Jenkins Marzban Logan LLP
lawyers

The Validity and Enforceability of Electronic Bid Bonds[1]

I. Introduction

The provision of a bid bond by a surety on behalf of a bidder (i.e. the principal under the bid bond) is common practice in most formal tendering processes. A bid bond constitutes a promise from the surety to the obligee that if the obligee awards the construction contract to the principal and the principal fails to enter into that contract with the obligee and provide the specified contractual security, then the surety will pay a stipulated penalty set out in the bid bond.[2] The purpose of a bid bond has been described as to guarantee to the obligee the good faith of the principal.[3]

The CCDC 22 – 2002, A Guide to Construction Surety Bonds, provides:

> Bid bonds provide construction purchasers with assurance that the contractor submitting the bid has been examined by the surety company and has been found qualified to perform the work. Specifically, this bond offers an Obligee financial protection should a successful bidder not enter into a formal written contract, or not provide the specified security. This protection is limited to the lesser of the bond amount (usually 10% of the bid) and the difference in price between the Principal's bid and the next lowest compliant bid. This is the primary prequalification instrument issued by a surety company to ensure that construction purchasers receive a bid from a qualified contractor.[4]

The legal requirements for a valid and enforceable bid bond are found in both the common law and statute. A bid bond is considered a deed at common law, meaning that in order to be valid and effective it must be "signed, sealed and delivered".[5] Further, the *Law and Equity Act* requires that a guarantee or indemnity, which a bid bond qualifies as, is not enforceable unless it is evidenced by writing signed by, or by the agent of, the guarantor or indemnitor.[6] A bid bond will generally not be valid or enforceable if these legal requirements are not met.

Tendering practices dealing with the legal requirements of valid bid bonds have developed over time in the context of paper bids and bonds submitted in sealed envelopes. However, the

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[1] This paper was prepared by Tyler Galbraith, a partner at Jenkins Marzban Logan LLP, whose practice is primarily focused on construction law. To view Tyler's profile go to: http://www.jml.ca/lawyers/lawyers_tyler/.

[2] K.W. Scott and R.B. Reynolds, *Scott and Reynolds on Surety Bonds*, looseleaf ed. (Toronto: Carswell, 2012 update) p. 9-1.

[3] *Derby Holdings Ltd. v. Wright Construction Western Inc.*, 2002 SKQB 247 at para. 7.

[4] CCDC 22 – 2002, A Guide to Construction Surety Bonds, at p. 10.

[5] *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2001] 1 S.C.R. 842 at para. 36, see also: *Scott and Reynolds on Surety Bonds*, at p. 2-18.3.

[6] *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 59(6). Section 59(6) of the *Law and Equity Act* also provides, as an alternative, that if a guarantee or indemnity is not in writing it may be enforceable if the alleged guarantor or indemnitor has done an act indicating that a guarantee or indemnity consistent with that alleged has been made.

traditional paper tendering process is slowly giving way to paperless electronic bidding, which process may require electronic bid bonds. This has led to the emergence of issues surrounding electronic bonding, and specifically the validity and enforceability of electronic bid bonds.

II. Electronic Bid Bonds and Formal Bid Bond Requirements

(a) Writing

As set out above, the *Law and Equity Act* provides that a bid bond is not enforceable unless it is evidenced by writing signed by, or by the agent of, the guarantor or indemnitor.[7] On the issue of a requirement for a document to be in writing, the *Electronic Transactions Act* provides:

> 5 A requirement under law that a record be in writing is satisfied if the record is
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> (a) in electronic form, and
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> (b) accessible in a manner usable for subsequent reference.[8]

With respect to the *Electronic Transaction Act* generally, a record to which the *Electronic Transactions Act* applies must not be denied legal effect or enforceability solely by reason that it is in electronic form.[9]

The term "record" is not defined in the *Electronic Transactions Act* but is defined in the *Interpretation Act* as follows:

> "record" includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by any means whether graphic, electronic, mechanical or otherwise;[10]

Based on this definition, a bid bond will qualify as a "record" for the purposes of the *Electronic Transactions Act* meaning the writing requirement of the *Law and Equity Act* should be met if a bid bond is in electronic form and is accessible in a manner usable for subsequent reference.

(b) Signed

As set out above, the common law requires that a bid bond be signed in order for it to be valid. On the issue of signatures, the *Electronic Transactions Act* provides:

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[7] *Law and Equity Act*, s. 59(6).

[8] *Electronic Transactions Act*, S.B.C. 2001, c. 10, s. 5. See also section 2(3) which provides that the provisions of the *Electronic Transaction Act* that relate "to the satisfaction of a requirement of a law apply whether or not the law creates an obligation or provides consequences".

