



DOES A PARTNERING AGREEMENT MEAN SHARED RESPONSIBILITY FOR PERFORMANCE?

## **Tendering, Partnering and Legal Obligations**

Does your organization use a “partnering” process in major contract awards for construction, outsourcing of services, or alternate service delivery? Using this popular approach, the winning bidder and the owner try to build good working relationships, and typically sign a “project charter.” But does partnering change the contractual obligations of the parties?

In *EBC Inc. v. Province of New Brunswick*, [2007] N.B.J. No. 435 (N.B. Court of Appeal), the trial Judge said that a “project charter” in a major construction contract increased the government’s obligations to disclose performance risks. The province took the case to the court of appeal.

### **Contract Award and Partnering**

After a tendering process, EBC had been awarded a \$9.6 million contract to construct a new ferry terminal. EBC had to supply four concrete caissons for the ferry-docking structure, for a unit price of \$2.83 million. To avoid a penalty of \$5,000 per day, these four caissons had to be in place by June 15, 1999.

The contract had a “partnering” section in its standard provisions. Partnering was “a proactive effort ... among all key players in a Contractual relationship.” The key objectives dealt with shared goals, identifying and resolving problems, procedures to avoid conflict escalation, and monitoring of team performance. Individuals from EBC and the province, along with other stakeholders, participated in a two-day “partnering workshop,” after which they signed a “project charter” document.

### **Construction Difficulties and Extras**

EBC built the concrete caissons in the winter months of March and April 1999, having selected slip-forming as the construction method.

When calculating its unit bid price, EBC had relied on its experience with slip-form pouring in the summertime, using normal Portland cement. However, the New Brunswick tendering documents required LASF (low-alkali silica fume) cement, and required pouring during winter months.

According to the trial evidence, EBC did no investigative due diligence about the use of LASF cement in a slip-form during winter months. As a result, the EBC unit bid price did not include any dollars to cover additional costs.

In reality, to meet the performance requirements, EBC had to add costly water reducers and accelerator admixtures to the LASF concrete and conduct frequent field tests to assess concrete strength.

EBC completed the concrete caissons on time, and was paid in full for its work on the project. However, EBC claimed damages of \$330,517.60 to cover its extra costs.

### **Trial Court Decision**

The Judge followed the Supreme Court of Canada decision in *Auto Concrete Curb Ltd. v. South Nation River Conservation Authority*, [1993] 3 S.C.R. 201. This tendering precedent says that the contractor has the legal responsibility for choosing the method or how to go about accomplishing the work contemplated by a construction contract, “barring specific arrangements to the contrary.”

The trial Judge decided that the partnering agreement was a “**specific arrangement to the contrary**” [emphasis added]. “Partnering” contradicted the province’s argument that it was ‘not its job’ to disclose to the contractor what the province's engineers knew about slip-forming LASF concrete in winter conditions.

The province was ordered to pay extra costs of \$147,604.41.

### **Court of Appeal Analysis**

The “partnering” clauses, and the “project charter” document, signed by individual participants, did *not* change the underlying contractual obligations.

First, the contract signed by the parties described “partnering” as “bilateral in makeup, [and] ... participation will be totally voluntary.” Second, EBC never indicated its written intention of “entering into a voluntary partnership agreement” with the province. Third, if there was a “partnering,” then the contract said that each party would “function within the laws and statutes applicable to their duties and responsibilities.” In other words, partnering did not alter the legal responsibilities and duties between EBC and the province.

Finally, the Court of Appeal described the “project charter” as “a statement of laudable intentions concerning the Project's participants' attitudes ... It is not a ‘partnering contract’ (or Charter) that alters the pre-existing legal obligation (the ‘legal responsibility’) of those who are under contract to construct the Project.”

The N.B. Court of Appeal allowed the province's appeal, and awarded the province costs of \$3,500.

### **Lessons to be Learned**

As an owner undertaking tendering, your “partnering clauses” should not go beyond the

language approved by the Court of Appeal in this case. Otherwise, those “laudable intentions” could greatly increase your legal obligations of disclosure.

As a contractor, remember the fundamental law of tendering: a contractor has a choice of whether or not to bid for a project. If it chooses to bid, the contractor must determine whether “the work can, in fact, be carried out in accordance with the specifications,” and by the method it proposes to use to carry out the work. It must do its own due diligence before deciding whether or not to tender, and if so, in preparing its bid.

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