# Bid shopping: Canada's Supreme Court compensates thwarted firm

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## ABSTRACT (ABSTRACT)

This is bid shopping.

5. When the Ontario Labour Relations Board decision was released which did not allow Ellis-Don to use the Naylor union, Ellis-Don took the [Naylor] price and arranged for Guild Electric to do the same work at that price.

By the terms of the Bid Depository System, all participants agreed to follow a set of rules, which included the clear principal that if a contractor carried a sub-contractor in its bid to the owner, the contractor is obliged to use that sub-contractor for the project, unless there are reasonable objections to that sub-contractor.

In the circumstances of this case, the court held that there was no reasonable objection to the contractor using Naylor. The Court found on the facts that Ellis-Don's conduct through the project, and its affirmation of the selection of the sub-contractor after receiving the adverse OLRB decision, disentitled it to object. As stated by the Court: "In my view, however, the fact that [Ellis-Don] lost its OLRB gamble is not sufficient to absolve it of the financial consequences to [Naylor]. Its belated objection to [Naylor] in light of this history, was unreasonable." What may be reasonable in other cases will have to be determined on those facts.

## FULL TEXT

The bidding and tendering process is intended altruistically to provide an efficient, fair and competitive way of awarding construction contracts. Like any system, it has flaws, which have sometimes been exploited over the years.

Obvious prohibited (and criminal) conduct includes bidrigging, or complementary bidding, where bidders have formal or informal arrangements to predetermine who will be the low bidder on a particular tender call by an owner. Less blatant, but almost as pernicious, has been the practice of "bid-shopping," where the submission of bids is used merely as a basis for the tendering party to carry on further price negotiations among the bidders.

The provision, "Lowest or any bid not necessarily accepted" is used in the tender documents to protect the party receiving the bids from having to contract with the lowest bidder, who may not have the financial stability of a higher bidder, or for other legitimate or bona fide reasons. It is not a license for the bid recipients to use the lowest bidder's price to leverage concessions from higher bidders.

Another important legal consideration is known as Contract A/Contract B. Courts and the construction industry have wrestled with means to control the problem of unfair leverage, while parties putting contracts out for tender have sought to maintain flexibility while not doing damage to the integrity of the bidding process.

Thus, the court, in Right of Ontario v Ron Engineering &Construction (Eastern) Ltd. [1981] S.C.R. 111, established the now well-known concept of Contract A and Contract B. Contract A is formed by the bidding process--tender and bid, and Contract B is the actual construction contract for the project.

Refinements to this analysis came in 1999 in MJB Enterprises v Defence Construction (1951) Ltd. [1999] 1 S.C.R. 619, where it was held that the terms of Contract A depended on the terms and conditions of the tender call.

These two cases, together with the Bid Depository System, came to be considered by the Supreme Court of Canada last year in Naylor Group v Ellis-Don Construction Inc. [2001] S.C.J. No. 56.

The recent case develops the simple idea that the integrity and efficiency of the tender process depends on parties not seeking unfair advantage, and in particular, by not bid shopping. Simply put, if a contractor carries a price from a particular sub-contractor in the bid, it had better have a really good reason not to use that bidder at that price.

Similarly, if you ask for bids, you had better have a really good reason not to go with the lowest bidder.
The reported circumstances of the case were:
1. Oakville-Trafalgar Hospital wished to do a major renovation.
2. The Toronto Bid Depository was used to obtain, first, bids from prequalified sub-contractors, and then bids for contractors for the entire project. The contractors were required to use the submitted sub-contractors' prices, and to agree that if their bid was selected, they would use those sub-contractors on the job.
3. Contractor Ellis-Don used the price from Naylor Group for the electrical work. The use of Naylor's low price was important in enabling Ellis-Don to be overall low bidder and obtain the contract.
4. Although Ellis-Don had a pending Ontario Labour Relations Board (OLRB) decision on the use of union labour, the contractor assured Naylor that its particular union affiliation was not a problem in bidding or doing the work.
5. When the Ontario Labour Relations Board decision was released which did not allow Ellis-Don to use the Naylor union, Ellis-Don took the Naylor price and arranged for Guild Electric to do the same work at that price.
6. Naylor sued and received its loss of profit it would have made on the contract had it been given the work. The Supreme Court of Canada allowed the loss of profit as the traditional method of assessing damages in a breach of contract case, rather than the trial judge's award of merely the relatively small costs to Naylor of preparing the bid.
Moral of the story
By the terms of the Bid Depository System, all participants agreed to follow a set of rules, which included the clear principal that if a contractor carried a sub-contractor in its bid to the owner, the contractor is obliged to use that sub-contractor for the project, unless there are reasonable objections to that sub-contractor.
While the court recognized that an owner or contractor could discover something about a sub-contractor which would make the objection reasonable, there would have to be evidence of the reasonableness of the objection. Factors such as financial stability, experience and availability are possible grounds for objection, but the court did not definitively pronounce on that issue in the decision.
In the circumstances of this case, the court held that there was no reasonable objection to the contractor using Naylor. The Court found on the facts that Ellis-Don's conduct through the project, and its affirmation of the selection of the sub-contractor after receiving the adverse OLRB decision, disentitled it to object. As stated by the Court: "In my view, however, the fact that [Ellis-Don] lost its OLRB gamble is not sufficient to absolve it of the financial consequences to [Naylor]. Its belated objection to [Naylor] in light of this history, was unreasonable." What may be reasonable in other cases will have to be determined on those facts.
Similarly, the sub-contractor would have the assurance that its price would not be "shopped around" once carried unless there were reasonable objections raised to using its services that could not be met. In a situation where the bidders have been pre-qualified, one could be fairly satisfied that once a sub-contractor was carried with its price, it would be unlikely that an objection to using that particular firm would arise.
Thus, the Supreme Court of Canada has given a boost to the use of either a Bid Depository System with clear rules, or a tender call with fair provisions, as a means to ensure a balanced and efficient bidding process.
Julian Heller, LL.B., B.C.L. is a construction litigator at Julian Heller and Associates, Barristers and Solicitors of Toronto, e-mail jheller@hellerandassociates.on.ca
"The fact that [Ellis-Don] lost its OLRB gamble is not sufficient to absolve it of the financial consequences to [Naylor]," said the Court.

## DETAILS

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