[9] *Electronic Transactions Act*, s. 3. See also section 2(4) which lists the records that the *Electronic Transactions Act* does not apply; of note, bonds are not included in this list. See also section 15(2) which provides that a "contract is not invalid or unenforceable solely by reason that information or a record in electronic form was used in its formation".

[10] *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 29.

> 11(1) If there is a requirement under law for the signature of a person, that requirement is satisfied by an electronic signature.[11]

The *Electronic Transactions Act* defines an "electronic signature" as:

> 1 … [I]nformation in electronic form that a person has created or adopted in order to sign a record and that is in, attached to or associated with the record.[12]

The common law requirement for a bid bond to be signed should be met where an electronic signature created or adopted by the surety or principal in order to sign the bid bond is attached to or associated with the bid bond. Accordingly, by pressing on a "Sign Bond" or similar icon or button which attaches the electronic signature to or associates it with the bid bond, the principal or surety should have properly signed electronic bid bond.

(c) Sealed

As set out above, a bid bond must be sealed in order for it to be binding; however, the *Electronic Transactions Act* is silent on the issue of electronically sealing records.

The practice of sealing documents is one which is centuries old and which predates much of our modern legal history. Originally, it was used as a means of authenticating a document when most individuals were unable to sign their names. However, as time passed, the seal became a symbol of the solemnity of a promise and began to serve an evidentiary function. The seal rendered the terms of the underlying transaction indisputable, and thus rendered additional evidence unnecessary.[13]

The Law Reform Commission of British Columbia, in its *Report Deeds and Seals*, has written:

> Whether a deed is binding on its maker depends upon whether he intended to execute and be bound by it as his deed. This he signifies by executing the document under seal, which raises the issue of what is a sufficient act of sealing.
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> Affixing a seal does not in itself make an instrument a deed. That must be determined from the circumstances, such as the acts and words of the instrument's maker. It is useful to note the classic *dicta* of Blackburn J.:
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> > No particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it. The mere affixing the seal does not render it a deed; but as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him, it is sufficient.

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[11] *Electronic Transactions Act*, s. 11(1).

[12] *Electronic Transactions Act*, s. 1.

[13] *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2001] 1 S.C.R. 842 at para. 19.

> It has been held that what constitutes a good seal is a question of law, while what constitutes a sufficient act of sealing is a question of fact. This is not a particularly useful distinction. Whether something constitutes a good seal invariably involves a consideration of the process of sealing. Ultimately, the issue becomes whether the maker of the instrument *intended* to execute it under seal and make it a deed.[14]

The Supreme Court of Canada has framed the issue of what constitutes a validly sealed deed as follows:

> … As I stated above, historically, the act of sealing was a solemn act designed to impress upon the parties to the contract the significance of their obligations. As a result, different legal obligations flowed from sealed instruments than from simple contracts. Today, while the creation of a sealed instrument no longer requires a waxed impression, there are still formalities which must be observed. At common law, a sealed instrument, such as a deed or a specialty, must be signed, sealed and delivered. The mere inclusion of these three words is not sufficient, and some indication of a seal is required … . To create a sealed instrument, the application of the seal must be a conscious and deliberate act. At common law, then, the relevant question is whether the party intended to create an instrument under seal.[15]

With respect to proving intention, a distinction has been drawn between the "form and material substance" of the seal and whether there was a "sufficient act of sealing". Whether the seal is regular in "form and material substance" relates to the physical form or appearance of the seal on the document. Whether there was a "sufficient act of sealing" relates to the procedure followed when the document was executed.[16]

The "form and material substance" analysis relates to the need for some sort of attachment, mark or impression to be placed on the deed. On the issue of what constitutes a proper physical seal, the following has been written:

> *Chitty On Contracts* (25th ed.), vol. 1, pages 15 to 16, states:
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> > Sealing was an ancient essential of a deed. Before writing became a general accomplishment, a man signified his assent to a document by impressing it with his seal. "No writing without a seal can be a deed". However, at the present day, "to constitute a sealing neither wax nor wafer nor a piece of paper nor even an impression is necessary". Ex p. *Sandilands* (1871) L.R. 6 C.P. 411, 413. Pieces of green ribbon or a circle printed on the document containing the letters "L.S." (*locus sigilli*) or even a document bearing no indication of a seal at all will

[14] Law Reform Commission of British Columbia, *Report on Deeds and Seals*, L.R.C. 96 (June 1988) p. 9, cited with approval in *Romaine Estate v. Romaine*, 2001 BCCA 509 at para. 34.

[15] *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2001] 1 S.C.R. 842 at para. 36.

[16] *Romaine Estate v. Romaine*, 2001 BCCA 509 at paras. 37, 38 and 41.

