McGILL LAW JOURNAL

Montreal

Volume II 1965 *Number 3*

The Preparation Of Construction Contracts

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Invitations to Bidders and Bids

Any considerable contract is usually preceded by public bidding secured by invitations to bidders published in the press.

The advertisement usually gives rough information about the job and may list the quantities involved.

A simple invitation to bid might read:—

> "Sealed proposals are desired for the performing of all the work and the furnishing of all the labour, material, and equipment incidental to the construction of a powerhouse on the north fork of Cherry Creek, Logan County, Utah, in accordance with the plans and specifications available in the office of the Chief of Engineers."

If more detail were thought necessary, the invitation might read thus:

> "Sealed proposals are desired for the construction of the intake structures, intake shafts, and river connecting tunnel at Berry Point, Wisconsin. The intake structures will be built of reinforced concrete. The two intake shafts will have an internal diameter of 11 feet and 15 feet, respectively, and will be lined with concrete. The portions passing through earth being of reinforced concrete", etc.

Very often a deposit is required by certified cheque to guarantee that a bid is serious. The deposit is returned to unsuccessful bidders. Bidders can obtain copies of plans and specifications on paying for them.

It is customary to specify that any bid, whether the lowest or not, may be accepted or refused, and to set forth the time and place where bids will be opened.

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The present article was delivered as an address at the Junior Bar Symposium, November 19, 1964.

An invitation to bid is merely what the words imply and no contract can result from the bid. In fact the bid is merely an offer to the owner which he may or may not accept. If a bid is accepted a contract is then entered into usually a variation of one of a standard form of contract used by the Canadian Construction Association and the Royal Architectural Institute of Canada. We will presently consider at length such a contract.

Types of Contract

Lump Sum — Here the interests of owner and contractor are opposed. The less the contractor gives in labour and materials the more profits he makes although the owner does know what the total will be.

Unit Price (with schedule of quantities) — The contractor is not so tempted to skimp but the owner has no definite knowledge of the total cost.

Cost-Plus — Sometimes there is cost plus a flat fee rather than a per cent. In order to give the contractor an incentive to save he is sometimes given a per cent of any saving below a certain total.

Important Characteristics of Contract - apart from Legal Essentials

Fairness, definiteness, accuracy, clarity, brevity, convenient arrangement.

Contents of Contract Generally

The contract usually consists of four things:

1 Plans
2 Specifications
3 General Conditions of Contract (which are more or less same for all)
4 Specific conditions of particular contract.

These things form a single whole. In one form one reads: *"The general conditions and specifications and drawings form part of this agreement and constitute the contract between the parties".*

Plans

Preliminary plans are usually necessary in order to permit bidders to bid. The degree of detail required varies from job to job. The successful bidder is entitled to a reasonable number of copies of plans and of shop drawings showing in detail the various jobs.

Specifications

These are a written description of the work to be performed, usually describing in detail the quality and nature of the work and materials required. e.g. The Memorandum Specifications under the *National Housing Act* gave a list of minimum standards of materials and construction which was then followed by the detailed specifications.

They may be in one document or in a series of documents, one for each trade — steel work, reinforced concrete, plumbing, electrical, etc.

Capacity or Required Performance

It is important to set forth for a load bearing structure live load, impact, wind load, etc. For pipe lines or tanks pressure should be stated. A contract for a pump may require so many gallons per minute at a given plunger speed and head. A generator may be required to have a given output at a stated power factor and speed and to be able to stand a given overload. Vehicles and ships may be required to maintain prescribed speeds.

Quality of materials

What is first class should be defined, otherwise who is to say. It is dangerous to specify brands without an alternative, if one is unavailable. Negative characteristics are often as important as positive ones. Characteristics which will cause rejection should be set forth. In one contract sewer pipe specifications contained the following:

> "A single fire crack which extends through the entire thickness of a pipe... must not be over 2" long at the spigot end, nor more than 1" long at the hub or socket end, measured in the latter case from the bottom or shoulder of said hub or socket. Two or more such cracks, however, at either end of said pipe will cause the same to be rejected."

Quality of Workmanship

Do not specify higher quality than is reasonable in the district. One should define the acceptable degree of straightness, smoothness, tolerances in detail. It is useless to say that concrete must be smooth. What is smooth ?

In Ontario Department of Highways contracts, the standard of smoothness on a concrete bridge floor is defined as where a ten foot straight-edge parallel to axis of a bridge would not indicate a departure of more than ¼ inch.

In another contract "straight" was defined as not more than ¼ inch out in 50 feet.

Construction Contracts in General

There are usually: *i.* main contract between owner and contractor; *ii.* contracts between contractor and sub-contractor; *iii.* contract between owner and engineer or architect for supervision.

