



July 29th, 2004

Withdrawing a bid not “bid-rigging”, court finds

by Michael G. Osborne and Sonny Ingram, Affleck Greene Orr LLP.

In *R. v. Rowe*,¹ the Ontario Superior Court found that the offence of bid-rigging, in s. 47 of the *Competition Act* does not include *withdrawing* a bid or tender.

Two companies submitted identical bids to supply chlorine to the City of Toronto. One company subsequently withdrew its bid. The Crown alleged that the two had agreed that the bid would be withdrawn, and charged them with bid-rigging.

German J. interpreted the wording of s. 47 narrowly, holding that the word “means” restricted the definition of bid-rigging to the specific language of s. 47. Section 47 states that bid-rigging “means” an agreement whereby one or more persons agrees or undertakes *not to submit a bid* in response to a call or request for bids or tenders, or the submission of bids that are arrived at by agreement. Thus, German J. concluded, *withdrawing a bid* is not prohibited by s. 47. German J. found support for this interpretation of s. 47 in the fact that there are serious consequences from a finding of guilt, including jail or imprisonment. People should be “entitled to plan their conduct so they are not in breach of s. 47”, German J. reasoned.

German J.’s conclusion is in line the narrow approach to s. 47 taken by the British Columbia Court of Appeal in *R. v. Coastal Glass & Aluminum Ltd.*² The court held that bid-rigging requires a direct relationship between the person calling for bids and the persons submitting bids. Because no individual requested bids, the elements of the offence of bid-rigging had not been satisfied and thus, bid-rigging had not occurred.

In *Rowe*, the Crown had argued that the definition of bid-rigging should be interpreted broadly to include all collusive conduct in the bidding and tendering process in Canada. An agreement to withdraw a bid is a manipulation of the bidding process, which is what the prohibition in s.47 is intended to combat, the Crown asserted. The phrase “agrees or undertakes not to submit” in s. 47 includes withdrawing a bid, the Crown urged.

In our view, the Crown’s position over-reaches. It is tantamount to an invitation to the courts to expand the ambit of criminal offences by way of judicial gloves. This is contrary to the principle that criminal offences in Canada are statutory in nature. The finding in *Rowe* is consistent with previous judicial interpretations of bid-rigging.

Nevertheless, an agreement to withdraw a bid that has been submitted is functionally equivalent to an agreement not to submit a bid in the first place. It clearly falls within the scope of the mischief that s. 47 guards against. Accordingly, it was open to the court to conclude that not submitting a bid includes withdrawing a bid for purposes of s. 47.

¹ (2003), 29 C.P.R. (4th) 525.

² [1986] B.C.J. No. 364.