> suffice, if there is evidence (e.g. attestation) that the document was intended to be executed as a deed. …

The formalities of sealing and delivery, in relation to legal deeds, have been eroded as a result of widespread literacy and the demands of a fast-paced commercial world. Over a hundred years ago this had already been noticed in Canada in *McEachern v Somerville; McEachern v White* (1876), 37 U.C.Q.B. 609 at page 621. As mentioned in Waddams, *The Law of Contracts* (2d ed.) at pages 130 to 131:

> The requirement of wax disappeared long ago, the requirement of delivery is much reduced, and some modern decisions have held that an instrument purporting on its face to be a sealed instrument may take effect on the signature alone, even though there is no seal, or the seal is added later by the obligee. …

While many of these cases are like the case at bar, in that there was a bargain, and hence consideration to support the obligations under the "deed", the evident trend of the authorities is away from mere formalism and towards legal recognition of what the parties intended. In the words of *Anson's Law of Contract* (25th ed.) at pages 70 to 71:

> In modern times, seals are often very much of a legal fiction, being no longer wax impressions of a man's crest or coat of arms, but merely an adhesive wafer attached to the document or even a printed circle containing the letters 'L.S.' (*locus sigilli*). The party executing the deed is supposed to place his finger on the seal and utter the words 'I deliver this as my act and deed'. Meticulous persons may still carry out this quaint ceremony, but the courts will not listen to evidence that it was omitted.

We have come some distance since *In re Imperial Canadian Trust Company and McKeague*, (1929) 2 W.W.R. 423 (Man. C.A.), in which Fullerton, J.A. agreed with the trial judge, at page 425, that the document in question was a sealed instrument, the "seal" being no more than a printed facsimile, while Trueman, J.A. took a contrary view and the two remaining members of the court, Dennistoun and Prendergast, JJ.A., declined to state any opinion. It is noteworthy, however, that Laskin J.A. (as he then was) dissenting in *Royal Bank of Canada v. Kiska* (1967), 63 O.L.R. 2d 582 (Ont. C.A.) at page 594, strongly expressed his opinion in a sense contrary to what I take to be the predominant view held in Canada today. The majority of the Ontario Court of Appeal in that case simply assumed, but did not decide, that the document there in question (a guarantee to a bank, on a standard bank form) was not executed under seal. With great deference to the contrary opinion of Laskin, J.R., I agree with J.E. Cote (as he then was) in *An Introduction to the Law of Contract* (1974), at pages 74 to 75:

> Anything will do as a seal if it is intended to be one, and some documents and forms merely have a written or printed representation of a seal on them. It is often a picture of a red wafer seal, consisting of a red spot with indentations around its circumference. In such a

> case a party signing the form presumably intends to adopt the printed mark as his seal, and so by signing notionally seals also. The usual testimonium and attestation clauses, if present, may be some evidence of proper sealing and delivery of the document.[17]

The "sufficient act of sealing" analysis focuses on the intentions of the parties as revealed by the process or act of sealing. On this issue the Law Reform Commission of British Columbia has written:

> There must be "acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him." …
>
> The application of the seal must be the maker's conscious and deliberate act, but no particular form of words in the document is necessary. ... In each case the issue is the intent at the time of signing. …
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> Furthermore, there is today no conventional procedure or ceremony to be followed in sealing a document. The traditional procedure (overlapping with the procedure for delivery of the deed) was for the executant to place his finger or thumb on the seal and at the same time to utter the words "I deliver this as my act and deed." Today, the signature, combined with whatever constitutes a seal in form and material substance is sufficient.[18]

In the electronic bonding context, the issue of whether an electronic seal is valid will be based on the parties' intention to create a bid bond under seal. The necessary intention should exist where there was a sufficient act of sealing and where the procedure in place demonstrates an intention to create bid bond under seal.

As set out above, no particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it. The mere affixing the seal does not render it a deed; "but as soon as there are words or acts sufficient to show that it is intended by the party to be executed as its deed presently binding on him, it is sufficient". Further, there are no longer any formal requirements for what constitutes a valid physical seal and basically anything will do as a seal if it is intended to be one.

The *Electronic Transactions Act* provides it may be inferred that a person has consented to provide a record in electronic form based on that person's conduct.[19] Further, unless the parties otherwise agree, any matter that is material to the formation or operation of a contract may be expressed by means of a record in electronic form or by an activity in electronic form, including touching or clicking on an appropriately designated icon or place on a computer screen or

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[17] *Canadian Imperial Bank of Commerce v. Dene Mat Construction Ltd.*, [1988] 4 W.W.R. 344 (N.W.T. S.C.) at pp. 351-353, cited with approval in *Hongkong Bank of Canada v. New Age Graphic Design Inc.*, 1996 CanLII 1898 (BC SC) at para. 11.

