



Remembering Tendering!

If You Do, You Can Make it Work Well for Your Condominium Corporation



A good indication that the law on a particular area is working well is when a system works so smoothly, you forget that the law is even there. A good example of this is the law of tendering. Using basic contract law principles, the Supreme Court of Canada has created an effective system for tendering. And, this law is worth remembering because if you do, you can make it work well for your condominium corporation.

Tendering, or procurement as it is also called, is a practice where a buyer invites multiple sellers to submit offers to supply a good or service. The idea is to have each seller compete with one another to submit the best offer (or bid). The buyer then chooses which offer suits its needs. It is very common for governments, public agencies and large businesses to tender. And the law of tendering has evolved accordingly. In the condominium world, we often see condominium corporations sending large construction projects to tender.

Tendering law consists of two contracts – Contract A and Contract B – which work together to ensure that the all participants in a tendering process are accountable. Contract A is an agreement between the buyer and each contractor (as a seller) submitting a bid. The terms of Contract A are in the Instruction to Bidder found in the Request for Proposal (sometimes called an “RFP”) or Invitation to Bid prepared by the buyer. The buyer promises to set up the bidding process and consider bids. In exchange, each contractor agrees to accept the tendering process terms and to submit a bid that conforms to the requirements in the Instructions to Bidders.

Contract B is the actual contract between the buyer and the contractor selected at the end of the bidding process. For example, for a lobby renovation, Contract B would be the construction contract (be it CCDC-2 or in some other form). Contract B would contain the work specifications

– the price, the payment terms, the work timeline and all other items normally found in a service contract.

The whole tendering process is intended to be very competitive. Every so often, a losing bidder will scrutinize the Instructions to Bid and sue both the buyer and winning contractor over a perceived breach. As a result, courts have developed principles concerning the interpretation and implementation of Contract A. For example:

1. Contract A does not arise in every case. It all depends on whether the tendering instructions show that the parties intended to create a binding contractual relationship. Indeed, a buyer can actively prevent Contract A from arising with certain well-placed language in the initial tendering package.
2. When Contract A does form, its terms are encapsulated in the tendering in-

structions prepared by the buyer. The terms are binding on both the buyer and contractor. Typical terms will address issues like withdrawing or amending a bid, deposit requirements and when the contractor is deemed to have forfeited that deposit to the buyer. It is also common to see a “privilege clause”, which provides that the lowest bid will not necessarily be accepted.

3. Courts may imply terms into Contract A, but they tread carefully. Judges are not in the business of rewriting contracts. For a court to imply a term, it has to be so obvious that without it the entire tendering process simply could not work. In legalese, the implied term must give “business efficacy” to Contract A.

In the past, Courts have been willing to imply the following terms into Contract A:

- The buyer shall only accept a bid that complies with the tender instructions.
- The buyer is under a duty to treat all bidders equally. The buyer must be fair

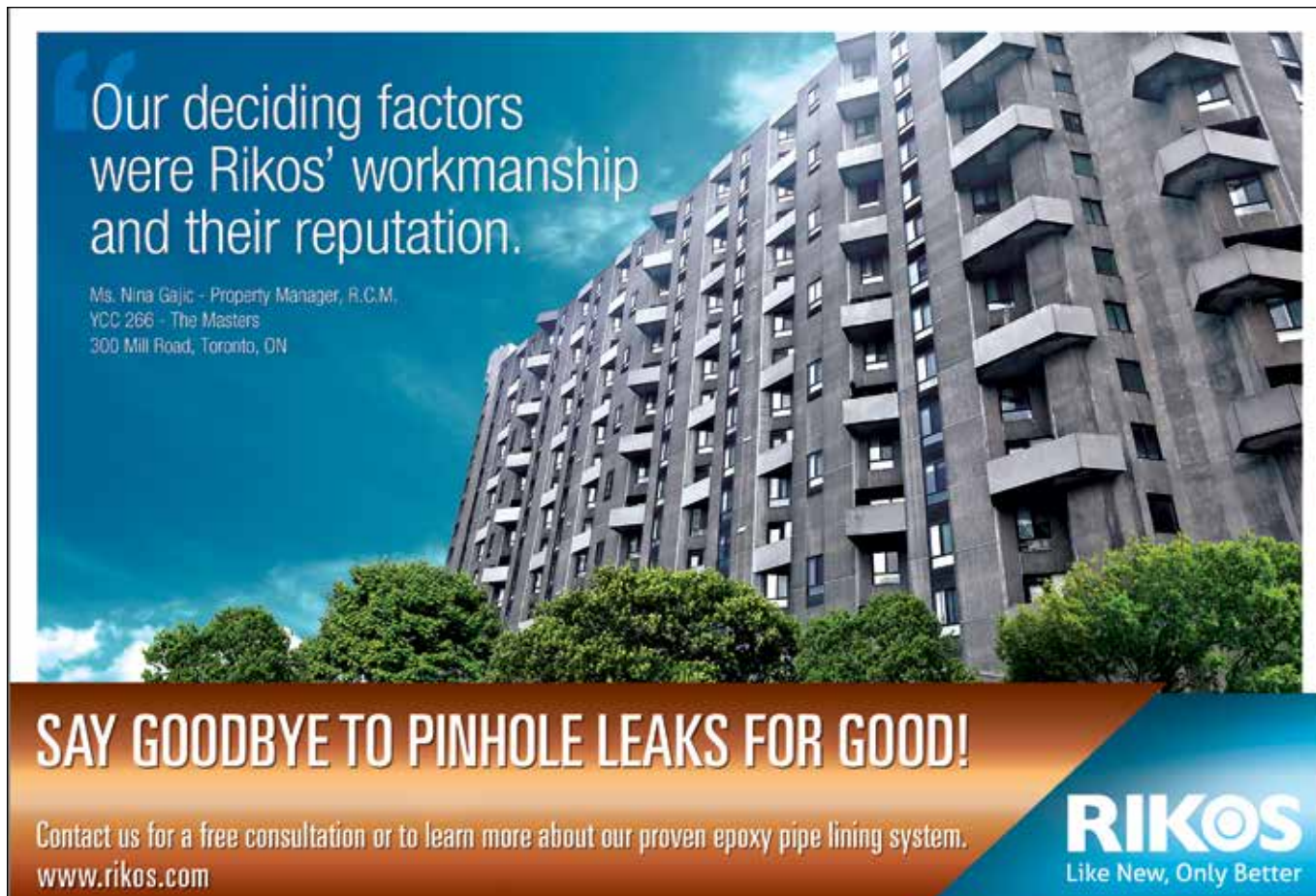
and consistent in assessing the bids with due regard for the terms in the tendering instructions. There is case law suggesting that this duty specifically prevents a buyer from “bid shopping” or using a lowest bid to pressure another bidder to reduce their price after the bid submission deadline.

