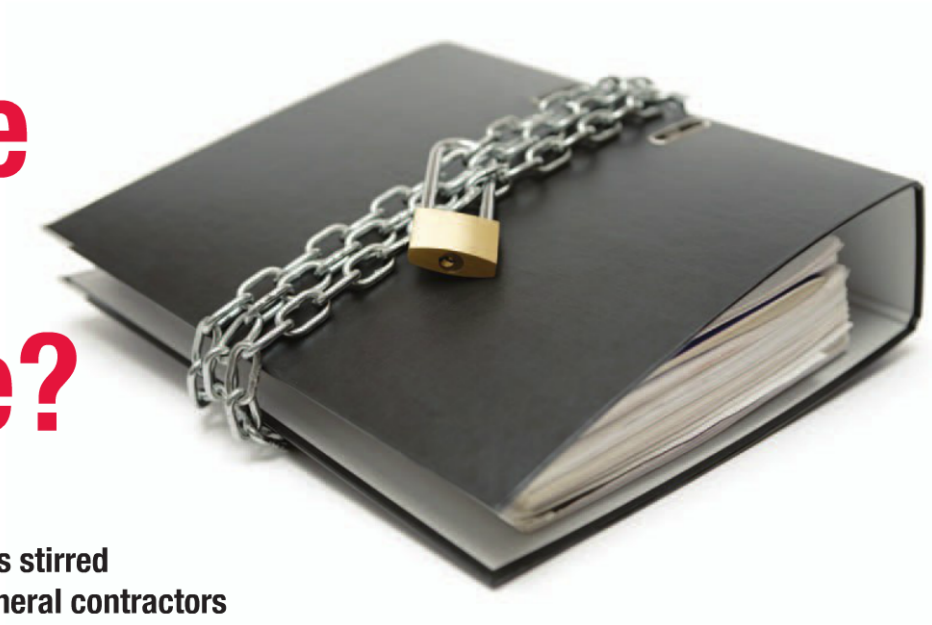
To name or not to name?



A 10-year old legal decision has stirred fresh debate about whether general contractors should be asked to name subtrades at bid closing time.

Whether you support the notion of naming subtrades at tender closing time or not likely depends on the role you play in the construction process.

On the one hand, most general contractors will tell you they don't want to name subtrades. They say that a two-envelope closing process in which they're first evaluated on price and—if accepted—later on technical ability allows them time to review subtrades' bids for quality and to ensure that the subs they carry are qualified to do the work and haven't made critical mistakes in their estimates. They argue that bid documents are becoming more complex, and errors more common. Time to evaluate bids for completeness and accuracy will help ensure generals partner with the right subs to get the job done right for the client.

On the other hand, most subtrades will tell you that owners should insist as many subs as possible are named at tender closing time to protect the subtrades from bid shopping. They argue that too much time between the owner's opening both envelopes allows the general contractor time to shop bids, cut costs and boost their margins—at the sub's expense.

In order to help guide the industry's thinking, associations have developed their own position papers on the matter. OCA, for example, recommends that owners ask for only "critical" subtrades to be named at closing time. The criteria that make a subtrade "critical" obviously varies from job to job, but, "on typical building construction projects, the mechanical and electrical subtrades are usually considered critical trades and hence are commonly requested by owners at time of tender."

OCA's position paper goes on to say that when the owner judges that there are three or fewer critical subtrades on a job, all should be named at the time of bid submission. But if the owner requires additional information to supplement the bid price (such as alternate prices, separate prices, itemized prices and further subtrades to be named), then OCA recommends adopting a two-stage closing with at least an hour elapsed between opening of the price envelope and the bid information requirements.

Owners and designers become police?

That position seems clear enough. Certainly it matches those put forth by major national groups such as the Canadian Construction Association (CCA). So why the fuss? It appears as though more and more owners—and even designers—are being asked by trade contractors to draft tender documents that require general contractors to name subtrades at the time of closing. The trades say this approach is the best way to guarantee that generals are not able to shop their bids around.

OCA's position paper on the naming of subtrades is available on our website. Go to www.oca.ca, click the Resources menu and then the Standard Practices button.

General contractors take issue with that notion.