As already stated there are standard conditions and the construction agreement proper.

General Conditions

These vary widely, of course, but might well contain the following items:

Definitions

These are important to avoid later argument. They could include, owner, company, engineer or architect, contractor, subcontractor. It is usually provided that the law of the place of building will govern the interpretation of the contract.

Documents

It usually says that all are read together, that in case of discrepancy between specifications and drawings the specifications govern.

Things to be provided by Contractor

It is usual to say that he provides all labour, materials, supplies, etc., as well as tools, electricity, water.

Authority of Architect and Contractor

The architect has general supervision and direction of the work. He is the interpreter of the contract and the judge of its performance. The contractor must in the last analysis do what the architect tells him to do but often provision is made for arbitration of a serious dispute.

Subject to the architect's general supervision, the contractor has complete control of his organisation. The contractor shall keep a foreman on the job at all times who shall represent him.

Inspection of work

The owner or architect (or his representative) shall at all times have access to the work. The architect can decide what work is not

satisfactory and order it to be redone. In this case, contractor must forthwith do so at his own expense.

If the architect so decides, work is not redone but the price is reduced to the extent that the work is not satisfactory.

It is often stipulated in the contract that even after final payment the contractor is liable to replace defective materials or workmanship within one year. This is without prejudice to any longer responsibility under the Civil Code or any other statute in another province.

Protection of Work and Insurance

It is usual to provide that work shall be protected from damage and that adequate steps will be taken to protect the public.

The contractor must maintain sufficient liability insurance to protect him and the owner from claims under the *Workmen's Compensation Act* [1] or claims for injury, death or property damage (e.g. collapse of an adjacent building due to the undermining of the foundations.) The contractor must file certificates of insurance with the architect who must be satisfied.

The contractor must pay for and maintain in force fire and supplemental risk insurance in the joint names of the owner and the contractor to at least 80 per cent of the value of work done. In case of loss there are detailed provisions regarding payment. Ten days after notice in writing from the architect that the construction is complete, the contractor's liability to insure against fire shall cease.

It is important to consider who should insure because of the requirement under insurance law that a person taking out a policy must have an insurable interest in the object insured, under pain of nullity. In *Commissaires d'Ecoles de St-Eugène* v. *Baloise Fire Ins. Co.*,[2] a contractor was building a school supplying both labour and materials. He insured against fire for $3,000 and the Commission insured for $5,500. Two days before completion there was total loss by fire. An action by the School Commission against the fire insurance company was dismissed because until delivery, the contractor remained owner and the risk was his and so the Commission had no insurable interest. It is better to insure in joint names of contractor and owner as their interests may appear.

Guaranty Bond

The owner may require the contractor to supply a guarantee bond to guarantee completion, including correction of errors and

[1] R.S.Q. 1941, c. 160.
[2] [1944] S.C. 19.

defects. This is important in case of bankruptcy of the contractor, or sub-contractor.

Alterations and Extras

It is customary to provide that the owner or architect may make changes by adding or subtracting from the work, the contract price being adjusted accordingly. This should normally be authorized in writing except in case of emergency.

If no provision is made in contract based on plans and specifications for extra, then 1690 C.C. applies and states that in a fixed price contract based on plans and specifications the contractor cannot claim any additional sum upon grounds of change in plans or specifications or increase in prices or wages unless the change or increase is authorized in writing and price agreed with owner or admitted by him. The admission must be complete.

However if an extra is a brand new job separate from the main job these principles do not apply. In a case where a house painter was to paint the interior of a house, he was able to prove a claim for the cost of sanding and refinishing floors as this was held to be an independent contract. Also in *Leblanc* v. *Côté*,[3] a builder agreed to build a two story house with the second story unfinished inside. After the work started, the owner instructed the builder to finish the second story. In an ensuing lawsuit it was held that this was a brand new job, not an extra or change in the original plans, and proof by testimony was permitted.

Payments

The contract usually provides for progress payments. The detailed conditions require that for each payment the contractor must submit an application to the architect supported by receipts and vouchers covering labour and materials including materials on site but not yet incorporated into the building. This application should be submitted at least five days before due date.

The architect shall issue a certificate to the contractor on the date due but may withhold an amount sufficient to protect against privileges of subcontractors or workmen. Interest at five per cent runs from the date that a progress payment is due.

Cost of licenses, etc.

It is usual to state that all permits or licenses shall be obtained and paid for and all patent fees paid by the contractor.

[3] [1943] S.C. 351.

Cleaning up

The contractor must keep the premises cleaned up as much as possible during the job, and must clean up and remove all waste at the end of the work.

