

Taking a stand on price-based bidding

by Gayle Aitken and Bernard Ennis, P.Eng.



Since the early 1990s, concerned members have been telling the association that some buyers of engineering services use price as the sole determining factor in selecting engineering consultants, observing that the practice can have negative influences on quality in a competitive market. This is a situation PEO Council and its Fee Schedule Committee have been working to prevent.

port of his motion, "could result in dangerous consequences for PEO." He said he was concerned that a death or accident might occur that could be clearly attributed in a court of law to low fee bidding by a PEO member, who provided engineering services "with the full knowledge and permission granted by PEO's Certificate of [Authorization]."

With approval of the motion, PEO began to investigate the effects on public welfare and safety of the constraints low-est fee procurement practices impose on the provision of engineering services. Part of this investigation was to ascertain whether PEO could take disciplinary action against engineering firms that were awarded contracts to provide engineering services on the basis of very low fee bids.

Meanwhile, PEO also embarked on a campaign to increase awareness among P.Eng. buyers and sellers of engineering services about the risks of price-based selection. Key to the campaign was awareness raising letters, drafted by the Fee Schedule Committee, to be sent to both groups.

Setting a legal precedent

Within months, however, PEO received a legal opinion that, as the regulator of engineers in Ontario, it cannot discipline a member because of low fees, since a correlation between low fees and inferior quality cannot be substantiated using case law precedents and decisions.

In an address to the Canadian Bar Association (Ontario) in 1989, Calvin S. Goldman, Q.C., director of investigation and research, Bureau of Competition Policy, talked about the application of the federal Competition Act to the regulated professions, noting that professional associations cannot link maintaining professional standards of practice with low fees.

"It is my view," he said, "that there is no necessary correlation between price competition and lower standards of quality and integrity. In any event, standards of integrity and competence may be adequately addressed by the (professional associations) under their provincial mandate."

Goldman cited a Supreme Court of the

United States ruling in the matter of the *National Society of Professional Engineers (NSPE) versus United States*. The decision found that the engineering association's use of a rule in its code of ethics to enforce a prohibition among members on price-based competition prevented competitive bidding and was an unreasonable restraint of trade. The U.S. Supreme Court rejected NSPE's argument that the prohibition on competitive bidding was necessary to protect the public from poorly constructed buildings, because price competition would necessarily result in poor quality engineering and workmanship. The U.S. Supreme Court stated that "the Rule of Reason does not support a defence based on the assumption that competition itself is unreasonable" and described the engineers' attempt to justify the bidding rule as "nothing less than a frontal assault on the country's competition legislation."

Goldman stated: "We have no such categorical statements to rely upon in the Canadian jurisprudence. However, it has long been established by the Canadian courts that the public interest in free competition is paramount over other business considerations."

"I am certainly appreciative of the concerns of members of the profession that poor quality work reflects badly on the profession as a whole and undermines public confidence," Goldman added. "However, such concerns can be addressed more appropriately through resort to established lawful disciplinary channels in individual cases, rather than through broad restraints on price competition."

Where to from here?

As a result of the position of the federal Competition Bureau, and the opinion of PEO's legal counsel, it was determined that a prohibition against low fee bidding could not be enforced through PEO's complaints and discipline processes. The Fee Schedule Committee's letters campaign to buyers and sellers of engineering services then became PEO's primary mechanism for promoting service delivery quality in a competitive marketplace, but questions remained about what should trigger the

letters to be sent: Should they be sent to all providers and as many major purchasers as could be identified, simply as a reminder? Should they be issued only in response to complaints? And, if so, how should the validity of complaints be determined? These were the kinds of questions the Fee Schedule Committee needed to answer.

Meanwhile, though, PEO members continued to express the view that engineering firms that consistently submit low project quotations must have difficulty sustaining reasonable revenues to provide adequate client service and maintain profes-

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sional standards. Members have also continued to express concern that "low-ball" project quotations can be a result of underestimating the scope of a project and the expectations of the client.

In response to these ongoing concerns, the PEO Complaints, Discipline and Enforcement department has agreed that it will investigate any of these ongoing concerns that are brought to its attention *in writing*. If the complainant submitting such a concern can provide evidence that: (1) there has been an adverse impact on public safety and welfare; and/or (2) there are errors, deficiencies or omissions in the provided engineering services, the matter can proceed through PEO's complaints and discipline processes.

However, from a complaints and discipline standpoint, where insufficient evidence of either condition is provided, the situation can only be seen as a successful

competitor possibly obtaining a project on the

basis of a low bid price. This may be seen as a possible breach of the Code of Ethics, but cannot be grounds for discipline. Under Regulation 941, situations that are solely breaches of the Code of Ethics are not considered to be professional misconduct. In such cases, if it has been established that the job was awarded to a low bidder, the Fee Schedule Committee's educational letters will be sent to the seller and buyer involved.

The letters inform buyers of engineering services that PEO is concerned that their competitive buying processes may result in engineering firms submitting bids that could be low enough to be detrimental to the project. Letters to engineers remind them of their duty to protect public safety and welfare which, the Fee Schedule Committee believes, can only be accomplished if fees are sufficient to provide for ongoing professional development and adequate salaries, while maintaining reasonable workloads.

For the complete text of the letters, see "Putting it in writing" on pp. 36-37. The letters can also be found in the Professional Practice Guidelines section of PEO's website at www.peo.on.ca.

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