"The trades have this idea that all generals are the root of evil and that they need to be policed by owners and architects," says Clive Thurston, president of the Ontario General Contractors Association (OGCA). "If they have a problem with bid shopping, and no one denies that some contractors—generals as well as trades—shop bids post-closing, then the right approach is to sit down and iron

out the problem with the general contractors. Not owners or designers or other groups that have no business meddling in the contractual relationship between generals and subtrades."

He adds that the majority of general contractors and subtrades act fairly and honourably in the tender process, but that the integrity of the process is ruined by a few bad apples.

For years, OGCA supported the notion of naming subtrades at tender closing time. The association's initial policy was to advise generals to name up to five subtrades. Five then became 10, which then became 15, and 20 and, in one case, 30. And although the numbers spiraled out of control on some projects, the association maintained its position—until the ripples of a 2004 court decision began to be felt across the industry.

The Mighty Hercules

A brief background on contract law is required. Doubtless everyone in the industry knows of the Supreme Court of Canada's decision in *R v Ron Engineering and Construction (Eastern) Ltd*. Essentially, the notion boils down to a contract—known as Contract A—being created at the time the subcontractor issues its bid to the general (and the general chooses to carry that subcontractor's bid in its price to the owner). A second contract—Contract B—comes into effect when the general and the subcontractor negotiate the actual terms of the arrangement between the two companies for the duration of the job.

Ron Engineering was a seminal case in our industry and effectively ensured that generals and subtrades honoured their commitments to one another during the tendering process and throughout the construction project. Courts have built on *Ron Engineering* since that decision, but the essential notion—of Contract A and Contract B—remains established legal precedent.

Enter the 2006 Ontario Superior Court of Justice (Divisional Court) decision in *David J. Harvey Holdings Inc. (Merit) versus Hercules Food Equipment Ltd*. In it, the court found that a subcontractor (Hercules) reneging on its price was not liable to the general contractor (David J. Harvey), which carried the sub's price to the owner.

According to OGCA, this case has set in motion a flurry of activity from subtrades. Some are using the decision as the basis for walking away from their bids to general contractors. Their reasons vary: they're too busy, someone made a mistake, etc. So the problem for general contractors becomes what to do if an owner or a designer requires them to name a subtrade, which subsequently walks away from its Contract A, post award.

"Generals are left holding the bag," says Thurston. "This kind of situation is happening more and more to small and mid-sized contractors who cannot afford to go to court to challenge their subs—and the legal decision. They simply can't afford to have subs walk away from their bids. Nor can the industry."

OGCA is so upset by the apparent precedent set in the *Hercules* case that the association is prepared to finance any OGCA member that wishes to challenge the court and reinforce the notion of Contract A.

Don't be too quick to react

Hold on, says Dan Leduc, a construction law partner at Norton Rose Fulbright Canada. In a detailed report to the OCA, Leduc describes a number of recent developments leading up to *Hercules* that clarify the Contract A/Contract B landscape. He cautions that anyone who interprets *Hercules* as carte blanche to renege on their bids may not understand the full story.

"Whether a subcontractor can refuse to honour a bid that has been carried by a general in its bid for the prime contract depends heavily on the unique facts of every case," he wrote, adding that various factors such as the irrevocability of subcontractor bids and clear communications between general and subtrade notifying the sub of its bid being carried in the bid for the prime contract, can help solidify the integrity of Contract A—and protect all parties.

In short, says Leduc, *Hercules* is not the precedent-setting decision that some believe it to be.

"Because tenders are premised on contract law, inasmuch as there are a variety of contracts, there will be a variety of tender terms. Each must be reviewed individually."

OGCA will continue to oppose naming

As far as OGCA is concerned, whether *Hercules* sets established legal precedent is irrelevant. As long as subcontractors use the decision—rightly or wrongly—to walk away from their bids to generals, OGCA will be forced to oppose the naming of any subtrades at tender closing time. The association has reached out to the Ontario Association of Architects to express its concerns about designers requiring subs to be named—and to the CCA, which is about to issue a position paper on subtrade naming—with its firm position.

"If subtrades don't trust generals to be honest, my advice is don't bid them," says Thurston. "But don't ask owners and designers to police our industry. That's not their role. In the meantime, if everyone is serious about getting rid of bid shopping and honouring contracts, then let's get generals and subtrades together in a room to find a solution to these problems. For the good of the industry."