Time and Delays

It is usual to provide somewhere that time is of the essence. The time of completion is usually dealt with in the contract proper. In the conditions it is only fair to provide that delays due to strikes, lockouts, unusual delays by carriers, or other delays beyond the control of contractor shall result in an extension of the completion date for such reasonable period as the architect may decide.

Right of Owner to terminate for unreasonable Delay or Bankruptcy, etc.

It is usual to state that if there is an unjustifiable delay or other failure to fulfil the contract, or in case of bankruptcy or insolvency of the contractor, the owner, upon a certificate of the architect, may terminate the contract. This applies only in the case of nonfulfilment of important clauses of the contract. The owner can then himself complete it. When the job is completed, the contractor will receive the balance of payment if the unpaid balance of the contract price shall exceed the cost of completion.

In the unlikely eventuality of a contract for construction at a fixed price saying nothing about this, 1691 C.C. states that the owner may cancel at any time on paying all expenses of the contractor and paying damages according to the circumstances of the case.

1691 C.C. applies to a contract between the architect and the owner *Hôpital St-Luc* v. *Beauchamp.*[4]

These damages are not necessarily and automatically the profits that the contractor would have made had the contract not been resiliated.[5] In other words the plaintiff must show that it has been unable to obtain other work to replace the cancelled contract and then it may be able to recover as damages the profit it would have made on the cancelled contract.

It has been held that this article applies only between owner and principal contractor and not between contractor and subcontractor.[6]

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[4] [1950] S.C.R. 3.

[5] *Gauthier* v. *St-Laurent* [1958] Q.B. 114; *Société Napthes Transports* v. *Tidewater Shipbuilders Limited* [1957] S.C.R. 20.

[6] *Pelisson* v. *Desrochers* [1958] S.C. 289.

Termination by Contractor

The contract should provide that if completion becomes impossible because of a court order or an order of a public authority without act or fault on the part of the contractor, he may on notice to the owner cancel and recover payment for all work done, with a reasonable profit.

Assignment and Sub-contracts

No assignment should be permitted except by mutual consent. The contractor shall give notice of the names of proposed subcontractors who must be approved by the architect.

Usually the contractor agrees to bind subcontractors by general conditions so far as applicable.

Arbitration

It is often provided in contracts that in case of dispute either party may elect to proceed to arbitration. Each appoints its arbitrator and the two so appointed select a third, and if they cannot agree, a judge of the Superior Court appoints the third. The parties agree to accept the award.

There is considerable doubt as to the validity in Quebec of such a general clause because it merely is an undertaking to submit to arbitration future disputes. There are in the Code of Civil Procedure articles for submitting to arbitration actual disputes that have already arisen. The matter is extremely complicated and is dealt with in detail in *The Clause Compromissoire*, by Walter S. Johnson, Q.C.

The Contract or Agreement Proper

This usually contains the following:

i. Names and description in detail of parties.

ii. Description of job to be done which is usually also described as shown in plans and specifications.

iii. Completion dates with penalties for lateness and bonus for early completion.

iv. Provision for payment periodically on a certificate of the architect.

v. Addresses at which for purposes of the contract all communications may be sent to the contractor, architect and owner.

Example of Litigation over a Construction Contract

In *Verona Const. Ltd. v. Frank Ross Const. Ltd.*,[7] there is a good example of the importance of foreseeing all possibilities before contracting.

[7] [1961] S.C.R. 195.

"In 1949, the defendant company entered into a contract with the City of Dorval to construct sewers within the city, and gave a sub-contract to the plaintiff company for some of the work. Within a few weeks of the signing of this sub-contract, the plaintiff wrote to the defendant that having encountered quicksand the sub-contract would have to be cancelled and a new one made for an increased price. The defendant refused to change the sub-contract, and eventually the work was stopped and taken over by the defendant. The plaintiff alleged in its action that the defendant had prevented it from completing the contract. The defendant counterclaimed and alleged abandonment of the contract. The trial judge found that both parties had voluntarily put an end to the sub-contract. He maintained the action in part and dismissed the counterclaim. The Court of Appeal reversed this judgment and held that the plaintiff had abandoned the sub-contract and that the taking over of the work by the defendant did not amount to a consent to the abandonment. The plaintiff appealed to the Supreme Court of Canada.

It was held: "The appeal should be dismissed. As held by the Court of Appeal, the *impasse* giving rise to this litigation was created by the plaintiff's decision to abandon the work when it came to the realization that it could not complete it without suffering a serious financial loss. The defendant did not have to remake its contract with the plaintiff or to temporize, and neither its refusal to do so nor the celerity with which it had the work completed could have changed the fact of the abandonment and its consequences.

The acceptance of the abandonment as a *fait accompli*, after the plaintiff had openly abandoned the contract and shown a clear intention to keep on doing so, did not imply that the defendant had consented to this unilateral act on the part of the plaintiff."