



# 2005 Construction Law Seminar

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# **Construction Bonds: Review and Recent Developments**

# Construction Bonds

- Introduction and the Effect of Lac La Ronge Indian Band v. Dallas Contracting Ltd.

## What is a Bond?

- Bonds are not insurance - two party agreement between an Insurance Company (insurer) and their client (insured)
- Bonds are three party agreements. It is a contract of guarantee as opposed to a contract of insurance

## What does a Bond do?

- A joint and several commitment of the Bond Company and the Contractor to indemnify the Owner against losses suffered as a result of the failure of the Contractor to perform it's bonded obligation;
- Shifts risk of non-performance from the owner to the Bond Company;
- Loss on a Bond is ultimately the Contractor's loss due to indemnity agreements between the Contractor and the Bond Company;

## Parties to a Bond?

- The Principal (Contractor)
- The Surety (Bond Company)
- The Obligee (Owner)

## Common Characteristics of Bonds?

- Executed by both the Bond Company and Contractor to be enforceable
- Bond has a “face value” or maximum value
- Each bond has a “condition” – once the condition has been performed, the Bond Company’s obligation comes to an end

## Bond Pitfalls

- “prejudicial acts” that materially change the terms of the construction contract may void bond;
- Limitation periods and notice requirements;
- Always read bond carefully – comply with all requirements

# Common Bond Types

- Bid Bonds
- Performance Bonds
- Labour and Material Payments Bonds

# **Impact of *Lac La Ronge Indian Band v. Dallas Contracting Ltd.* on Performance Bonds**

## **Factual Background**

- CCDC 221 - 1979 Performance Bond
- Surety - Western Surety (“Bond Company”)
- Principal - Dallas Contracting Ltd. (“Dallas”)
- Obligee - Lac La Ronge Indian Band (the “Band”)
- Construction of a Sewage Lagoon

## **Impact of *Lac La Ronge Indian Band v. Dallas Contracting Ltd.* on Performance Bonds (Cont'd)**

### **Factual Background (Cont'd)**

- Contract dated December 7, 1995 (\$3.2 Million), included Liquidated Damages of \$1,000 per day
- Completion date November 12, 1996
- Band declared default on October 29, 1996
- Band terminates Contract on November 19, 1996 (at which time it is believed that the contract balance of \$1.2 Million is sufficient to complete the Project)

## **Impact of *Lac La Ronge Indian Band v. Dallas Contracting Ltd.* on Performance Bonds (Cont'd)**

### **Factual Background (Cont'd)**

- Followed by period of negotiation between Band and Bond Company
- Band awards contract to low bidder on April 28, 1997
- Band writes and advises taking matter out of hands of Bond Company

## **Impact of *Lac La Ronge Indian Band v. Dallas Contracting Ltd.* on Performance Bonds (Cont'd)**

### **Factual Background (Cont'd)**

- Band and competing contractor sign contract on May 8, 1997
- Obligee pays competing contractor \$1.8 Million
- \$600,000 shortfall
- Plus damages for delay and costs incurred by Band in completion

## **Impact of *Lac La Ronge Indian Band v. Dallas Contracting Ltd.* on Performance Bonds (Cont'd)**

### **The Trial Judgment**

- Five week trial in Saskatchewan Q.B.
- Dallas and Bond Company both found liable
- Dallas liable for \$970,190
- Findings re Dallas:
  - Work did not meet spec.
  - Failed mainly because of one sub.
  - Not entitled to extension of time

## **Impact of *Lac La Ronge Indian Band v. Dallas Contracting Ltd.* on Performance Bonds (Cont'd)**

### **Court Findings**

- Findings re Bond Company
  - Bond Company did not seriously investigate until too late
  - The Dallas/Golder completion proposal was a “bid” but was not from a “responsible bidder”
  - Band could set off in respect of accrued Liquidated Damages
  - Bond required the Bond Company to “complete the Contract” including the payment of liquidated damages and the Bond Company was liable for other damages/costs
  - Bond Company liable for \$970,190