[18] *Report on Deeds and Seals*, p. 10; see also *Romaine Estate v. Romaine*, 2001 BCCA 509 at paras. 41, 42 and 43.

[19] *Electronic Transactions Act*, s. 4.

otherwise communicating electronically in a manner that is intended to express that the matter is material to the formation or operation of a contract.[20] In the context of electronic bonding, the affixation of an electronic seal on a bid bond after pressing on a "Seal Bond" or similar icon or button should constitute the necessary physical form or appearance of the seal on the bid bond. Similarly, pressing on a "Seal Bond" or similar icon or button, combined with signing the bid bond electronically, should constitute a valid sealing process and demonstrate the requisite intention to create a bid bond under seal.

(d) Delivered

After signing and sealing a bid bond, it must generally be delivered to the obligee. With respect to sending and receiving electronic records, the *Electronic Transactions Act* provides:

> (1) Unless the originator and addressee agree otherwise, information or a record in electronic form is sent when it enters an information system outside the control of the originator or, if the originator and the addressee are in the same information system, if the information or record becomes capable of being retrieved and processed by the addressee.
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> (2) If information or a record is capable of being retrieved and processed by an addressee, the information or record in electronic form is deemed, unless the contrary is proven, to be received by the addressee
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> (a) when it enters an information system designated or used by the addressee for the purpose of receiving information or records in electronic form of the type sent, or
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> (b) if the addressee has not designated or does not use an information system for the purpose of receiving information or records in electronic form of the type sent, on the addressee becoming aware of the information or record in the addressee's information system.[21]

The terms "originator" and "addressee" are not defined in either the *Electronic Transactions Act* or the *Interpretation Act*. Regardless, the *Electronic Transactions Act* must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.[22] The purpose of the *Electronic Transactions Act* is to create commercial certainty regarding the legality and enforceability of electronic transactions conducted in the British Columbia, which is also a goal the courts are mindful of when dealing with electronic transactions generally.[23]

Based on the foregoing, depending on the nature of an electronic transaction there can be multiple originators and addressees. In the context of the provision of electronic bid bonds, an

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[20] *Electronic Transactions Act*, s. 15(1).

[21] *Electronic Transactions Act*, s. 18.

[22] *Interpretation Act*, s. 8.

[23] *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801 at para. 232.

electronic bid bond will likely originate with the surety (an originator) who electronically signs, seals and then sends it to the principal (an addressee) who receives it and then electronically signs and seals it. The principal (now an originator) may then electronically send the fully signed and sealed electronic bond, along with its electronic bid, to the obligee (an addressee) or, in the case of an electronic bid depository, the electronic bid depository system (also an addressee).

In the former circumstance, the electronic bid bond will be deemed received by the obligee (as addressee) once it enters an information system designated or used by the obligee for the purpose of receiving electronic bid bonds or, if no such system has been designated by the obligee, on the obligee becoming aware of the electronic bid bond in its information system. In the latter case, the electronic bid depository (as originator) will likely make the electronic bid bond available to the obligee (as addressee) at bid closing through the electronic bid depository system. Once the electronic bid bond is capable of being retrieved and processed by the obligee through the electronic bid depository system, it should be deemed received as the electronic bid bond will have entered the electronic bid depository system which system is used by the obligee for the purpose of receiving electronic bid bonds. That being said, and putting aside the deemed receipt provision of the *Electronic Transactions Act* which can be rebutted through evidence to the contrary, the electronic bid bond should be considered delivered to the obligee no later than when the obligee actually accesses the electronic bid bond through the electronic bid depository system.

III. Conclusion

From a legal perspective, the common law and statutory criteria required to create a valid and enforceable electronic bid bond should be met through the operation of the *Electronic Transactions Act* and common law principals that are flexible enough to deal with modern commercial realities. Perhaps more importantly, from a practical perspective, it will be difficult for a compensated surety or principal to argue that an electronic bid bond is not valid and enforceable in circumstances where each has consented to provide a bid bond electronically and knowingly affixed their respective electronic signatures and electronic seals to the electronic bid bond with the intention of creating a bid bond under seal.

Assuming that adequate technical processes, procedures and safeguards are in place regarding authentication, certification and validation,[24] there should be no legal impediment to the validity and enforceability of electronic bid bonds in British Columbia or any other jurisdiction with similar electronic transactions legislation and common law principles. As set out above, courts will be mindful of advancing the goal of commercial certainty when dealing with electronic transactions. In the context of electronic bonding, commercial certainty is advanced where sophisticated entities like compensated sureties, principals and obligees are held to their bargains.

[24] CCA 90 – 2007, Guidelines for Electronic Procurement, at p. 7.