robust, new legal obligations in government procurement, mainly through the main trade agreements, the case law and some statutory innovations.

The second lesson to be drawn is that a consultancy typically cannot rely on the government authority for guidance on all aspects of the procurement process. The ministry that launched the procurement process in *Stanco* had access to significant legal expertise in procurement. This, however, is not the norm with most third-tier public sector entities in Canada, where the resources are often not available in-house to support the public entity's procurement mandate. In *Stanco*, the engineering firm was fortunate; had the ministry not been found by the court to have had deep procurement expertise in-house, the outcome for Aplin & Martin would undoubtedly have been very different.

The third lesson is that a consultancy's specific contractual arrangement with the public sector authority should be carefully scrutinized. In *Stanco*, the engineering firm had a reasonable appreciation of the operational issues related to tendering, but it contractually committed to offering more than just operational competence; it offered advice in breach of legal requirements. Tendering is about much more than operations. Legal judgment must be applied at every stage of the procurement process, reflecting a balancing of the rights and obligations of the parties and the principles that underpin the procurement process.

The court's decision in *Stanco* is a clear warning that, when working with public sector entities in a procurement, a clear line must be drawn between operational and legal expertise. *mc*

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