## **Impact of *Lac La Ronge Indian Band v. Dallas Contracting Ltd.* on Performance Bonds (Cont'd)**

### **The Appeal**

- Bond Company appealed to the Saskatchewan Court of Appeal
- Appeal heard December, 2003
- Reasons released August, 2004

## **Impact of *Lac La Ronge Indian Band v. Dallas Contracting Ltd.* on Performance Bonds (Cont'd)**

### **Issues on Appeal**

1. Whether Dallas/Golder was a “responsible” bid
2. Whether the Band was entitled to receive the amount of the liquidated damages from the Bond Company under the Bond (\$263,000)
3. Interpretation of the Bond

## **Impact of *Lac La Ronge Indian Band v. Dallas Contracting Ltd.* on Performance Bonds (Cont'd)**

### **Result**

- The Bond Company was liable under the Bond because the Dallas/Golder “bid” was not a bid from a “responsible bidder”
- The Bond Company was not liable for the liquidated damages, and the Band could not set off

## **Impact of *Lac La Ronge Indian Band v. Dallas Contracting Ltd.* on Performance Bonds (Cont'd)**

- Most important Surety case since Citadel
- Six significant legal issues addressed by the Saskatchewan Court of Appeal

## **Impact of *Lac La Ronge Indian Band v. Dallas Contracting Ltd.* on Performance Bonds (Cont'd)**

### **Interpretation of the Bond**

- Surety Bonds are not insurance
- Standard forms
- Not to be construed against Surety
- To be interpreted like any other contract

## **Impact of *Lac La Ronge Indian Band v. Dallas Contracting Ltd.* on Performance Bonds (Cont'd)**

### **Incorporation by Reference of the Underlying Contract**

- Conflicts between the Bond and the underlying bonded contract are to be resolved in favour of the bond wording
- The Bond wording governs

## **Impact of *Lac La Ronge Indian Band v. Dallas Contracting Ltd.* on Performance Bonds (Cont'd)**

### **Completion by Defaulted Principal**

- What constitutes a reasonable attempt to reach a compromise?
- Can a defaulted Principal be a “responsible” bidder?
  - Loss of confidence in the Principal

## **Impact of *Lac La Ronge Indian Band v. Dallas Contracting Ltd.* on Performance Bonds (Cont'd)**

### **Liquidated Damages**

- Measure of damages - cost to surety of completion  
- same under either option
- Whether the Band has a right to set off accrued liquidated damages may depend upon the wording of the bonded Contract
- The Bond Company does not guarantee the performance of the liquidated damages provision of the bonded Contract

## **Impact of *Lac La Ronge Indian Band v. Dallas Contracting Ltd.* on Performance Bonds (Cont'd)**

### **Delay Damages**

- Look to the terms of the bonded Contract

## **Impact of *Lac La Ronge Indian Band v. Dallas Contracting Ltd.* on Performance Bonds (Cont'd)**

### **Engineering and Supervisory Costs**

- Look to the terms of the bonded Contract to determine whether recoverable



# **Occupational Health & Safety 2004 Overview**

## Outline

- Bill C-45 Update
- Important OHS Cases from 2004
- Hot Topics for 2005

## Bill C-45 Update

- Amendments to Criminal Code
- New Concept: “Organization”
- Representatives of Company
- New Legal Duty Section 217.1
- Context of 219
- *R. v. Fantini*

## ***R. v. Fantini***

- Ontario Case
- Vista Construction
- 68 Years Old Accused
- 38 Year Old Victim
- 12' Trench Collapse
- Date of Accident: April 19, 2004
- Charged: August 26, 2004
- Criminal Negligence Causing Death

## Important Cases from 2004

- *R. v. Arc Resources and Trican Well Services*
- Second Prime Contractor Conviction
- *Arc*: \$30,000 + \$4,500 v.f.s.
- *Trican*: \$120,000 + \$18,000 v.f.s.
- Implications:
  - High Onus on Primes
  - Reliance on Specialists
  - Reform Needed

## Jirah Construction and W.S. Building Products

- Fatality
- Trusses Collapsed After Over-loaded
- W.S.: \$5,000 fine + Charitable Donation
- Jirah: \$5,000 + \$85,000 Charitable Donation
- Implications:
  - Not a Supplier Case
  - Piercing the Corporate Veil

