



Dangerous Attitudes in Contract Negotiations

How should a contract manager handle a bitter and emotional dispute with an outside contractor? Can you refuse to negotiate a settlement, and fight the matter to the end? Can you blacklist the contractor, and refuse to accept any further bids from that company?

In April 2007, the B.C. Supreme Court dealt with these serious questions in *Soo Logging Co. Ltd. v. Province of B.C. (Ministry of Forests)*, [2007] C.C.S. No. 14701. After looking at the evidence, the Judge ordered that “special costs” be paid by the B.C. government due to “conduct deserving of rebuke” by government contract managers.

Background

The parties had already gone through two rounds of hard-fought litigation. In *Soo Logging Co. Ltd. v. Province of B.C.* [2001], 1646 C966303 (B.C. Supreme Court), the Court had ruled that the Ministry of Forests had improperly terminated a road construction contract, and awarded Soo Logging damages of \$196,643 plus court costs. The Court held that the ministry had attempted to terminate the contract due to “internal Ministry pique” against Geoff McLeod, the principal of Soo Logging.

In *Soo Logging Co. Ltd. v. Province of B.C.* [2004], B.C.J. No. 506, the B.C. Court of Appeal dismissed an appeal by the government.

In the 2007 judgment, the Court reviewed settlement tactics, blacklisting, and failure to disclosure documents, and concluded that ministry representatives were guilty of conduct worthy of rebuke.

Can You Refuse to Negotiate a Settlement?

The Court noted that the plaintiff, Soo Logging, had consistently offered to settle its claim, for \$125,000, “all in.” The ministry not only did not respond to the offers, it did not initiate any settlement discussions of its own.

The Judge said: “It is easy to infer from the evidence that the representatives of the Ministry who were instructing counsel were adamant ... there was to be no settlement. This was a case to be fought, all the way, regardless of the merits.” Further, such intransigence “... is not a stance to be condoned in a system which encourages reasonable settlement, as ours does.”

Further, “Economic inequality between litigants is an unfortunate reality of the justice system. Where that inequality is exploited, it should not be condoned.” And, “[T]he Ministry consciously and deliberately forced Soo Logging to litigate a meritorious claim, which could have been settled. That it then took the matter to appeal only aggravates the matter.”

Finally, the Court noted that Ministry representatives failed to disclose documents that were central to the litigation, and failed to provide any evidence to explain why these documents were not disclosed.

Can You Blacklist a Contractor, and Reject Further Bids?

After the initial lawsuit was started in 1996, Soo Logging received no further government work. Eventually, in 1999, the ministry wrote a letter to Soo Logging, confirming that its “ineligibility” was due to the plaintiff’s “not having completed the road construction contract satisfactorily.”

The Judge noted the obvious contradiction in the 1999 ministry letter. The completion of the road construction contract was something that the ministry itself had made impossible, by a termination that was then in litigation. The Judge also made a reasonable inference that the ministry had written the letter after receiving internal advice that it was unethical to allow Soo Logging to make bids when it was ignorant of the fact that it had been blacklisted.

The government lawyer argued that “blacklisting” was a normal ministry practice for contractors whose performance was found to be unsatisfactory. However, the ministry could not provide any evidence that blacklisting was a routine practice or had ever been done in the past. In the absence of any proof, the Court held that the motive for blacklisting was to punish Soo Logging for suing the ministry.

Does it Matter if You Work in Government or the Private Sector?

In this situation, the B.C. Supreme Court observed that, “The Crown, as a litigant, has an obligation of ethical behaviour in litigation, which is higher than that of a private litigant.”

Conclusion

Justice Fraser of the B.C. Supreme Court ordered that the government pay “special costs” to the plaintiff, saying: “The way in which the Ministry responded to this litigation constitutes misconduct requiring the censure of the court. Among other things ... it sent out the message to businesses that deal with the Ministry that it is unwise to insist that the Ministry observe its legal obligations.”

According to the plaintiff’s counsel, the total of the special cost award was \$71,049.54.

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