The law of tendering is designed to use contractual liability to hold both buyers and contractors accountable to one another. It puts an onus on the buyer to set up a fair and equal tendering process, and it requires the buyer to follow its own rules. It also puts an onus on the contractors to review the tendering instructions and submit compliant bids. If done right, the result is a cost-effective, first class contractor chosen through a process that is both efficient and impartial.

Despite the fact that a lot of the action in tendering revolves around contract law, the law of tort plays a role as well. Tort law prevents buyers from misrepresenting the project to the bidders. This obviously applies where a buyer intentionally

feeds false information (i.e. lies) to the contractor about the project. Where the contractor relies on those lies, wins the bid and then suffers damages, it may have a claim against the buyer for fraudulent misrepresentation. This is pretty serious and can include punitive damages. But it also applies where the buyer is reckless about the kind of information it gives to the contractor. For example, the buyer may find itself liable in tort if it leaves key information out of the tender documents, or allows those documents to go out without checking to make sure they are accurate. Where the contractor relies on this wrong information and suffers damages, it may have a claim against the buyer for negligent misrepresentation. These tort doctrines make it the buyer’s responsibility to make sure that the initial tendering documents are complete and correct.

The law of tendering provides helpful insight to condominium boards who want to tender their projects. A condominium board should consult their lawyer early on and have them work with the engi-



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neers, interior designers, property managers and other people involved to design a fair and efficient tendering process. For a small project, like a minor plumbing job or a snow-plough contract, it is likely sufficient to simply call on a trusted contractor with whom the condominium corporation has enjoyed a long relationship. For bigger jobs, such as a multi-million dollar lobby or garage renovation, it makes sense for the Board to provide detailed instructions to bidders in the form of Contract A and undergo a proper tendering process that results in a sophisticated final Contract B.

Boards should also remember to involve their lawyers early, preferably before they hire the project's consultant (i.e. the engineer, architect, interior designer, etc.). As a condominium corporation moves through the tendering process, it becomes increasingly tied in a Gordian knot of legal rules. The further it goes, the less flexibility it has. By the time it selects the winning bid, its flexibility is virtually non-existent. At that point, Contract A's duty of fairness prevents



Podcast: Contract Tendering

In Part I of this podcast interview Warren Ragoonan and Shawn Pulver discuss recent investigations by Canada's Competition Bureau surrounding condominiums. Watch for Part II as they discuss best practices for contract tendering.

the Board from adding or changing the terms of Contract B (such as by adding supplementary conditions); and there is very little a lawyer can do. That is why it is better to call counsel sooner rather than later.

When deciding to tender a contract, condo Boards should remember that the law of tendering is operating in the back-

ground. It is a good system – so good that it is easy to forget that the law is there. That is why it is really important to understand these tendering principles. Not only does understanding make it easy to remember, it also gives Board the ability to make the system work for the corporation. This can result in better quality work at less cost, and that is something that everyone will remember. **CV**

Every property manager is supported by an integrated team to manage your community's needs.

The diagram shows a central circle labeled 'Property Manager' with 'Your Community' in the middle. Surrounding this are eight segments representing support roles: Regional VP, Site Administrator, Regional Manager, Resident Support Line, Peer Support, Accounting, Senior Management, and Energy Sustainability Manager.

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