

The new *Strata Property Act* is overwhelming. Each month we attempt to inform and educate you on different provisions and we hope this process is helpful. If you need a copy of previous bulletins please feel free to ask your property manager. If you have joined your strata council in recent months you should obtain a copy of previous bulletins as they are most useful. The content of these bulletins does not purport to offer legal opinions or advice. You should retain and consult with legal professionals.

#### FEATURES THIS MONTH

- BE CAREFUL WITH CONTRACTS
- BE CAREFUL WITH CONTRACTS – AN EXAMPLE
- CAPACITY TO ENTER CONTRACTS AND JOIN ORGANIZATIONS

## BE CAREFUL WITH CONTRACTS

By Jamie Bleay

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Section 38 of the *Strata Property Act* (the "Act") states, in part, that

"In addition to its capacities under any other enactment, a strata corporation has the capacity to enter into contracts in respect of its powers and duties under this Act"

One of the "duties" of a strata corporation is the requirement to repair and maintain common property and common assets. Strata corporations will typically enter into "repair and maintenance" contracts for a variety of matters, including grounds maintenance, janitorial service, window washing, garbage removal and elevator maintenance. In most instances the funds used for payment of these routine contractual obligations are provided for in the annual operating budget of a strata corporation. Strata corporations should be diligent in taking steps to review these repair and maintenance contracts to determine:

- Whether they automatically renew and if so, on what terms;
- Whether or not the fee increases each year of the contract;
- Whether they can be terminated with or without written notice; and,
- What penalty, if any, the strata corporation will pay if the contract is terminated other than in accordance with the terms of the contract.

While common sense suggests that these steps would be taken in any event, it is no defense, to plead, after the fact, that you thought a contract said one thing when in fact it said another. A contract entered into by a strata corporation binds (except in case of fraud or lack of authority) all of its owners. Due diligence with the most routine repair and maintenance contracts will help reduce, if not eliminate, contractual disputes down the road.

In recent years hundreds of strata corporations have also been faced with non-routine repair and maintenance obligations caused by premature building envelope failure. The goal of a strata corporation is to ensure that the building envelope is correctly and professionally performed. The strata corporation performs its duty to repair by entering into a contract with a professional and diligent contractor to perform the necessary repairs. The strata corporation, in performing its due diligence, will have retained a professional consultant (usually an engineer) to inspect and determine the severity and extent of the repairs, had the consultant prepare a set of specifications for the necessary repairs, and had the consultant circulate the specifications to a number of qualified

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contractors who are asked to submit bids to perform the necessary repair work. The strata corporation will have taken the necessary steps required by the Act to raise the funds to carry out the repairs.

In many instances, strata corporations retain a lawyer to review the form of contract with the professional consultant or with the "successful" bidder. It has been my experience that the retainer does not usually extend to reviewing the terms of the tender packages being delivered to the contractors who are being asked to bid on performing the necessary repair work. While I am not aware of any mishaps resulting from this process, it is only a matter of time before something unfortunate happens. It is important to ensure that the tender packages, by their language, do not accidentally "accept" the lowest or highest bid. Due diligence at this stage is, in my view, as important as the due diligence required during the repair phase.

Once a bid, which in law is an offer, is accepted by a strata corporation, a binding contract has been entered into. The contract does not have to be in writing to bind the strata corporation; a simple telephone call or letter to the contractor advising them that their bid has been accepted will (in almost all situations) form the basis of a contract. In this regard, it is extremely important that the strata corporation does not accept any bid until it has done the following:

1. All bids are carefully reviewed by the engineer to ensure that the terms of the bid comply with the specifications;
2. The strata corporation has, in its possession, all or most of the funds required to pay for the proposed repairs;
3. The strata corporation is satisfied, to the best of its ability, that there are no other urgent expenditures which might result in a reallocation of a portion of the funds levied to pay for the proposed repairs; and
4. The due diligence with respect to the bidders, i.e. WCB coverage, Better Business Bureau checks, insurance and bonding coverage, has been completed.

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By performing these steps before advising a contractor that its bid has been accepted, the strata corporation can avoid several problems, including not having the funds to pay for the proposed repairs (which may result in builders liens being placed on all strata lots until all monies are paid to the contractor) or even worse, finding out after the fact that it cannot go ahead with the proposed repairs because another part of the building requires emergency repairs. Once a contractor has been told that its bid has been successful, the strata corporation has a contract with the contractor. If the strata corporation subsequently cannot fulfill its financial promises because it now needs the funds for other repairs, the contractor will likely sue the strata corporation for breach of contract. Having the right checks and balances in place will, at the end of the day, greatly assist a strata corporation in avoiding this situation and a host of others.

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## BE CAREFUL WITH CONTRACTS – AN EXAMPLE

In the preceding article by lawyer Jamie Bleay, there is important advice about retaining a lawyer to review your major contracts. Perhaps take a minute to reread the paragraph starting "*In many instances...*". What good advice Mr. Bleay offers, who says he is not aware of any mishaps so far. Here is a real example of what can go wrong.

A strata corporation embarked on a repipe project with a budget of \$800,000. A variety of credible contractors bid on the job using specifications and a contract form supplied by the technical consultant. The lowest bid came from an excellent firm and they were informed of their success; however, before awarding the contract, the strata council had their lawyer review the contract. (In this case, not Mr. Bleay.) The lawyer found several aspects of the contract and the tender documents to be unsatisfactory and suggested changes.

The successful contractor responded in two ways. First, on one item, he agreed to the change provided the cost of the base contract increased by about \$10,000. Luckily, the original bid was well below the budget allowance so the council was able to agree to the extra cost.

The second item could not be "cost identified" – it had to do with the manner in which the work would be done. The contractor refused and the strata council "took a chance" and entered into the contract despite their lawyer's advice. The council had little choice at this time since, to take a hard line, would have likely resulted in a legal wrangle and the project would have been delayed for who knows how long. (Meanwhile, pipes were popping throughout the building.) Luckily again, things worked out and the project was completed without any difficulties.

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The obvious bottom line is, of course, to have the contract vetted by your lawyer before it goes to tender. This is rarely done and Mr. Bleay has stated, "*it is only a matter of time before something unfortunate happens*". He is right.

## CAPACITY TO ENTER CONTRACTS AND JOIN ORGANIZATIONS

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Section 38 of the *Strata Property Act* says:

### ***Capacity to enter contracts and join organizations***

*In addition to its capacities under any other enactment, a strata corporation has the capacity*

*(a) to enter into contracts in respect of its powers and duties under this Act, the regulations and the bylaws, and*

*(b) to join organizations to further its purposes under this Act, the regulations and the bylaws.*

Considering that the vast majority of a strata corporation's annual budget is geared to funding contracts, it is remarkable how little the statute says about the process. Even more remarkable is that this statutory provision only became law on July 1, 2000. Prior to that, i.e., from 1966, the only "statutory" requirement or authority was found in the bylaws of the (old) *Condominium Act*.

Each year strata corporations spend hundreds of millions of dollars on contractual obligations and the process and detail is left up to each corporation to determine. It is important, therefore, that your contracting procedure be thoughtful and protective. It is not just a matter of getting the lowest price. Mr. Bleay has given sound advice about the contract itself but there is more. VCS urges clients to be mindful of other aspects also. Workers Compensation Board coverage and third party liability insurance are just two examples.

Section 38 is the statutory authority for your strata council to join organizations such as the Condominium Home Owner's Association of BC (CHOA) and the Canadian Condominium Institute (CCI).