## Peter Hammett

- Fatal Electrocution
- Stucco Supervisor
- Charged as Worker
- Fined: \$10,000 + \$1,500 v.f.s.
- Implications:
  - Supervisor Liability
  - Increase in Worker Penalties

## Hot Topics for 2005

- *Ebsworth v. Her Majesty the Queen*
- *Fullowka v. Royal Oak*
- *Alberta Environmental Rubber Products*

**THANK YOU!**



# **Requests for Proposals and Tendering**

## 1981 – *R. v. Ron Engineering*

Bid → Contract A

Contract B ← Award of  
Construction Contract

## Terms of Contract A

- Contractor must sign construction contract if bid accepted
- Owner must award construction contract according to tender documents

## The “Privilege Clause”

*MJB Enterprises Ltd. v. Defence Construction (1999)*

- “The lowest or any tender shall not necessarily be accepted”
- Does not permit the owner to accept a non-compliant bid

## The “Discretion Clause”

- Purports to give an owner the discretion to waive irregularities and defects
- E.g. “The owner reserves the right to waive irregularities and informalities at its discretion”

## ***Kinetic Construction Ltd. v. Comox – Strathcona*** **(2004)**

- “The owner may ... in its sole discretion reject or retain for its consideration tenders, which are non-conforming because they do not contain the content or form required ... or for failure to comply with the process for submissions ... ”
- B.C. Court of Appeal decided this permitted the owner to accept a non-compliant bid

## ***Graham Industrial Services Ltd. v. Greater Vancouver Water District (2004)***

- “If a tender contains a defect or fails in some way to comply with the requirements of the tender documents, which in the sole discretion of the corporation is not material, the corporation may waive the defect and accept the tender”
- B.C. Court of Appeal decided that this did not permit the owner to accept a non-compliant bid
- Implicit limit on owner’s discretion

## ***Chandos Construction Ltd. v. Alberta (2004)***

- “The Minister may accept or waive a minor and inconsequential irregularity ... The determination of what is, or is not, a minor and inconsequential irregularity, the determination of whether to accept, waive, or require correction of an irregularity, and the final determination of the validity of a bid, shall be at the Minister’s sole discretion”
- The Alberta Court of Queen’s Bench decided this did not permit the owner to accept a non-compliant bid
- Implicit limit on owner’s discretion

## A Trap for the Unwary

- Quote from Justice Ross: “ ... in some cases, an implicit limit on an owner’s discretion may be difficult to reconcile with the explicit language of a discretion clause.”
- Case is under appeal

## **“Requests for Proposals”**

- Avoiding Contract A / Contract B analysis completely

## ***Mellco Developments Ltd. v. Portage LaPrairie*** **(2002)**

- The owner would negotiate with the applicant that presented the most attractive proposal
- The RFP expressly provided that it was an invitation for proposals and not a tender call

## ***Melco Developments Ltd. v. Portage LaPrairie*** **(2002) (Cont'd)**

- The Court decided the owner was not bound to accept any particular proposal
- A tender call creates contractual relations, but a properly drawn RFP will indicate that there is no intention to create contractual relations
- Clear intention to negotiate
- Express statement that it was not a tender call
- Terms of Contract B not certain

## What's in a Name?

*Friesen v. Winnipeg (1998)*

- Calling it “Request for Proposals” does not make it so
- Bids were irrevocable
- Performance security letter provided with bids

## **Bid Shopping & Negotiating with Successful Bidders**

- Bid shopping is one of the practices Ron Engineering meant to eliminate
- Bid shopping is a breach of Contract "A"

## ***Dynasty Roofing (Windsor) Ltd. v. Marathon Construction (2004)***

- Dynasty was low bidder for roofing
- Dynasty asked to reduce price further and refused
- Marathon contracted with another for \$3,500 less than Dynasty
- Dynasty sued

## ***AON Reed Stenhouse Inc. v. Newfoundland and Labrador (2004)***

- Compliment bids from AON and Marsh
- Marsh was low bid
- Marsh was awarded Contract “B” but on different terms
- AON sued for breach of Contract “A”